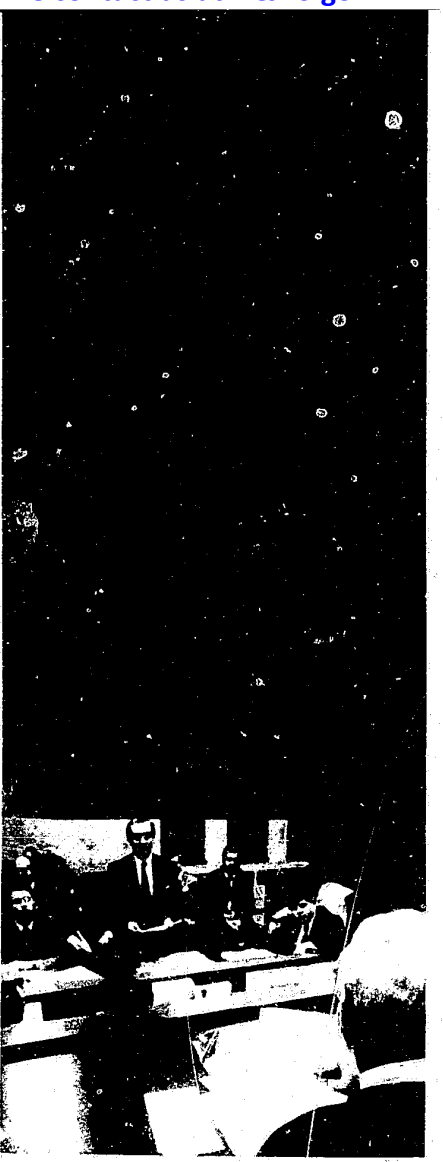

Uniform Law Commissioners'

Model Sentencing and Corrections Act

U.S. Department of Justice
Law Enforcement Assistance Administration
National Institute of Law Enforcement and Criminal Justice

Uniform Law Commissioners'

Model Sentencing and Corrections Act

Drafted by the
National Conference of Commissioners
on Uniform State Laws
and by it
approved at its
Annual Conference
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in New York, New York
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Law Enforcement Assistance Administration
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National Institute of Law Enforcement and Criminal Justice
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PREFATORY NOTE

In 1974 the National Conference of Commissioners of Uniform State Laws adopted and published its proposed Uniform Rules of Criminal Procedure. Drafted with the assistance of a grant from the Law Enforcement Assistance Administration, the Uniform Rules established the procedure governing the criminal justice system from prior to arrest to sentencing. In a few instances, rules regulating the process of sentencing were also included, but the basis for sentencing criminal offenders and the nature of correctional programs were not addressed. In 1973, a committee of the National Conference was formed to examine the possibility of carrying forward through the sentencing and correctional phases the work begun with the Uniform Rules. In 1974 LEAA provided the necessary funds for that project to proceed. This Act along with the Uniform Rules provides a basic structure for the operation of a criminal justice system. The Model Sentencing and Corrections Act is limited to the sentencing and correction of persons convicted of crimes. Juvenile court cases are not governed by this Act.

The project began at a propitious time. A year earlier the National Advisory Commission on Criminal Justice Standards and Goals had published its report on Corrections offering a wide-ranging set of recommendations for reform. Among them was the call for wholesale reform of the correctional laws of the fifty states. The drafting committee for the Model Sentencing and Corrections Act relied heavily on the pioneering work of the National Commission.

The fundamental bases for sentencing criminal offenders were also undergoing a major reexamination. The traditional approach to sentencing, adopted by the National Commission and earlier by the American Bar Association in its Criminal Justice Standards, consisted of a system of judicial sentencing designed to tailor the sentence in each particular case to the needs of the offender and of society. Although there were recommendations to reduce or to structure the discretion of the sentencing court, the system proposed in those reports remained heavily discretionary. Parole also was a critical element of the envisioned system, although here again recommendations were offered to structure the discretion of paroling authorities.

As the drafting committee began its work, a series of proposals from a variety of different study groups began to suggest an abandonment of traditional practice. The universal feature of these proposals was the recognition that individualized sentencing had failed and should be replaced by a system that provides a higher degree of equal treatment. The indeterminate sentence with parole was to be replaced by a flat, determinate sentence. The discretion to select a particular sentence was to be severely restricted, either by legislative mandate or by other devices. Sentences were no longer to reflect the rehabilitative potential of the defendant but rather were to insure a punishment justly deserved for the offense committed. The National Conference built upon these proposals and Article 3 of this Act reflects, in part, their philosophy.

In the late 1960's the courts abandoned what had become known as the "hands off" doctrine under which courts refused to intervene to review the decisions of correctional administrators or the conditions of correctional programs. Instead, courts began to measure correctional practices against constitutional principles and in many instances the existing practices fell short. Since these early beginnings nearly every aspect of correctional programs has been evaluated by courts. In some cases, dramatic change was ordered. It became clear, on the other hand, that dramatic change would not come easily through judicial decrees. Oftentimes, lack of funds prevented prisons from meeting minimum standards even where those in charge of the institution desired to make change. In a few cases federal courts actually took over the operation of a prison in order to correct unconstitutional conditions and practices.

There is general agreement that the rule of law must be applied to the correctional elements of the criminal justice system. There remains, however, disagreement as to how that is to be accomplished. The National Advisory Commission recognized the gains to be derived from a legislative codification of the rights of persons subject to correctional authority:

> Legislatures should respond with a comprehensive statement of the rights lost by confinement and procedures designed to implement and enforce retained rights. Otherwise, the courts will continue the slow, painful, and expensive process of accomplishing this task through case-by-case litigation. The inevitable period of uncertainty, of abrupt change, and of allocation of valuable and scarce correctional resources to litigation can be minimized by carefully conceived legislation.

National Advisory Commission on Criminal Justice Standards and Goals, Corrections at 558 (1973) [hereinafter cited as Nat'l Advisory Comm'n]. The Model Sentencing and Corrections Act responds to these concerns and proposes detailed legislative direction for the treatment of offenders.

The National Advisory Commission also examined and evaluated existing legislative proposals relating to sentencing and corrections. Nat'l Advisory Comm'n, Corrections at 549. Most of the then available proposed codifications were developed before the courts had begun to impose constitutional standards on correctional programs. Other proposed legislation addressed relatively specific problems and did not provide a comprehensive or coordinated statutory framework for correctional reform. Although many of these earlier proposals including the American Law Institute's Model Penal Code and the Study Draft of a New Federal Criminal Code provided a starting point for committee deliberation, this Model Act goes far beyond earlier attempts to define statutorily the treatment of offenders. And the sentencing provisions of this Model Act are based on different premises than these earlier proposals.

Several major themes distinguish the Model Sentencing and Corrections Act:

-- The Act unifies the various elements of the correctional system into one department of corrections in order to coordinate the deployment of scarce correctional resources and to make correctional programs consistent and effective.

-- The Act implements the legislative responsibility for determining basic correctional purposes and policies and, in several sections, legislatively established criteria and goals for decision-making are announced.

-- The Act seeks to reduce the unfairness and ineffectiveness occasioned by sentencing disparity. Rehabilitation is eliminated as a goal of sentencing. Sentences, based on the punishment deserved for the offense, are determined by courts in accordance with statutory and administrative guidelines. Appellate review of sentences is authorized. Parole is abolished.

-- Although rehabilitation will no longer be a factor in determining sentences, within the sentence imposed the Act seeks to enhance the rehabilitative potential of correctional environments by authorizing a wide variety of programs and giving offenders a greater voice in, and accordingly a greater incentive for, their own self-improvement.

-- The Act also seeks to recognize the interests of victims in the sentencing and correctional process.

-- Most importantly, the Act strives to bring justice and the rule of law to the correctional process. Traditional mechanisms used to structure and limit governmental discretion in the free society are applied to sentencing and corrections. The fundamental rights of confined persons are defined and protected in an attempt to enhance individual liberty unless compelling justification exists for its restriction.

The Act is divided into six Articles. Article 1 contains general provisions including definitions and rule-making procedures. Article 2 establishes the organization of the Department of Corrections. The Article has avoided inflexible organizational provisions in favor of enacting general organizational structures and providing authority for the administrative creation of a more detailed organization. Article 3 deals with sentencing. The Article establishes the fundamental policies behind sentencing criminal defendants and the procedures for doing so. In addition, each sentencing alternative, from community supervision to continuous confinement, to fines and restitution are more fully implemented. Article 4 contains provisions directly related to the treatment of sentenced persons. The Article articulates the protected interests of

confined persons as well as requiring the establishment of grievance procedures. Activities within correctional agencies which directly impact on persons in the custody of the department are carefully circumscribed. Article 5 establishes a program for assisting the victims of criminal offenses. Article 6 provides for the effective date of the Act and governs the transition from prior law to the provisions of the Act.

Many if not all of the provisions of this Act are fraught with controversy. The Committee is indebted to the wide-range of individuals and organizations that have contributed their suggestions and criticism throughout the drafting process. In many instances the Act confronts and seeks to alter long-standing traditions in both sentencing and corrections. The presence and patience of many individuals insured that the provisions of the Act were not casually adopted but are the result of extensive and, at times, intense debate.

The Committee is grateful to the LEAA's National Institute of Law Enforcement and Criminal Justice for the grants which have made the Committee's and Staff's work possible.

ARTICLE 1

GENERAL PROVISIONS

SECTION 1-101. [Definitions.] As used in this Act, unless the context otherwise requires:

(1) "chief executive officer" means a warden, superintendent, or other administrative head of a facility or program;

(2) "confined person" means a person confined in a facility for any purpose;

(3) "correctional mediator" means the correctional mediator created by Part 2 of Article 4;

(4) "department" means the department of corrections;

(5) "director" means the director of corrections;

(6) "facility" means a prison, reformatory, jail, training school, reception center, community-corrections center, half-way house, or other residential institution, and surrounding grounds, administered by the department for persons in its custody, but does not include a short-term holding facility maintained and administered by a political subdivision of the State;

(7) "furlough" means an authorized leave of absence from a facility for a designated purpose and period of time;

(8) "offender" means a person sentenced for an offense, who has not been discharged;

(9) "person in the custody of the department" includes a confined person and a person supervised in the community;

(10) "person supervised in the community" means a person authorized to reside in the community subject to the supervision of the department;

(11) "pretrial detainee" means a person accused of an offense and detained before the imposition of a sentence;

(12) "pretrial detention facility" means a facility or part of a facility used for the care and custody of pretrial detainees; and

(13) "sentencing commission" means the sentencing commission created by Part 1 of Article 3.

COMMENT

Paragraph (2) defines "confined person" to include anyone confined in a facility. This includes sentenced persons, pretrial detainees, and material witnesses.

Paragraph (6) defines a "facility." The term has an administrative as well as a physical connotation meant to include an entire institution. A farm located near or administered by an institution would be included in the term facility. Section 2-404 authorizes local political subdivisions to continue to administer short term holding facilities after local jails are brought into the state correctional system. These short term facilities are lock-ups utilized by police departments for short term security or secure rooms used by courts during a trial. These holding facilities are excluded from the definition of "facility," even though Section 2-404 allows the department to administer them on behalf of a political subdivision.

Paragraph (7) provides a general definition of a "furlough." The details of granting furloughs are provided in Sections 4-409 and 4-410.

Paragraphs (8) through (11) provide definitions separating the various classifications used in reference to persons over whom the department has some control. The term "offender" is used to signify a person subject to a sentence; the line of demarcation between an "offender" and a "defendant" is the imposition of sentence. A person remains an "offender" until he is released from his sentence. Paragraph (9) defines "person in the custody of the department" as including both a confined person and a person supervised in the community. This phrase is the most general reference in the Act and is intended to include pretrial detainees, sentenced offenders, material witnesses, and any other person who for any reason is subject to the custody and control of the department of corrections. A "person supervised in the community" is distinguished from a "confined person" and relates to those subject to a sentence to community supervision, those released on bail conditions and subject to the supervision of the department, and those in pretrial diversion programs in which the department plays a supervising role. Paragraph (11) defines as a subcategory of "confined person," a "pretrial detainee" who is a person not yet convicted of an offense but detained prior to his trial. Paragraph (12) makes a "pretrial detention facility" a subclass of "facility."

SECTION 1-102. [Scope of Act.] This Act governs the sentencing, care, custody, and treatment of persons accused of or sentenced for a violation of the criminal laws of this State or otherwise held in the custody of the department. This Act does not apply to:

(1) juveniles processed by a [juvenile, family court] except to the extent they are pretrial detainees in a pretrial detention facility; or

(2) programs, services, or facilities administered by the department exclusively for juveniles committed to its custody by a [juvenile, family court].

COMMENT

This Act is designed to govern sentencing and correctional activities relating to criminal law enforcement. It specifically applies to persons involved in the system because of the accusation of or conviction for a felony or misdemeanor. Although correctional programs and facilities generally serve these persons, a number of other persons in various ways become involved in the correctional system. Material witnesses are confined in jails or pretrial detention facilities. Facilities designed as pretrial facilities often serve a sorting function, initially confining persons who are subsequently diverted from the criminal justice system. The section applies to two major classes of persons: First, those who violate or are accused of violating the criminal laws and second, those who otherwise are in the custody of the department of corrections.

The Act is not intended to govern the processes of juvenile courts nor to apply to facilities administered exclusively for the care of juveniles adjudicated as within a status, such as unruly or in need of special supervision, not amounting to a criminal conviction. The Act would apply to juveniles who are transferred to adult court for criminal prosecution. Paragraph (1) exempts from the Act's coverage juveniles processed by a juvenile court. In some instances, however, juveniles are arrested for criminal conduct and confined in jails or other pretrial facilities until the jurisdiction of the juvenile court is asserted. To the extent those juveniles would be confined in facilities of the department, this Act would apply. In some jurisdictions the department of corrections administers juvenile as well as adult facilities. Paragraph (2) makes the Act inapplicable to those facilities as long as they are maintained exclusively for juveniles committed by a juvenile court. A group home or temporary detention home maintained exclusively for arrested juveniles would not be governed by the Act nor would a training center maintained exclusively for delinquent youth. However, states may wish to examine the provisions of this Act to determine whether they could be implemented in exclusively juvenile facilities.

The scope of the language "criminal laws" may in some states create confusion as applied to minor proceedings oftentimes viewed as "quasi-criminal" or minor offenses carrying "civil penalties." A state may wish to specifically exempt persons involved in these proceedings from the Act. See Uniform Rules of Criminal Procedure, Rule 111 (1974). See also comment to section 3-112 infra (authoring the sentencing commission to define "infractions" and thereby exempt them from the sentencing provisions). In those states that may constitutionally prohibit legislative interference with ordinances adopted by home-rule cities, drafters should exempt these ordinance violations from this Act.

SECTION 1-103. [Adoption of Rules; Procedures.]

(a) For purposes of this Act, "rule" means the whole or part of a statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describe the organization, procedure, or practice requirements of an agency.

(b) Whenever the director adopts a measure, other than a rule, which is binding on persons in the custody of the department, he shall publish the measure in a manner reasonably calculated to give notice of its contents to those persons likely to be affected by it.

(c) Whenever this Act specifically requires the director to implement a section of this Act by adoption of rules or whenever the director specifically designates a measure as a rule, the director shall, before adoption, amendment, or repeal:

(1) give at least 10 days' notice of his intended action to persons in the custody of the department

and likely to be affected. The notice shall contain the time, the place, and the manner in which affected persons may present their views. The director shall give actual notice to persons likely to be affected or,

(i) if the action is likely to affect confined persons, post notice in facilities in a location readily accessible to confined persons and generally used for distributing information to them; and

(ii) if the action is likely to affect persons supervised in the community, mail or otherwise distribute written notice to 10 percent or 100 persons, whichever is less, of the supervised persons likely to be affected;

(2) afford interested persons reasonable opportunity to submit data, views, or arguments in writing relating to the director's intended action. The director also shall set aside a reasonable time period for receiving oral testimony from interested persons. The director may designate a hearing officer to receive and summarize oral testimony for consideration by the director. The director or the hearing officer shall seek to hear a variety of representative views and may refuse oral testimony that is repetitive or irrelevant; and

(3) consider fully all submissions and, if the proposed action is taken, issue a concise statement of the

principal reasons for taking the proposed action, incorporating therein the reasons for rejecting contrary views.

(d) If the director finds that an imminent peril to the health, safety, or welfare of any person requires action without compliance with subsection (c), he may proceed without prior notice or hearing. The action may be effective for a period of not more than 30 days, renewable once for an additional 30-day period.

(e) All rules and regulations in force on the effective date of this Act remain effective for 6 months unless readopted, amended, or repealed in accordance with this section. Thereafter, no rule is valid unless adopted in substantial compliance with this section.

(f) This section applies to rules adopted within the department, whether by the director, associate director, or a subordinate.

(g) The director or his delegate at least annually shall hold a hearing for persons in each facility or program to consider proposals by these persons for changes in the rules of the department.

(h) The director at least annually shall publish copies of the rules of the department affecting the status, activities, or conditions of confinement or supervision of persons in its custody and make them readily accessible to persons in the custody of the department and the public.

At least one current copy of the rules applicable to that facility shall be kept in each facility.

(i) The requirements of this section are in addition to, and in the event of conflict control, any other provision of law applicable to the adoption and publication of rules by state agencies.

COMMENT

This provision is designed to permit persons in the custody of the department to participate in the process of adopting rules affecting them. One of the major techniques developed since the 1940's to improve the administrative process has been notice and comment rulemaking, in which affected persons are given notice of a proposed agency course of action and allowed to voice their views. Congress applied this technique to federal agencies in 1946 in the Administrative Procedure Act, 5 U.S.C.,§§ 551-59, 701-06 (1976). The National Conference of Commissioners on Uniform State Laws proposed similar legislation for the states the same year in the Model State Administrative Procedure Act and substantially revised its provisions in 1961. Approximately 25 states have adopted part or all of the Model Act. This section is derived primarily from the 1961 version.

The National Advisory Commission found that the "concepts developed by these statutes (administrative procedure acts) rarely have been applied to administrative agencies dealing with criminal justice. However, for the most part, the language of these statutes indicates that they are applicable to criminal justice agencies." Nat'l Advisory Comm'n on Criminal Justice Standards & Goals, Corrections Std. 162 [hereinafter cited as Nat'l Advisory Comm'n]. The Commission recommended notice and comment rulemaking procedures for correctional agencies. Id. A committee of the American Bar Association has also recommended broad participation by prisoners in rulemaking. ABA Joint Comm. on the Legal Status of Prisoners, Standards Relating to the Legal Status of Prisoners (Tentative Draft 1977), reprinted in 14 Am. Crim. L. Rev. 377, 572 (1977) [hereinafter cited as ABA Joint Comm.]. Some courts have interpreted existing acts to apply to correctional agencies Ramer v. Saxbe, 522 F.2d 695 (D.C. Cir. 1975); Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974); Parshay v. Buchkoe, 30 Mich. App. 556, 186 N.W.2d 859 (1971) (Michigan procedure act applicable to prison rules).

The purpose of the section is to increase the communication between correctional administrators and persons in their custody and to provide the latter with some minimal participation in rules governing their lives. The section will not only advantage offenders and other persons in custody but will facilitate the administration of correctional programs by regularizing staff conduct and by reducing the actual or perceived incidents of arbitrary conduct. See generally K. Davis, Discretionary Justice (1969).

The section requires notice of prospective rulemaking to be given only to persons in the custody of the department. The intensity of the regulation affecting persons in custody supports the need for such procedures even in states which have not adopted such a system as a general state policy. No attempt in this Act was made to extend rulemaking participation to the public-at-large. The extent of public participation should be governed by general enactments governing all administrative actions. For those states which do have general administrative procedure acts, this section will insure their application to the department of corrections and will make provision for the specialized circumstances of persons in custody.

Subsection (a) provides a definition of rule which is adapted from the Federal Administrative Procedure Act, 5 U.S.C. §55. The definition seeks to isolate as rules those administrative actions which are analogous to legislation in that they have general applicability and are designed to direct the activities of employees and persons in custody in the future. The definition does not include administrative action with an adjudicatory cast such as a disciplinary or classification decision. The definition also excludes the range of ad hoc decisions that inevitably will be made in administering a correctional facility such as menu planning, movie selection, and a variety of purchasing decisions that ultimately would have an impact on persons in custody.

Subsection (b) establishes a modest procedure for adopting administrative measures other than "rules". The extent of the obligation to give notice to persons affected by the measure will depend on the nature of the measure adopted.

Subsection (c) establishes a more formal procedure for the adoption of rules. The subsection is applicable in two situations: (1) when the act specifically requires the Director to adopt rules and (2) when he specifically designates an administrative measure as a rule. As a general matter, the Act requires rules in those areas that have a special significance for the lives of persons in

custody. The Director is required to operate by rules when establishing policies regarding discipline, classification, and grievance systems and when limiting the realization of protected interests.

Paragraph (c)(1) outlines the form that notice must take in order to comply with the section. Administrative procedure acts require publication in general circulation newspapers which is not an effective means of communication to persons in custody. Where a rule affects only a limited number of persons the director may give actual notice to such persons. However, subparagraphs (i) and (ii) if complied with, satisfy the notice requirement against claims by a person that he was not notified. Subparagraph (i) allows posting in a location generally used to communicate with confined persons and subparagraph (ii) allows direct mail to a sample of persons supervised in the community.

Paragraph (c)(2) recognizes the reality of prison life which imposes few opportunity costs on persons participating in procedures such as those proposed. Thus, the paragraph gives the director substantial leeway in limiting the receipt of oral testimony on proposed rules.

Subsection (d) is an emergency provision which authorizes adoption of rules without compliance with the procedure of subsection (c). Subsection (e) gives the department 6 months to reexamine existing rules and repromulgate them in accordance with this Act. Subsections (c) through (e) follow the general policies of section 3 of the Model Act.

Section 2-103 authorizes the director to delegate authority to his subordinates. Subsection (f) of this section insures that the adoption of rules by a chief executive officer or by the head of one of the divisions complies with this section.

The Model Act, section 6, authorizes any "interested person" to petition an agency to adopt or repeal rules. Rather than authorize a general right to petition for rule changes, subsection (g) insures an annual opportunity for persons in the custody of the department to evaluate existing rules. This would allow these persons to propose new rules as well.

Subsection (h) makes adopted rules available to the public and to persons subject to the department's custody.

Subsection (i) insures that the section would not be construed as limiting other state requirements for adoption of rules. If a state has enacted the Model State Administrative Procedure Act or some other form of rulemaking procedure requiring

notice to the public, adoption of rules by the department would be governed by those procedures as well. However, in the event of conflict, this provision would control.

SECTION 1-104. [Judicial Review of Contested Cases.]

(a) A person who has exhausted all administrative remedies available within the department and who is aggrieved by a final decision in a proceeding for which judicial review is authorized is entitled to judicial review under this section.

(b) Proceedings for review must be instituted by filing a [petition; complaint] in the [District Court of _____ County] within [10] days after notice of the final decision of the department. Copies of the [petition; complaint] must be served upon the department.

(c) The filing of a [petition;complaint] does not itself stay enforcement of the department's decision. The department may grant or, upon its refusal to do so, the reviewing court may order a stay upon appropriate terms.

(d) If a [petition; complaint] for review on its face reflects that it is meritorious, the reviewing court shall order the department to transmit to the reviewing court in the form maintained by the department a copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceeding, the record may be shortened.

(e) The review shall be conducted by the court without a jury and confined to the record. In cases of alleged irregularities in procedure before the department, not shown in the record, proof thereon may be taken in the court.

(f) The court may not substitute its judgment for that of the department as to the weight of the evidence on questions of fact. The court may affirm the decision of the department or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the person have been prejudiced because the findings, inferences, conclusions, or decisions of the department are:

(1) in violation of a constitutional, statutory, or administrative provision;

(2) in excess of the authority of the department;

(3) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(4) arbitrary or capricious.

COMMENT

This section prescribes the procedure for direct judicial review of administrative decisions. The procedure is closely parallel to section 15 of the Model State Administrative Procedure Act (1961). It provides a limited judicial review on the administrative record.

The section applies only where judicial review is specifically authorized. The Act provides for judicial review of three decisions. Section 4-413 authorizes judicial review of classification decisions that adversely alter initial classifications. Initial classifications of offenders as to security risk, facility assignment, and program are not reviewable. Reclassifications to a more restrictive class, transfer from a permanent assignment, or increase in the security risk classification are reviewable. Section 4-508 authorizes review of major disciplinary decisions imposing substantial punishment. Section 4-508 authorizes review of a decision excluding a visitor from a facility. Judicial review of general rule-making is not provided in this Act.

The purpose of review under this section is to allow a relatively fast and inexpensive judicial review of major decisions affecting the life of an offender. The court is not authorized to substitute its judgment for that of the administrative official. Subsection (f) provides for the standards of review.

The section is not intended to limit other remedies provided by law.

The Nat'l Advisory Comm'n Correc. Std. 16.2 recommends judicial review of all actions "affecting the substantial rights of individuals."

ARTICLE 2

ORGANIZATION AND AUTHORITY

PREFATORY NOTE

The provisions of Article 2 relate to the organization of the correctional system and the allocation and regulation of administrative authority. The thrust of the Article is to improve correctional programs, services, and facilities. Although it is recognized that statutory provisions alone cannot insure effective corrections, a sound legislative framework is a prerequisite to the administrative development of a workable program.

The major policy position implemented in this Article relating to organization is the unification of all adult correctional programs under one department of corrections. Historically, correctional agencies and thereby correctional programs have been fragmented within a jurisdiction with no overall direction. Until recently in many states each correctional facility operated as an independent governmental agency subject only to general supervision by a board of corrections. In many states community-based programs such as probation and parole are administered separately from the facility-based correctional agency. In most states misdemeanant and pretrial detention facilities are operated by local law enforcement agencies. Article 2 and other provisions of this Act seek to bring all adult correctional programs within one agency--a unified department of corrections.

Most recent national studies of corrections have called for unification. Nat'l Advisory Comm'n on Criminal Justice Standards & Goals, Corrections Std. 16.4 (1973) [hereinafter cited as Nat'l Advisory Comm'n]; President's Comm'n on Law Enforcement & Adm. of Justice, The Challenge of Crime in a Free Society 161-62 (1967) [hereinafter cited as President's Comm'n on Law Enforcement]. See also Advisory Comm'n on Intergovernmental Relations, State-Local Relations in the Criminal Justice System 55 (1971) (unification of all programs except local jails); American Correctional Ass'n, Manual of Correctional Standards 151-170 (3d ed. 1966) (recommending central state correctional organization) [hereinafter cited as ACA Manual]. According to American Correctional Ass'n Directory: Juvenile and Adult Correctional Departments, Institutions, Agencies and Paroling Authorities (1975-76) [hereinafter cited as ACA Directory] twenty-two states have placed adult probation, parole, and institutions in one state agency although some retain overlapping local probation systems. Id. at 250-57. Four states place these three programs in three separate agencies. The breakdown between state and local responsibility for various aspects of the correctional system is shown in the following table from the Directory. Id. at 257.

TABLE 1

No. of Jurisdictions with Indicated Responsibilities
(50 States, D.C., Canal Zone & Puerto Rico

Program	Local Resp.	State Resp.	State/Local Resp.
Juvenile detention	43	8	2
Juvenile probation	26	8	19
Juvenile institutions	0	50	0
Juvenile aftercare	4	47	2
Misdemeanant probation	13	19	9
Adult probation	9	32	12
Jails	43	9	1
Adult institutions	0	53	0
Adult parole	0	53	0

See also, Cal. Bd. of Corrections, Coordinated California Corrections: The System (1971); Final Report of the Prison Study Comm., A Unified System of Correction (Conn. 1957). Many states report plans for further unifying correctional activities. LEAA, Recent Criminal Justice Unification, Consolidation and Coordination Efforts (Jan. 1976).

The arguments in favor of unification are based on effectiveness and efficiency. Correctional programming should be consistent and coordinate, particularly when the same individual often is subject to more than one element of the correctional system. An offender subject at relatively short intervals to pretrial detention, probation, and confinement should not confront inconsistent philosophies or expectations. His gradual reintegration into the free society may require an overall program that builds on past experience.

Consolidated authority over correctional programs also will allow the efficient utilization and allocation of scarce resources. In many instances professional counselors can assist confined persons as well as persons on supervision in the community. Consolidation also provides economies of scale which allow greater flexibility in providing programs and services.

Unification also facilitates long-range planning, the development of training and personnel programs, and the research and evaluation of past efforts.

Legislative formulations have proposed various levels of unification and have served as models for the development of some of Article 2: Ill. Unified Code Correc., Ill. Ann. Stat., ch. 38, §§ 1001-1-1 to 1008-5-1 (Smith-Hurd 1973); Neb. Treatment & Corrections Act, Neb. Rev. Stat. § 83-170 59 1, 152 (Reissue 1976); Advisory Comm'n on Intergovernmental Relations, Stat Department of Correction Act (1971); ALI, Model Penal Code art. 401 (1962) [hereinafter cited as Model Penal Code]; Nat'l Council on Crime and Delinquency, Standard Act for State Correctional Services (1966) [hereinafter cited as Standard Act].

In keeping with the nature of a model law designed for implementation in fifty states, the organizational structure of the department has been kept flexible. The statute creates four divisions within the department and two independent offices. The program-based divisions--division of facility-based services, division of community-based services, and division of jail administration--are created primarily as legal devices to regulate sentencing practices. In Article 3, offenders are sentenced to a particular division within the department. The director, however, is authorized to appoint a single person as associate director of more than one division, and otherwise to coordinate the activities of the divisions. This may be appropriate in small states.

The division of medical services is created as a separate division for substantive reasons. Delivery of medical care often comes into conflict with the security and administrative needs of the facilities. The separate division provides medical personnel with some independence from facility administrators while at the same time retaining departmental control and responsibility for medical services.

The effectiveness of the office of correctional legal services depends on its independence from direct supervision by the department of corrections. Personnel of the office may have to contest actions of departmental personnel; they must retain the confidence of both administration and persons in the custody of the department.

Beyond these provisions, the director is given full authority to organize the department and to create additional divisions. Larger systems may develop separate divisions for research, planning, purchasing, administration or other activities.

The other major purpose of Article 2 is to allocate and regulate correctional authority.

Historically, the legislative delegation of authority to correctional administrators has been framed in relatively broad language. Indeed, in some jurisdictions facilities or agencies are created and their operation left to administrative discretion without further guidance. This type of statutory foundation can have adverse effects. First, left without legislative guidance or support, some correctional administrators may be hesitant to attempt new and promising ideas for fear of public or legislative discontent or from doubt as to the limits of their authority. Second, without legislative direction the thrust of correctional programming over time will be erratic with each new change in administration operating on its own perception of public policy. Third, legislative restraint on administrative discretion is necessary to insure that persons in the custody of the department are treated fairly.

Many of the provisions applied in Article 2 are derived from long-standing techniques utilized to regulate administrative discretion in other areas. The basic approach follows the recommendations in K. Davis, Discretionary Justice (1969). See also Nat'l Advisory Comm'n Correc. Std. 16.2; President's Comm'n on Law Enforcement at 179-181.

Article 2 contains provisions to confine, structure, and check administrative discretion without unduly interfering with the flexibility and authority needed to effectively administer correctional facilities and programs. In some provisions, legislatively established goals are established and relevant considerations and factors for decisionmaking are stated. In many instances throughout this Act the director is obligated to exercise his discretion through formally adopted rules. The procedure for adopting rules allows participation by persons subject to the rules. The existence of rules will facilitate uniform application of policies throughout the department and provide a measure of protection against arbitrary actions by subordinates. The public nature of the rules will assist in creating a greater public awareness of the operation of the department.

OVERVIEW OF ARTICLE 2

Part 1 establishes the centralized department of corrections and provides for its authority and responsibilities. Provisions in this part have general application throughout the programs of the department.

Parts 2, 3, and 4 create the operational divisions of the department. The division of facility-based services has responsibility for major correctional facilities including prisons and

long-term confinement institutions. The division of community-based services provides a cluster of programs and services that have a general community orientation. This division would have custody over persons sentenced to community-supervision. It might also have administrative responsibility for half-way houses and other facilities not used for continuous confinement. The division of jail administration would administer facilities traditionally thought of as local jails which would include pre-trial detention facilities and misdemeanant confinement institutions.

Part 5 establishes a division of medical services responsible for all aspects of medical services in departmental facilities.

Part 6 establishes an independent office of correctional legal services to provide legal assistance to confined persons. The office is authorized to provide both legal counsel and paralegal assistance.

Part 7 provides legislative direction for the planning and design of new correctional facilities.

Underlying all of these provisions is the implicit premise that persons in the custody of the department have the right to be treated fairly. In part, support for the premise is philosophical--that the measure of the greatness of a society can be found in the way it treats its offenders. In part, support for the premise is utilitarian--that fair treatment is a prerequisite for rehabilitation. In part, support for the premise is legal--that offenders are entitled to basic elements of fair treatment under the Constitition. And, in part, support for the premise is traditional--that governmental power always should be restrained, not necessarily because of proven abuse but because of the potential for abuse.

ARTICLE 2
ORGANIZATION AND AUTHORITY

PART 1
DEPARTMENT OF CORRECTIONS

SECTION 2-101. [Department of Corrections; Function.]

(a) A department of corrections is created [within the executive branch of government; Department of Human Resources]. It shall provide programs, services, and facilities required for the care, custody, and treatment of persons in the custody of the department.

(b) Pursuant to an arrangement with a court or prosecuting attorney, the department:

(1) shall supervise persons released before trial whenever supervision is a condition of release; and

(2) may provide access to or maintain programs for persons accused of a criminal offense but released before trial.

COMMENT

The section creates and establishes the jurisdiction of the department of corrections. The department should either be an independent state agency or part of a broader administrative organization. The Act takes no position on which is preferred. The American Correction Association seems to prefer a structure in which the director of corrections reports directly to the Governor. ACA Manual at 152-153. About 50% of the states conform to this model. See ACA Directory 250-57. See also Advisory Comm'n on Intergovernmental Relations, State-Local Relations in the Criminal Justice System 56-58 (1971); Model Penal Code § 401.2; Standard Act § 4. See also ACA Comm'n on Accreditation, Standards for Adult Correctional Institutions 4001 (1977) calling for statutory creation of the parent agency for correctional institutions.

On the other hand, there has been a movement in some states to consolidate agencies and in at least 13 states, adult corrections has been placed within a broader agency responsible for a wide variety of social services. The experience with this latter form of organization is reported to be mixed. Council of State Governments, Human Resource Agencies: Adult Corrections in State Organizational Structure (1975) (reporting on experience in Alaska, California, Delaware, Florida, Hawaii, Iowa, Massachusetts, Missouri, New Jersey, Oregon, South Dakota, Utah, Vermont, Washington, and Wisconsin). Delaware and Florida recently separated adult corrections from such an agency.

Subsection (a) lists the department's primary functions of providing facilities for and supervising pretrial detainees and sentenced offenders. The section creates a unified correctional system, placing under one administrative agency responsibility for all aspects of the correctional system including facilities for pretrial detainees, misdemeanants, and felons as well as programs of supervision in the community including what is traditionally known as probation. Parole supervision is abolished by the Act but section 3-507 authorizes the department to offer post-release programs. The one exception to unification is that juvenile programs and facilities are not included within the department. See section 1-102. However, states may wish to complete the unification process by giving the department of corrections authority over juvenile facilities and programs.

A unified correctional system has been advocated as the best means to insure efficient and effective use of correctional resources. It is also true that many persons experience several aspects of the correctional system and thus a consistent philosophy is essential. See Nat'l Advisory Comm'n Correc. Std. 16.4.

Subsection (b) authorizes the department, when requested by the appropriate official, to supervise persons released to the community awaiting trial or released to a pretrial diversion program. Because these programs are so closely tied to the judgments of local court and prosecutorial officials and are not traditional correctional functions, they are not integrated into the department's jurisdiction. However, because the department will have persons trained to supervise persons in a community setting and may be administering treatment programs in the community, efficient use of resources may result from use of these resources for persons awaiting trial. Upon request, the department is obligated to provide supervision and, in its discretion, may authorize programs to be made available to persons awaiting trial.. Pretrial diversion subject to supervision is authorized by Rule 442 of the Uniform Rules of Criminal Procedure (1974).

Although used in a few states, the Conference does not recommend the establishment of a policy-making board of corrections preferring to rely on a professionally trained director of corrections. A lay board provides little in the way of professional guidance and expertise. It may also be a source from which political considerations are interjected into correctional decisionmaking. On the other hand, in some states the board may be a buffer against political pressures. See ACA Manual at 153-54 (urging abolition of lay boards). For states using policymaking boards, see: Ala. Code tit. 45 § 10 (1) (1958); Ark. Stat. Ann. § 7-201 (1976); Idaho Code § 20-201 (Supp. 1977); S.D. Compiled Laws Ann. § 1-15-1 (1974). The Act does provide for an advisory committee in section 2-109.

SECTION 2-102. [Director of Corrections; Appointment.]

The Governor shall appoint a director of corrections who has appropriate training and experience in corrections. The director shall serve for a term of [6;4] years and until his successor has been appointed. The Governor may remove the director only for disability, neglect of duty, incompetence, or malfeasance in office. Before removal, the director is entitled to a hearing.

COMMENT

The section provides for the appointment of a director of corrections to administer the department. The American Correctional Association recommends a single administrative head for the corrections system. ACA Manual at 151-170. A unified correctional system would require a single administrator.

The statutory qualifications for the director are left purposely general. The language is intended to insure that a professional correctional administrator is appointed but to leave a large amount of discretion in defining the background of a professional. At this level of appointment some experience and training are required. Several states provide similar statutory qualifications. Cal. Penal Code § 18-80 (West 1970); Conn. Gen.

Stat. Ann., § 18-80 (West 1975). See Advisory Comm'n on Intergovernmental Relations, State Department of Correction Act, § 3 (1971) and Standard Act, § 4 which both require the director to be qualified by "character, personality, ability, education, training, and successful administrative experience in the correctional field." The Model Penal Code does not include statutory qualifications.

A few states provide more specific qualifications for the director. See Ariz. Rev. Stat., § 41-1603 (West 1974) (masters degree and 10 years' experience in corrections). This approach was rejected as unduly limiting. Beyond training and experience there is no evidence that specific educational attainment is a necessary requirement for the position.

The section also provides a 6-year term for the director. This would normally extend his term beyond that of the governor and provide some measure of insulation from political pressure. Neb. Rev. Stat., § 83-172 (Reissue 1976) (for cause); Tex. Rev. Civ. Stat. Ann. art 6166k (Vernon 1970) (for cause). Some states may prohibit appointed officials from serving beyond the term of the appointing authority. In those cases, a 4-year term is recommended. Many states currently provide that the director serves at the pleasure of the Governor or other appointing authority. See ABA, Compendium of Model Correctional Legislation and Standards, Chart 2 at X-85 (1972). This approach may subject the director to political pressure and prevent his exercise of professional judgment.

SECTION 2-103. [Powers of Director.] The director shall:

(1) administer the department;

(2) establish, consolidate, or abolish administrative subdivisions not established by law; and he shall appoint and may remove according to law the heads thereof;

(3) delegate appropriate powers and duties to the heads of administrative subdivisions and the chief executive officers of facilities and programs;

(4) adopt rules, statements of general policy, interpretive memoranda, and other measures relating to the care, custody, and treatment of persons in the custody of the department, the administration of programs, services, and facilities, and the conduct of employees of the department;

(5) collect, develop, and maintain information concerning the programs, services, and facilities of the department;

(6) at the request of the sentencing commission, collect, develop, and transmit statistical information required by the commission for the exercise of its duties;

(7) cooperate with individuals or public or private agencies or organizations for the development and improvement of the personnel, programs, services, and facilities of the department;

(8) explain correctional programs and services to the public; and

(9) exercise all powers and perform all duties necessary and proper in discharging his responsibilities.

COMMENT

This section establishes the powers of the director of corrections. As the chief administrative officer of the department, he is charged with the entire responsibility for correctional programs, services, and facilities. All administrative powers are conferred initially on the director and he is authorized to delegate some of his authority to administer the department; the

other paragraphs specify some powers within the general grant of authority. These specific paragraphs are designed to eliminate arguments over whether the director's general powers include those specified and to provide explicit legislative support for some activities. The list of specific powers is not intended to be exclusive; paragraphs (1) and (9) are broad general statements of responsibility and authority.

Paragraph (2) gives the director the power to organize the department. It allows him to create, consolidate, or abolish administrative subdivisions not otherwise established by law. The Act requires the creation of four divisions within the department--community-based services, facility-based services, jail administration, and correctional medical services. Model Penal Code, § 401.3 (1962) recommended eight departmental divisions: treatment services, custodial services, young adult correction, fiscal control, prison industries, research and training, probation, and parole. The variation in size and administrative tradition among the fifty states suggested that statutory organizational requirements be kept to a minimum. The three operational divisions created by this Act--community-based services, facility-based services, and jail administration--are designed to facilitate the sentencing provisions of the Act and to insure that within a coordinated unified department of corrections the distinct character of confined felons, misdemeanents, pretrial detainees, and persons subject to community-supervision will continue to be recognized. Additional flexibility within the statutory organization is provided in Section 2-106.

The phrase "appoint and may remove according to law" is used in paragraph (2) and elsewhere in the Act to incorporate existing state civil service or personnel systems. Some states have rigid civil service requirements for all state employees; others have only limited systems. Whatever rules and procedures currently govern the appointment and removal of employees would continue in effect under this Act.

Paragraph (3) provides the director with an unlimited power of delegation. In some instances in the Act, a restriction on the director's authority to delegate is established. Absent such an express limitation, authority or duties imposed upon the director by this Act are delegable under this paragraph.

Paragraph (4) establishes the methods authorized for the administration of the department. The director is specifically empowered to issue rules, statements of general policy, interpretive memoranda, and other directives. The paragraph suggests

that standard operating procedures be reduced to writing and that the department be governed in a formal manner. The adoption of rules as distinguished from policy statements, etc., requires a formal notice and comment proceeding under Section 1-103. The Act specifies instances in which the director must exercise his authority by "rule." Where no method is specified, this subsection authorizes a variety of different administrative techniques.

Paragraphs (5) and (6) relate to research and evaluation of departmental activities. The department may have information or access to information required by the sentencing commission and paragraph (6) would require the department, at the commission's request, to provide that information to it.

Paragraph (7) is one of many provisions in the Act which encourages the use of existing community resources within correctional programs. In many instances the use of existing resources is preferable to the internal development of duplicative programs within the department. It is also widely recognized that contact with the community is an important element in an effective rehabilitative program. See, e.g., Nat'l Advisory Comm'n Correc. Stds. 7.3-7.4.

Paragraph (8) removes any doubt that the director is authorized to expend departmental funds to educate the public regarding the activities of the department. Correctional programs, particularly those that are facility-based, operate largely outside the public eye. Generally only incidents of failure are widely reported. Yet, correctional programs cannot be effective without not only community acceptance, but community participation.

See, generally, ACA Comm'n on Accreditation, Standards for Adult Correctional Institutions (1977).

SECTION 2-104. [Public Accountability.]

(a) The director shall adopt rules encouraging visits to facilities and programs by public officials and authorizing public visits to facilities and public observance of programs. The rules must be consistent with the following:

(1) The Governor, Attorney-General, members of the [Legislature], members of the state judiciary, members of the advisory committee, and members of the sentencing commission may visit any part of any facility at any reasonable time and conduct private interviews with any willing employee or confined person unless the director determines that a state of emergency exists.

(2) Individuals and groups of persons may visit facilities or observe programs at reasonable times.

(3) Visits must be conducted in a manner designed to preserve confined persons' reasonable expectations of privacy.

(b) The director shall transmit annually to the Governor a report on the department. The report must contain:

(1) a description and evaluation of the programs, services, and facilities of the department;

(2) any recommendation or proposal for the alteration, expansion, addition, or discontinuance of programs, services, or facilities;

(3) any recommendation for statutory change necessary to improve programs, services, or facilities; and

(4) any other information required by law, requested by the Governor, or determined to be useful by the director.

(c) Upon receipt, the Governor shall transmit a copy of the report to the [Legislature], each trial and appellate court having jurisdiction over criminal cases, and the sentencing commission, and he shall make copies available to the press and members of the public.

COMMENT

This section is designed to enhance public awareness of correctional programs. Subsection (a) requires that rules be adopted to facilitate tours of correctional facilities and observation of other programs. Paragraph (1) provides broad visitation rights for public officials who have some special interest in, or responsibility for, corrections or persons in the custody of the department. The governor, as the state's chief executive officer, and the attorney-general as the top law enforcement official have an obvious interest in the administration of the department. Members of the legislature, who are required to vote on departmental appropriations and to authorize correctional programs also should be entitled to view the results of their efforts first hand. Under the sentencing provisions of this Act, the sentencing commission and the state judiciary share the responsibility for determining who is sent to the various correctional programs. This responsibility cannot be exercised intelligently without an intimate knowledge of departmental resources and programs. The members of the advisory committee, established in section 2-109, are specifically directed to familiarize themselves with the problems of the department and persons in its custody, and this section allows them to fulfill that directive.

Subsection (a) authorizes named officials to tour facilities at any "reasonable" time. The standard of "reasonableness" must be evaluated in light of the special relationship of the specified officials to the department. Administrative convenience alone should not be a sufficient reason to deny access to a facility under this subsection nor would it be appropriate for the director to establish in advance visiting hours for the officials named in this subsection. It is the intent of the subsection to authorize visits by the named officials at their request unless some unusual circumstances make the visit unreasonable. For example, a director may be justified in denying

access to a facility during a riot or disorder. Nothing in this section limits the authority of the director to regulate the manner of the visit or to impose reasonable conditions to protect the privacy of confined persons or the security of the facility. To the extent authorized by this Act, the director could require searches of public officials prior to a visit or limit the number of visitors in a facility at any one time.

The paragraph also authorizes the named officials to interview any willing employee or confined person. This authority is another recognition of the special responsibility of the named officials for the nature and effectiveness of the department's activities.

The Nat'l Advisory Comm'n Correc. Stds. 5.9-5.10 recommend continuing judicial responsibility for confined persons and unlimited rights of facility visitation for sentencing judges. See also, ABA, Sentencing Alternatives and Procedures 7.4 (1968) (recommending regular visitation of facilities by judges). See Ill. Stat. Ann. ch. 38, § 1003-2-4 (Smith-Hurd 1973) (authorizing Governor to visit "as he deems fit"); Neb. Rev. Stat. § 83-186 (Reissue 1976) (allowing official visits at anytime).

Subsection (a)(2) authorizes other individuals and groups to visit facilities at reasonable times. The standard of "reasonableness" in this subsection differs from that in subsection (a)(1) and must again be construed in relation to the interest of the visitor. Administrative convenience would be an appropriate factor to consider in authorizing visits under this subsection.

Visits in facilities require a difficult balancing of the public's interest in viewing correctional programs and the confined person's interest in privacy. Some correctional administrators believe that persons in custody should not be seen by the public. This results in an inaccurate view of prison life. On the other extreme, some visits are conducted without prior announcement. Prisoners are viewed in various stages of undress or while performing bodily functions. Subsection (a)(3) does not purport to strike the balance for all situations; it is intended to emphasize that the issue does require a balancing and that a confined person's privacy interest should be considered.

Subsection (b) requires an annual report to the Governor and subsection (c) requires the report to be made public. A suggestion to provide for an independent auditor of the department was rejected. The correctional mediator established in Article 4 serves that purpose for the most part. See ACA Comm'n on Accreditation, Standards for Adult Correctional Institutions 4023, 4025 (1977) (requiring public information program and biennial reports on the correctional department to the public).

SECTION 2-105. [Programs and Services.]

(a) The director shall provide access to programs and services to meet the needs of persons in the custody of the department.

(b) The director may contract with any individual or public or private agency or organization to provide programs or services to persons in the custody of the department. The contract shall permit the director to evaluate periodicially the programs or services and to cancel the contract whenever the programs or services are not satisfactory.

(c) The director shall avoid unnecessary duplication of programs or services available from other sources.

COMMENT

The section provides authority for a wide-range of programs and services to meet the needs of persons in the custody of the department. Although the sentencing provisions of the Act have eliminated rehabilitation as an appropriate factor in determining a sentence, the self-initiated rehabilitation of offenders remains an important correctional goal.

Subsection (b) recognizes the findings of the National Advisory Commission that corrections should more extensively utilize program resources from the community. The community can provide a much broader range of services than can be internally developed within a prison setting and often the programs are more directly related to free world needs. Nat'l Advisory Comm'n Correc. Stds. 7.3-7.4; ACA Comm'n on Accreditation, Standards for Adult Correctional Institutions 4017-18 (1977).

Subsection (b) authorizes the department to contract for programs and services and to cancel the contract if the programs or services are not satisfactory. It is expected that the

contractual terms will define in more precise language the standards used to determine whether the contact is being satisfactorily performed, and prevent exploitation of confined persons.

SECTION 2-106. [Coordination Within Department.]

In order to avoid unnecessary duplication the director may:

(1) require one division to provide programs, services, and facilities to persons in the custody of another division; and

(2) appoint one person to head more than one division.

COMMENT

This section is designed to alleviate unnecessary duplication. In smaller states, the population subject to the department's custody may not warrant even the minimal bureaucratic structure established by this Act. In those cases the director may require one division to provide services to persons in another division and may appoint one person to head more than one division. The divisions would still be retained for purposes of separation of classes of persons subject to the department's custody.

In all states it may be appropriate for divisions to share responsibility for a facility or program. A half-way house may be suitable for persons in both the division of jail administration and the division of community-based services. The director is authorized by this section to give administrative control of the half-way house to one division and authorize its use by persons in more than one division. This section, however, would not authorize the housing together of different classes of persons if prohibited by some other section of this Act.

A person appointed to more than one position still would be required to meet the qualifications established for both positions. One person could likely qualify for the associate director position in both the jail administration and facility-based divisions.

SECTION 2-107. [Gifts and Grants.] Subject to other provisions of law, the director may apply for, accept, receive, and use, for and on behalf of the State, any money, goods, or services given by any source for purposes consistent with the responsibilities of the department and may agree to covenants, terms, and conditions the director considers necessary or desirable.

COMMENT

This section allows the director to apply for and accept gifts and grants from any source. The phrase "subject to other provisions of law" is intended to incorporate any other state provision that limits the rights of a governmental official to obligate the state to matching payments or other allocations of resources. Many states require all grant applications to be signed by the Governor and nothing in this section would limit the force of such a provision.

SECTION 2-108. [Employment and Training.]

(a) The director shall adopt measures governing the employment, training, and promotion of employees of the department. The measures shall prescribe:

(1) qualifications for the various positions within the department;

(2) for each position, initial training and educational requirements to be completed within one year after initial employment by the department; and

(3) for each position, training and educational requirements to be completed annually and additional training

and educational requirements for promotion within the department.

(b) A person may not be employed, promoted, or retained by the department unless he complies with the measures adopted pursuant to subsection (a). Those measures are in addition to rules or other provisions of law generally applicable to the employment, training, promotion, and retention of state employees.

(c) Notwithstanding any other provision of law:

(1) a person may not be denied employment within the department solely because of the fact of prior conviction; and

(2) a person may not be denied a position within the department solely because of a sexual difference from the persons supervised or assisted.

(d) The director shall:

(1) assure the availability of appropriate training programs;

(2) consult and cooperate with educational institutions for the development of general and specialized courses of study for employees of the department;

(3) consult and cooperate with other departments and agencies concerned with the employment or training of employees of the department; and

(4) develop a plan for the recruitment and employment of persons of the same race or national origin as persons in the custody of the department.

(e) The director may make loans, for the purpose of academic study or training in fields relating to corrections, to employees of the department or applicants for employment, and may grant leaves of absences to employees. The director shall establish rules for conditions and awards of the loans, which may include a provision forgiving the loan on condition that the recipient work for the department for a stated period after completion of his study or training.

(f) [Measures adopted pursuant to this section must be adopted in accordance with procedures for the adoption of rules governing similar rules for employees of other state agencies.]

COMMENT

The section requires the director to adopt rules relating to the employment, training, and promotion of employees. Subsection (b) provides that compliance with the rules established by the director is a condition of employment and is in addition to compliance with other applicable rules. These rules would either supplement or be incorporated within existing civil service or personnel systems. In a few states where civil service systems may be constitutionally exclusive, this section may have to be modified or removed.

The development of both in-service and training programs is a critical need in correctional departments. In 1968 the Joint Commission on Correctional Manpower and Training discovered that over 70 percent of persons working in corrections at all levels did not participate in academic or training programs. The

National Advisory Commission noted some improvement with the development of federal funding programs for training. Nat'l Advisory Comm'n Correc. ch. 14.

The Act does not establish educational or other requirements for employment in corrections. Statutorily created employment requirements are often too rigid to accommodate experimental programs and, particularly in a correctional context, are difficult to formulate. See H. Perlman, Legislating for Correctional Line Officer Education and Training (1973).

Subsection (c)(1) prevents discrimination against ex-offenders in employment by the department. The provision does not prevent the department from considering the underlying factual basis for the past conviction but does prohibit a general policy against hiring persons with past convictions. The Joint Commission found in 1969 that half of all correctional personnel had objection to hiring ex-offenders. Other sections of this Act and several state codes have provisions prohibiting governmental agencies generally from discriminating in employment on the basis of past convictions. Correctional administrators have worked hard to break down barriers to employment by private enterprise for ex-offenders. The Act recognizes that corrections itself should also be willing to hire ex-offenders. There is also some evidence to suggest that ex-offenders can be particularly effective in some correctional roles. See Joint Comm'n on Correctional Manpower & Training, Offenders as a Correctional Manpower Resource (1968). See also Nat'l Advisory Comm'n Correc. Std. 14.4 (recommending a standard consistent with this provision and noting that "New York, California, Washington, Illinois, and other States pioneered in the use of offenders and ex-offenders in correctional work"). See Section 4-1005 of this Act preventing discrimination against ex-offenders in employment. The direct relationship test in that section would govern hiring in the department.

Correctional facilities traditionally have been sexually segregated and this fact is reflected in employment patterns throughout correctional systems. A Louis Harris survey in 1968 discovered that only 12 percent of the correctional workforce was female. Recently the Federal Bureau of Prisons and some state systems have employed increasing numbers of women as line officers within male facilities. And the National Advisory Commission recommended that more women be hired "for all types of positions in corrections." Nat'l Advisory Comm'n Correc. Std. 14.3. Correctional agencies are subject to the federal statutory prohibitions against sexual discrimination in hiring. Subsection (c)(2) announces a legislative determination that the sex of persons being supervised is not a relevant criteria in determining whether some differences in employment patterns are justified. The subsection would not prohibit attempts to protect the privacy of persons in custody to the extent they do not prevent the hiring of employees of a given sex. This section is consistent with the position of the American Correctional Association's accreditation standards. ACA Comm'n on Accreditation, Standards for Adult

Correctional Institutions 4062 (1977) ("Men and women should have equal opportunities to compete for any position within the institution.")

Subsection (d) requires the director to undertake certain activities to improve the training and recruitment of correctional employees. Paragraph (4) requires the development of a plan for the recruitment of persons of the same race as persons in the custody of the department. The paragraph does not require an "affirmative action" program or direct the hiring of a set ratio of employees from racial groups represented in the custodial population. However, it is recognized that while minority groups are heavily represented in prison populations, they have only recently been included in the ranks of correctional staff. See generally, ACA Comm'n on Accreditation, Standards for Adult Correctional Institutions 4088-4104 (1977).

Subsection (e) authorizes the use of forgiveable loans and leaves of absence as devices for increasing the academic and training levels of correctional staff. The provision is modeled after the "LEEP" program administered by the Law Enforcement Assistance Administration and Ill. Ann. Stat. ch. 38 § 1003-2-7 (Smith-Hurd 1973).

SECTION 2-109. [Advisory Committee.]

(a) A department of corrections advisory committee is created to advise the director concerning the policies and practices of the department. It consists of 9 members appointed by the [Governor] who have an interest in or knowledge of corrections. Members of the committee shall serve staggered terms of [6;4] years.

(b) The committee shall elect a chairman from among its members and meet quarterly and at other times at the call of the chairman. Members of the committee shall serve without compensation but are entitled to be reimbursed for expenses necessarily incurred in the performance of their duties.

(c) The director annually shall report to the committee on the policies and practices of the department. The

members of the committee shall take appropriate steps to familiarize themselves with the problems and concerns of the department and persons in its custody and make recommendations to the director related thereto.

COMMENT

The section establishes a committee appointed by the Governor to advise the director of corrections. The committee is a device to enhance public participation in the affairs of the department. The committee does not have policymaking powers but is entitled to an annual report from the director and is instructed to familiarize itself with the problems of the department and persons in its custody. To a large extent the effectiveness of an advisory committee and the exact role it will play will be determined by the director and the appointed members. On the one hand, some directors may utilize the committee as a sounding board for new policies and for support with the public and the legislature. In other situations, the committee might be more an advocate of the interest of persons in the custody of the department. Either role can have significant advantages.

The section does not specify the type of persons who should be included on the committee. It is intented that the committee should be heavily weighted with members from the public-at-large rather than public officials. States may also wish to experiment with the appointment of ex-offenders to the committee. The phrase "interest in" is not meant to require evidence of a previous interest but only an interest contemporaneous with the persons' appointment.

SECTION 2-110. [Records.] The director shall establish and maintain a central file on each person in the custody of the department. If available and appropriate, each file shall include:

(1) the presentence report, the record of the sentencing hearing, and other information from the sentencing court;

(2) the admission summary;

(3) the classification report and recommendations;

(4) official records of conviction and commitment as well as any earlier criminal record;

(5) reports of disciplinary infractions and dispositions;

(6) progress reports and orientation reports;

(7) other pertinent data about background, conduct, associations, and family relationships; and

(8) an index of the nature and location of all other information about the person maintained by the department other than incidental references to the person in files not directly related to him.

COMMENT

This section establishes a central file for each person in the custody of the department. For similar provisions, see Neb. Rev. Stat. § 83-178 (Reissue 1976); Model Penal Code § 304.3. The file must include all information about the person or an index indicating where additional information is kept. The section does not prohibit the decentralization of files or the maintenance of duplicate files. It does require that there be one file or source that indicates the entire scope of information maintained.

The purpose of a central file is to insure informed decisions about persons in the custody of the department and to facilitate the implementation of Sections 4-120 and 4-121. These latter sections delineate the right of a person to have access to his own files.

Paragraph (1) includes the presentence report and the record of the sentencing hearing. Section 3-206 (e) requires these records to be transmitted to the department.

Paragraph (8) provides for the index in lieu of the actual information. The language "nature and location" of other information would suggest that the central file indicate that medical

records are kept at the facility hospital or that work records are kept at the office of the director of prison industries. The last clause of the paragraph is to insure that each file need not index every incidental reference regarding a person. Such incidental references in all likelihood would not be considered "about the peson" so long as they are not relevant to the department's decision-making process. For example, a casual reference to one offender during a disciplinary proceeding of another offender would not need to be indexed in the former's file. However, if that reference led to subsequent investigation of him or his direct involvement in the proceeding where his own actions were at issue, the material should be placed in his file as well.

The section is consistent with ACA Comm'n on Accreditation, Standards for Adult Correctional Institutions 4130-39 (1977).

PART 2
COMMUNITY-BASED SERVICES

SECTION 2-201. [Division of Community-Based Services; Creation.] The division of community-based services is created within the department. It shall administer programs, services, and facilities for:

(1) persons sentenced or transferred to its custody;

(2) persons released before trial whenever supervision is a condition of release and a court or prosecuting attorney requests the department to participate; and

(3) victims of criminal offenses as authorized by Article 5.

COMMENT

This section establishes the division of community-based services which is responsible for correctional programs that take place within the community as distinguished from those that occur within a correctional facility. The major responsibility of the division is the supervision of persons sentenced to community supervision, this Act's counterpart to traditional probation.

The division may also administer some facilities, such as half-way houses or other forms of community correctional centers, that provide only minimal custody and operate in the community. The Act contemplates the division will have facilities to provide custodial care for some individuals sentenced to split-sentences under Section 3-503 and periodic confinement under Section 3-506. Section 4-407 also authorizes the transfer of a person sentenced to continuous confinement from the division of facility-based services to the division of community-based services during his last 90 days of confinement in order to facilitate his adjustment

to the free society. Section 2-106 would authorize the director to utilize facilities in other divisions, i.e. jails, for this purpose as well.

The language in paragraph (1), "sentenced, committed, or transferred" is intended to include any person who is in the division's custody.

Paragraph (2) refers to conditional bail release programs and pretrial diversion programs involving community supervision. Courts or prosecuting attorneys operating such programs are authorized to request the division to provide supervision to persons in these programs. The nature and conditions of the supervision would be governed by those programs and not by the provisions of this Act.

Article 5 provides authority for programs to assist the victims of crime in relation to the criminal process. The division is authorized by paragraph (3) to provide these services.

SECTION 2-202. [Associate Director for Community-Based Services.] The director shall appoint and may remove in accordance with law an associate director of corrections for community-based services who has appropriate experience in corrections or training in a relevant discipline at an accredited college or university.

SECTION 2-203. [Duties of Associate Director.] Subject to approval of the director, the associate director shall:

(1) administer the division;

(2) adopt rules and other measures relating to the division;

(3) appoint, and he may remove in accordance with law, community-service officers, deputy officers, if

required, and other employees required to provide adequate supervision and assistance to persons in the custody of the division;

(4) appoint, and he may remove in accordance with law, the chief executive officer of each facility or program within the division and other employees and delegate to them appropriate powers and duties;

(5) evaluate and improve the effectiveness of the personnel, programs, services, and facilities of the division;

(6) develop programs, services, and facilities to meet the needs of persons in the custody of the division and victims;

(7) acquire and utilize community resources and social services for the benefit of persons in the custody of the division and victims; and

(8) exercise all powers and perform all duties necessary and proper in discharging his responsibilities.

COMMENT

This section lists specific duties of the associate director of the division of community-based services. He is given broad authority in paragraphs (1) and (8); the additional specific duties listed are not intended to limit his authority but to emphasize and give legislative support for the conduct of certain activities. The associate director may also be delegated specific functions by the director of corrections.

SECTION 2-204. [Powers of Community Service Officers.]

(a) A community service officer shall:

(1) assist and supervise persons in the custody of the division;

(2) make reports required by a sentencing court to determine the effectiveness of a program of the division or the progress of an individual participant in a program; and

(3) exercise all powers and perform all duties necessary and proper in discharging his responsibilities.

(b) A community service officer may not arrest a person under his supervision except to the extent private citizens may make arrests.

COMMENT

Community service officers are comparable to probation officers in traditional systems. However, the functions of pre-sentence investigations and field supervision, usually the responsibility of a single officer, are separated under the Act. Studies have demonstrated that where both functions are combined, the pre-sentence investigations are generally given priority and interfere with field superivison. D. Glaser, The Effectiveness of a Prison and Parole System 442-48 (1964). In addition, supervision of persons in the community is comparable to a custodial function and should be administered by the unified correctional agency. Pre-sentence investigation is more closely related to the judicial sentencing function, and the relationship between the pre-sentence investigator and the sentencing judge should be one of trust and confidence. Although the Act does not prevent one officer from performing both functions, the separate treatment of the two functions in the Act is intended to suggest consideration of creating two separate classes of staff. Pre-sentence service officers are authorized by Section 3-201.

Subsection (b) insures that community service officers do not function as auxiliary police officers. It has been demonstrated that surveillance and counseling roles cannot be successfully performed by the same individual at the same time. Nat'l Advisory Comm'n Correc. Std. 12.7; Studt, Surveillance and Service in Parole (1972). The subsection deprives these officers of the arrest powers of a law enforcement officer and emphasizes their counseling role.

PART 3
FACILITY-BASED SERVICES

SECTION 2-301. [Division of Facility-Based Services; Creation.] The division of facility-based services is created within the department. It shall administer programs, services, and facilities for:

(1) offenders convicted of felonies and sentenced to terms of continuous confinement; and

(2) persons sentenced, committed, or transferred to its custody.

COMMENT

This section establishes the division of facility-based services which is responsible for administering facilities for long-term offenders. It is also possible that periodically other persons will be subject to the division's custody. The phrase "sentenced, committed, or transferred" is intended to include any person who is in the division's custody.

SECTION 2-302. [Associate Director; Appointment.]

The director shall appoint, and he may remove in accordance with law, an associate director of corrections for facility-based services who has appropriate experience in corrections or training in a relevant discipline at an accredited college or university.

SECTION 2-303. [Duties of Associate Director.]

Subject to approval of the director, the associate director shall:

(1) administer the division;

(2) adopt rules and other measures relating to the division;

(3) appoint, and he may remove in accordance with law, the chief executive officer of each facility or program within the division and other employees and delegate to them appropriate powers and duties;

(4) evaluate and improve the effectiveness of the personnel, programs, services, and facilities of the division;

(5) develop programs, services, and facilities to meet the needs of persons in the custody of the division;

(6) acquire and utilize community resources and social services for the benefit of persons in custody of the division; and

(7) exercise all powers and perform all duties necessary and proper in discharging his responsibilities.

COMMENT

This section lists specific duties of the associate director of the division of facility-based services. He is given broad authority in paragraphs (1) and (7); the additional specific duties listed are not intended to limit his authority but to emphasize and give legislative support for the conduct of certain activities. The associate director may also be delegated specific functions by the director of corrections.

PART 4
JAIL ADMINISTRATION

SECTION 2-401. [Division of Jail Administration.] The division of jail administration is created within the department. It shall administer programs, services, and facilities for:

(1) offenders convicted of misdemeanors and sentenced to terms of continuous confinement;

(2) pretrial detainees; and

(3) persons sentenced, committed, or transferred to its custody.

COMMENT

The local jail has long been recognized as one of the most intractable elements of the correctional system. Many have recommended the state assumption of responsibility for these facilities as a necessary first step in reforming the jail. Nat'l Advisory Comm'n, § 9.2. President's Comm'n on Law Enforcement at 178. At least six states have assumed responsibility for local misdemeanant and pretrial detention facilities. ACA Directory (Alaska, Connecticut, Delaware, North Carolina, Rhode Island, Vermont).

State control of jails introduces substantial flexibility into the correctional system. It allows transfer and separation of different types of prisoners, the development of programs on an efficient scale, and the coordination and efficient use of correctional resources. The 1972 survey of local jails conducted for the Law Enforcement Assistance Administration counted 3,921 jails of which 2,901 had fewer than 21 inmates. More dramatic, most jails did not provide basic program or personnel resources. The table below is constructed from the 1972 survey.

Number of jails out of 3,921 without the following:

Resource	Number
Drunk tank	2,210
Medical facility	3,380
Exercise yard	3,278
Federally funded rehabilitation programs	3,446
Any rehabilitative programs	1,276

At the time the survey was taken there were 141,588 persons confined in local jails.

This section establishes the division of jail administration to administer what are now known in most states as local jails. The division's authority extends over misdemeanants sentenced to continuous confinement, pretrial detainees, and other persons, such as material witnesses and prisoners from other jurisdictions in transit, who may temporarily be subject to the division's custody. Section 4-407 also allows the director to transfer some felons to these jails during the last 90 days of their sentence to facilitate release assistance programs.

[The following optional section is provided for states that prefer not to bring local jails within a unified state department of corrections. The section would be substituted for the entire Part 4 of Article 2.]

[SECTION 2-401. [Facilities Operated by Local Governments.]

(a) This Act does not prevent political subdivisions of the State from maintaining and administering local facilities for persons convicted of misdemeanors or pretrial detainees and temporary holding facilities for the short-term custody of persons held immediately following arrest and before [pretrial release or bail hearing].

(b) The director may contract with a political subdivision or a combination of subdivisions to maintain and administer on their behalf a local facility listed in subsection (a). The subdivision or subdivisions shall bear the costs associated with the facility.

(c) The director shall:

(1) upon the request of local officials, provide assistance with respect to the construction, maintenance, administration, and personnel of local facilities;

(2) establish standards for the construction, maintenance, administration, and personnel of local facilities and procedures for enforcement of the standards;

(3) periodically inspect local facilities;

(4) certify local facilities meeting these standards; and

(5) establish standards and procedures for the temporary certification of holding facilities to accommodate an unusually large number of persons confined as a result of riot or other disorder.

(d) A person may not be confined in a local facility unless it is certified by the director as meeting the standards established pursuant to this section. The director may obtain an order from the [appropriate court] enjoining use of a facility that is not certified.

(e) The director may adopt rules exempting a local facility from specific provisions of Article 4. Unless a local facility is exempted, Article 4 applies, and for that purpose a person confined therein is considered to be a "confined person".]

COMMENT

A major recommendation of this Act is the unification of local jails within a unified state department of corrections. However, it is recognized that this issue may be politically troublesome in some states. This section is an optional provision to insure that should the principal recommendation of unification not be adopted, local facilities will not be completely without some form of state supervision.

The term "local facility" is used throughout to refer to facilities maintained by political subdivisions. The definition of "facility" in Section 1-101 is limited to those maintained and administered by the department.

SECTION 2-402. [Associate Director for Jail Administration.] The director shall appoint, and he may remove in accordance with law, an associate director of corrections for jail administration who has appropriate experience in corrections or training in a relevant discipline at an accredited college or university.

SECTION 2-403. [Duties of Associate Director.]

Subject to approval of the director, the associate director shall:

(1) administer the division;

(2) adopt rules and other measures relating to the division;

(3) classify each facility or part of each facility within the division as a place of confinement for offenders or pretrial detainees or as a holding facility administered on behalf of a political subdivision of the State;

(4) appoint, and he may remove in accordance with law, the chief executive officer of each facility or program within the division and other employees and delegate to them appropriate powers and duties;

(5) evaluate and improve the effectiveness of the personnel, programs, services, and facilities of the division;

(6) develop programs, services, and facilities to meet the needs of persons in the custody of the division;

(7) acquire and utilize community resources and social services for the benefit of persons in the custody of the division; and

(8) exercise all powers and perform all duties necessary and proper in discharging his responsibilities.

COMMENT

This section specifies the duties of the associate director. Paragraphs (1) and (8) give him broad authority; the listing of specific duties in the section is not intended to limit that authority but to emphasize and give legislative support to certain activities.

Paragraph (3) authorizes the associate director to classify the various types of facilities within the division. Section 4-407 requires in most instances the separation of pretrial detainees from offenders. And Section 2-404 authorizes the department to operate temporary holding facilities on behalf of local political subdivisions. Paragraph (3) authorizes the associate director to designate a facility as either a pretrial detention facility, a facility for persons already sentenced to confinement, or a temporaryholding facility. The associate director could also designate a part of a facility as a pretrial detention facility and another part of the same facility as available for housing misdemeanants.

SECTION 2-404. [Temporary Holding Facilities.]

(a) This Act does not prevent political subdivisions of the State from maintaining and administering temporary holding facilities for the short-term custody of persons held immediately following arrest and before [pretrial release or bail hearing].

(b) If a state detention facility is not reasonably accessible, temporary holding facilities may be used to confine persons needed in a locality for a continuing investigation or a trial.

(c) The associate director may contract with a political subdivision or a combination of subdivisions to maintain and administer on their behalf a temporary holding facility. The subdivision or subdivisions shall bear the costs associated with the facility.

(d) The associate director shall:

(1) provide, upon the request of local officials, assistance with respect to the construction, maintenance,

and administration of temporary holding facilities;

(2) establish standards for the construction, maintenance, administration, and personnel of temporary holding facilities and procedures for enforcement of the standards;

(3) periodically inspect temporary holding facilities;

(4) certify temporary holding facilities meeting these standards; and

(5) establish standards and procedures for the temporary certification of holding facilities to accommodate an unusually large number of persons confined as a result of riot or other disorder.

(e) A person may not be confined in a temporary holding facility unless it is certified by the associate director as meeting the standards established by the associate director. The associate director may obtain an order from the [appropriate court] enjoining use of a facility that is not certified.

COMMENT

In most states the law enforcement functions are retained at the city or county level. Most police departments require a "lock-up" or other detention capability for persons immediately following arrest. A particular local jurisdiction may or may not have access to a state operated jail. This section authorizes local subdivisions or government to operate a temporary holding facility for persons after arrest but before they are arraigned or otherwise given an opportunity for pretrial release.

Subsection (b) also allows confinement in holding facilities of persons needed in a locality for a law enforcement purpose where no jail is reasonably available.

Subsection (c) provides that a local jurisdiction that needs a holding facility may contract with the department to provide one in the locality. In localities where there already exists a state facility that facility could be utilized without charge. There is nothing to prevent the director from establishing facilities in jurisdictions which could serve the purpose of a temporary holding facility. This subsection would only apply where the director did not deem it important to establish a state facility but the subdivision wanted one anyway.

Subsection (d) provides for statewide standards, inspection, and certification of local holding facilities to insure they meet minimal standards. Most states have some form of state inspection or standards for local jails. See ABA Comm'n on Correctional Facilities & Services, Survey and Handbook on State Standards and Inspection Legislation for Jails and Juvenile Detention Facilities (3d ed. 1974). Other proposed acts have made comparable proposals. Advisory Comm'n on Intergovernmental Relations, State Department of Correction Act, § 4 (1971); Model Penal Code, §§ 303.1, 401.11; Standard Act, § 3. Since the provision only applies to temporary holding facilities, elaborate enforcement mechanisms are not provided.

Subsection (d)(5) is designed to accommodate the infrequent but real problem of a temporary large influx of detained persons. This subsection allows the adoption of a procedure for the immediate temporary certification of a facility by the associate director. Some situations have required the use of schools or other large halls for temporary detention. This provision will allow some external review of the arrangements made in emergency situations.

[SECTION 2-405. [Transition to State Control.]

(a) Within 5 years after the effective date of this Act, sole responsibility for the care, custody, and treatment of offenders sentenced to confinement or community supervision and pretrial detainees must be transferred to the State. The associate director of

corrections for jail administration shall develop a plan for the orderly transfer of functions to the State. The plan must:

(1) include a timetable for implementing this section;

(2) detail the financial resources required for implementation;

(3) describe the extent to which existing facilities maintained by political subdivisions will be integrated into the department of corrections and the extent to which regional facilities will be established;

(4) describe the way in which programs, services, and facilities for short-term offenders will be integrated with existing or projected programs, services, and facilities for long-term offenders; and

(5) make recommendations for additional legislation necessary to fully implement this section.

(b) In developing the plan, the associate director shall consult with representatives of political subdivisions.

(c) Within one year after the effective date of this Act, the associate director shall submit the plan to the Governor and the [Legislature, General Assembly]. One year after submission of the plan, the director may exercise all powers and perform all duties necessary to implement the plan.

(d) All officials of the State and its political

subdivisions shall cooperate with the associate director in developing the plan required by this section and comply with the requests of the associate director necessary to implement the plan.

(e) Notwithstanding any other provision of law, the associate director may assume responsibility for a facility administered by a political subdivision at any time funds are available and the affected political subdivision agrees.

(f) As long as a facility remains under the control of a political subdivision, it may:

(1) receive offenders on behalf of the department in order to establish the date on which a sentence to confinement commences;

(2) confine persons from the jurisdiction served by the facility before the effective date of this Act; and

(3) confine persons from other jurisdictions if the chief executive officer of the facility agrees, in which case the director may compensate the political subdivision for the cost of the confinement.

(g) The director may adopt rules exempting a facility administered by a political subdivision from specific provisions of Article 4. Unless a facility is exempted, Article 4 applies, and for that purpose a person confined therein is a "confined person."]

SECTION 2-405

COMMENT

In most states, misdemeanant jails and pretrial detention facilities are operated by counties or municipalities. The Act adopts a unified correctional system placing all correctional facilities in a state agency. This section provides for a gradual transition from shared correctional responsibility to a state system. States that have already taken responsibility for local jails can eliminate this section. In some states a transition period may not be needed. Elimination of this section would provide a unified system upon the effective date of this Act.

The gradual transition allows proper planning. Each local facility may be unique; outstanding financial obligations, personnel contracts or agreements, and other arrangements may differ from jurisduction to jurisdiction. It would be very difficult to direct the process of transition by specific legislation. This section requires the associate director to develop a transition plan in which he would be able to provide for each particular problem.

The details of this plan would automatically become effective one year after submission to the legislature. This would provide an opportunity for legislative override or alteration of the proposed plan.

Subsection (e) allows the director to assume responsibility for some local facilities where resources are adequate and the local jurisdiction agrees. The director would not have to wait for completion of the plan under this section. Indeed this section would authorize a pilot project to acquire experience for development of the plan.

Subsections (f) and (g) allow for the gradual implementation of the provisions of this Act during the transition period from local facilities to universal state control. Under the Act, a sentence to confinement begins on the date the offender is received by the department. Subsection (f)(1) insures that the sentence commences even though the offender may be sent to a facility still remaining under the control of a political subdivision. Subsections (f)(2) and (3) grant authority for jails under local control to continue to house prisoners. The sentencing provisions of the Act direct that all persons sentenced to confinement be sent to one of the divisions of the department and, technically, these local jails would not be included during the transition period. On the other hand, a local political subdivision should not be forced to house prisoners from other political subdivisions as long as it continues to bear the cost of the facility.

Subsection (g) allows the director to exempt a local facility from the provisions of Article 4. The Act is drafted with definitions referring to persons in the custody of the department, and during the transition period persons housed in a local facility technically would not be included. On the other hand, during the transition there would be no other provisions governing the treatment of persons confined in local facilities. Persons in these latter facilities should not be placed in a position of significantly less statutory protection than those sent to state facilities. However, there may be some provisions that would not be appropriately implemented in all existing local facilities. Subsection (g) seeks to accommodate these various interests during the transition period. Once the facility is administered by the department, all of the provisions of this Act would apply.

PART 5
CORRECTIONAL MEDICAL SERVICES

SECTION 2-501. [Division of Correctional Medical Services; Creation.]

(a) A division of correctional medical services is created within the department. It shall provide medical care to confined persons.

(b) As used in this Part, "medical care" includes the diagnosis or treatment of physical, dental, or mental health problems.

COMMENT

The common law long recognized, because a prisoner cannot provide or obtain his own medical treatment, that there is an obligation upon the state to provide it for him. See e.g., Spicer v. Williamson, 191 N.C. 487, 132 S.E. 291 (1926); See generally Alexander, The Captive Patient: The Treatment of Health Problems in American Prisons, 6 Clearinghouse Rev. 16 (1972), Neisser, Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care, 63 Va. L. Rev. 921 (1977); See also Brabson v. Wilkins, 45 Misc. 2d 286, 256 N.Y.S. 2d 693 (Sup. Ct. 1965). Virtually every state provides specific legislation protecting the rights of prisoners to reasonable medical treatment. See e.g., Alaska Stat. § 33.30.050 (1975); Kan. Stat. § 75-5249 (Supp. 1976); Neb. Rev. Stat. § 83-181 (Reissue 1976). The principle has been recognized by every recent analysis of corrections. See e.g., ACA Manual at 436; Nat'l Advisory Comm'n Correc. Std. 2.6 (1973); Isele, Constitutional Issues of the Prisoner's Right to Health Care (1977); ABA Joint Committee § 5.1. The Supreme Court has held that the obligation is recognized so universally that the infliction of "such unnecessary suffering" as would occur if there were no such care would violate the Eighth Amendment to the Constitution.

Estelle v. Gamble, 429 U.S. 97, 103 (1976). As Mr. Justice Marshall, writing for the majority in that opinion, stated, "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.... The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency ...." Id. The Court proceeded to hold that "deliberate indifference" to the medical needs of a prisoner would result in personal liability on the part of those who ignore the need. Id. at 104. Cf. Annot. 28 A.L.R. Fed. 279 (1976). Although Justice Marshall interestingly rested the rationale of Estelle upon the eighth amendment, which applies only to convicted persons, there is no doubt that similar reasoning applies to pretrial detainees under the fifth amendment. See, e.g., Anderson v. Nosser, 456 F. 2d 835 (5th Cir. 1972) cert. denied 409 U.S. 848 (1972). Cf. Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) cert. denied 414 U.S. 1033 (1973).

This provision places the responsibility for providing the services, or access to the services, upon the department of corrections, but the director of that department, or of the division of medical services, may fulfill the duty imposed by this section by contracting out for services. Whether medical care should be provided by a non-correctional agency has provoked much recent controversy. See, e.g., Community Service Soc'y of N.Y., Prison Health Care in New York City (1976), concluding that better service is obtained if health care providers are totally independent of the department. Some systems have recently attempted to do that, including New York and San Francisco. See Health Policy Advisory Center Bulletin (Sept. 1973). See also ABA Comm'n on Correctional Facilities & Services & Resource Center on Correctional Law and Legal Services, & the American Medical Ass'n, Div. of Medical Practice, Medical & Health Care in Jails, Prisons, & Other Correctional Facilities (3rd ed. 1974) [hereinafter cited as ABA & AMA Compilation]. The provision leaves this possibility open to the department, but opts to leave final control--and responsibility--in its hands.

Although the provision does not so specify, the scope of medical care should include special medical services, including prosthetic devices, physical therapy, cosmetic and corrective surgery, medical counseling, etc., if the administrative head, in consultation with the medical staff, believes it helpful to the prisoner and not an unfair expenditure of medical resources. It is often suggested, for example, that persons sensitive about their appearance, whether from loss of limb or physical disfigurement, react more aggressively and violently than they would were the defect corrected. See ACA Manual at 441; Kurtzberg, Plastic Surgery in Corrections, Fed. Prob., Sept. 1969, at 44.

In this sense, such treatment may be not only humane, but productive in reducing recidism. Since these judgments are both medical and correctional, they are best left to the discretion of the involved expert parties.

At this point, the law is unclear whether the right to medical treatment includes cosmetic or elective surgery. Compare Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966) and Ricketts v. Ciccone, 371 F. Supp. 1249 (W.D. Mo. 1974) with Mills v. Oliver, 367 F. Supp. 77 (E.D. Va. 1973). Except for exorbitant requests, however, such service should come within the division's regulations.

The section also allows the department to provide services for the mentally ill, although there are specific provisions, section 2-912, to allow transfer of a mentally ill prisoner to the mental health department in the state. It is, of course, clear that treatment for mental illness is also required under the Estelle rationale. See, e.g., Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977). See also Schuster, The Recognition of Jail Inmates with Mental Illness, Their Special Problems and Needs for Care (1977).

SECTION 2-502. [Associate Director for Correctional Medical Services.] The director shall appoint, and he may remove in accordance with law, an associate director for medical services who has appropriate experience in the delivery of medical care.

COMMENT

Because the function of the associate director is to [illegible] it is not necessary that he be a [illegible] trained administrator [illegible].

SECTION 2-503. [Powers of Associate Director.]

Subject to the approval of the director, the associate director shall:

(1) administer the division;

(2) assure that each confined person has access to needed routine and emergency medical care;

(3) in cooperation with the division of community-based services, seek to assist persons supervised in the community to obtain medical care;

(4) appoint, and he may remove in accordance with law, the chief medical officer of each facility and other employees of the division and may delegate to them appropriate powers and duties;

(5) purchase, or authorize the purchase of, all medical equipment used in facilities;

(6) in cooperation with other divisions of the department, establish medical training programs for both correctional employees and confined persons;

(7) adopt rules, consistent with standards established by the department of health, governing,

(i) the provision of medical treatment to confined persons;

(ii) the administration of hospitals and other medical quarters within facilities;

(iii) the maintenance and use of medical equipment;

(iv) the storage and dispensing of medication;

(v) nutritional standards; and

(vi) sanitation within facilities;

(8) evaluate all medical personnel, programs, equipment, or services within facilities; and

(9) exercise all powers and perform all duties necessary and proper in discharging his responsibilities.

COMMENT

This section requires the associate director to adopt rules to assure access to medical care. These rules should speak in quantitative terms, including the number of medical personnel who should be available, and the hours during which they should serve, commensurate with the population of the institution. Most proffered model rules and many recent state correctional standards provide for specific numbers of personnel. Thus, a decade ago, the American Correctional Association provided the following standards for medical personnel:

> The basic medical staff for a penal institution of approximately 500 inmates should include the following: one full-time chief medical officer, one full-time psychiatrist, serving as assistant medical officer, one full-time dental officer, one full-time psychologist, five full-time medical technicians representative of the technical specialities described above and a suitable complement of consultants in the various medical and surgical specialties.
>
> For every additional 500 to 1,000 inmates at least one additional medical officer and medical technician should be added. An additional dental officer is required for each 1,000 additional inmates. In large

> institutions of over 1,500 inmates, with hospitals having 40 or more beds, consideration should be given to the inclusion of trained registered nurses to insure that the highest nursing standards are maintained with adequate supervision of the operating room as well as the intensive treatment areas. Experience has shown that female nurses can function effectively in the performance of these duties. In smaller institutions, adequate nursing services can be provided by suitably trained medical technicians. However, hospitals depending upon this type of nursing service should have continuous training programs including suitable refresher courses to insure that the nursing skills of the technicians are maintained at an acceptable level.

ACA Manual at 439-40.

Similarly, the National Sheriffs' Association Manual recommends, for an institution of 500 prisoners, a minimum of (a) a chief medical doctor, (b) a technician, (c) a psychiatrist, (d) a psychologist, (e) a dentist; for institutions of 300, a minimum of at least one full-time physician; for institutions of at least 50 prisoners, one full-time nurse. National Sheriffs' Manual On Jail Administration, § 4.

Court decisions finding medical services in prisons and jails inadequate have similarly required relief in quantitative terms. Thus, in Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), aff'd, 501 F.2d 1291 (1974), the court ordered the hiring of the following personnel: "3 full-time physicians, 2 full-time dentists, 2 full-time trained physician assistants, 6 full-time nurses certified as RN or LPN, 1 medical records librarian, and 2 medical clerical personnel." Id. at 901.

No inmate was to fill the positions listed above, although "competent" inmates might supplement the civilian medical staff. In addition, the court ordered that the prison's medical facility have available on a regular basis the consultant services of a radiologist and pharmacist.

The court in Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974) required the following steps in personnel hiring:

> The staffing provisions of the plan shall provide as a minimum:
>
> a. nursing care 24 hours a day, seven days a week;

b. a full-time chief medical officer;

c. the equivalent of one additional full-time doctor;

d. an adequate support staff of qualified generalist or specialist medical para-professionals;

e. such additional dental and dental support staff as will bring dental care in the penitentiary system to an acceptable level; and

f. a designated staff member to be responsible for insuring that adequate in-patient psychiatric care and treatment are provided.

Id. at 434.

Other cases ordering the hiring of specific numbers of medical personnel include Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), aff'd and remanded, 503 F2d 565 (5th Cir. 1974); Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs 1 Pris. L. Rptr. 186 (Wayne Co. Cir. Ct. Mich. 1972); and Jackson v. Hendricks (Phila., Pa., C.P. 1972, cert. denied, 421 U.S. 948 (1975). See generally Plotkin, Enforcing Prisoners' Rights to Medical Treatment, 9 Crim. L. Bull. 159 (1973); Zalman, Prisoners' Rights to Medical Care, 63 J. Crim. L.C. & P.S. 185 (1972).

In addition, the regulations are to cover a broad range of topics all too frequently overlooked in today's prison medical care. Surveys and in-depth studies of medical services in prisons throughout the nation, from Florida to Pennsylvania, Massachusetts, and many other states, have concluded that, everywhere, care is "tawdry" at best. See, for excerpts from several state reports, ABA & AMA Compilation. See also, K. Babcock, Medical Survey of Florida Division of Corrections as Ordered by Judge Charles R. Scott (1974). The numerous cases which have ordered increased medical staff similarly recite incredible findings as to medical care.

The problem in jails, over which the department will ultimately wield control, is even worse. The American Medical Association conducted a study in 1972 which discovered that 56% of all jails had only first aid available, and 14% of all jails had no medical facilities or materials at all. American Medical Ass'n, Medical Care in U.S. Jails (1972). This prompted the American Medical Ass'n to establish a Jail Health Committee, and, in August 1977, to conduct the first national Jail Health Conference. See also ABA Joint Comm. at 470-475; LEAA, Prescriptive Health Care Package (for prisons and jails).

PART 6
CORRECTIONAL LEGAL SERVICES

SECTION 2-601. [Office of Correctional Legal Services; Creation.] An office of correctional legal services is created [within the office of a statewide public defender or other state agency providing legal services] [the office of the Governor]. It shall provide legal assistance to confined persons directly or by contract with public or private organizations. The [State Public Defender] [Governor] shall appoint and may remove in accordance with law an administrator of correctional legal services who has appropriate experience in the delivery of legal services.

COMMENT

It is now firmly established that prisoners have a constitutional right of access to the courts and that correctional authorities must provide sufficient materials to make this right meaningful. Bounds v. Smith, 430 U.S. 817 (1977). Like medical services, legal services are simply unavailable to prisoners, who cannot personally bring their plight to the ear of an attorney. The courts have thus been solicitous of this need, and have imposed affirmative duties on correction departments to compensate for this loss. Id. The best method of providing legal assistance is through licensed attorneys in most instances. See, e.g., ABA Joint Comm., § 2.2; ABA Resource Center on Correctional Law & Legal Services, Providing Legal Services to Prisoners: An Analysis and Report, reprinted in 8 Ga. L. Rev. 363 (1974) [hereinafter cited as ABA Resource Center]; Nat'l Advisory Comm'n Correc. Std. 2.2; Alpert, Prisoners' Right of Access to Courts: Planning for Legal Aid, 51 Wash. L. Rev. 653 (1976);

Champagne & Hass, The Impact of Johnson v. Avery on Prison Administration, 43 Tenn. L. Rev. 275 (1976); Dickey & Remington, Legal Assistance for Institutionalized Persons--An Overlooked Need, 1976 S. Ill. U. L. Rev. 175.

Correctional authorities generally support legal assistance programs both because attorneys are better able to dissuade prisoners from filing frivolous suits, and because unmet legal needs cause tensions. See ABA Resource Center, passim. Cf. Cardarelli & Finkelstein, Correctional Administrators Assess the Adequacy and Impact of Prison Legal Services Programs in the United States, 65 J. Crim. L.C. & P.S. 91 (1974). See also Sigler, A New Partnership in Corrections, 52 Neb. L. Rev. 35 (1972).

This provision establishes outside the department of corrections an office, in an appropriate agency of government, whose function is to provide prisoners access to legal services. The office may provide such assistance directly, by hiring employees, or indirectly, by contracting with other agencies, or by assuring that other agencies, such as a state public defender, provide assistance to prisoners. Complete independence of the office from the department of corrections can be assured only by placing it outside the department. Moreover, even if an internal division were, in fact, independent of the director, the credibility of the attorneys in the eyes of their clients would be diminished. Therefore, the Act provides for an independent division.

SECTION 2-602. [Powers and Duties.]

(a) Unless he can arrange with other agencies to do so, the administrator shall provide assistance in legal matters to indigent persons in the custody of the department in the manner and to the extent required by this Act.

(b) If a confined person has a legal problem for which the office is not authorized to provide assistance, the administrator shall refer the person to other sources of legal assistance.

COMMENT

This section allows the administrator of the legal services office flexibility in determining the mixture of methods by which legal services shall be delivered. Certainly, he should take advantage of, and expand, current programs delivering legal assistance to prisoners whenever they are of sufficient quality. Many law schools, for example, operate prison "clinics" which provide training for students and assistance for prisoners. See ABA Resource Center at 400-404 (a slightly outdated list of projects).

On the other hand, the presence of students or other paraprofessionals should not lead to the abandonment of providing actual counsel whenever permitted under this Act and requested by the prisoner. The ABA's Correctional Economics Center has estimated that the annual additional cost, per prisoner, of filling needs roughly equivalent to those suggested here would be $75 per prisoner, just barely more than 1% of the current $7,000+ per year confinement cost for each inmate. ABA Correctional Economics Center, Cost Analysis of Correctional Standards: Institutional-Based Programs and Parole 12 (Dec. 1975). Given both the presence of a legal mandate, and the high support of correctional administrators forlawyer-operated programs, the cost is insignificant.

The section authorizes the administrator to provide legal assistance as authorized by this Act. Section 4-108 outlines the nature of the legal assistance to which all persons in custody are entitled.

Subsection (b) imposes upon the administrator the additional burden of assisting a confined person in obtaining outside legal assistance in those instances in which the office cannot provide help. This may require referring the confined person to a local or state legal aid society or to a local bar association reference service. This Act does not assure legal assistance generally for those cases in which the

confined person is a plaintiff in a civil action. In some cases, particularly personal injury cases, private counsel may be available.

The presumption of the entire section is designed to encourage outside agencies to provide legal services to confined persons. Legal Aid societies, local bar groups and others can be utilized. The opening clause of the section suggests the administrator should develop support from these outside agencies.

SECTION 2-603. [Provision of Support Services.]

The director shall provide the office of correctional legal services with access to adequate space and equipment in each facility to perform properly its functions.

COMMENT

This provision requires the director of corrections to provide the office of correctional legal services with space and equipment in its facilities. The provision is necessary because the office is an agency independent of the department of corrections.

PART 7
FACILITY DESIGN AND CONSTRUCTION

SECTION 2-701. [Definitions.] As used in this Part, unless the context otherwise requires:

(1) "housing unit" means a structure containing one or more living units which is administered as a single unit and constructed to separate persons while in the unit from the sight and sound of persons in other housing units;

(2) "living unit" means a space consisting of living quarters and leisure space for confined persons which is administered as a single unit and constructed to separate persons living in the unit from the sight and sound of persons in other living units;

(3) "living quarters" means the space assigned exclusively to each confined person and includes a cell, room, or proportionate share of a dormitory or other space designed for multiple occupancy; and

(4) "new facility" or "new housing unit" means a facility or housing unit other than a facility or housing unit which on the effective date of this Act is in use as a facility or housing unit or for which the bids for construction have been let.

SECTION 2-701
SECTION 2-702

COMMENT

The definitions divide a facility into four elements. The facility itself, which is defined in Section 1-101, is the entire institution including surrounding grounds and has both a physical and an administrative connotation. A "living quarter" which is defined in paragraph (3), is the smallest element within a facility and consists of the space exclusively assigned to each person confined in the facility. A collection of living quarters would be considered a "living unit" as defined in paragraph (2). In a multi-floor configuration a living unit might consist of each floor; in a dormitory arrangement each dormitory might be considered a living unit. The major defining feature is the requirement that persons while in the unit must be separated by sight and sound from persons in other units. Thus, a traditional cellblock with multiple floors of cells all facing onto a common hallway would be one living unit as would a configuration of dormitories fronting a common hall if there were no provision for sound and sight separation. A collection of living units is a "housing unit" under paragraph (1). In many facilities a housing unit would consist of a separate building.

Paragraph (4) defines a "new facility." The Act establishes design criteria for the construction or acquisition of new facilities and thus the definition serves to establish which facilities must meet the criteria established. The definition would include as a "new facility" any facility that is not being used as a facility on the effective date of this Act. Since "facility" is defined as an institution within the control of the department of corrections, a "new facility" for purposes of this definition would include a military prison or other institution acquired by the department after the effective date of this Act. A "new facility" would also include an old abandoned prison that after the effective date of this Act is to be brought back into service, even if it had always been under departmental control.

SECTION 2-702. [<u>Facilities; Maintenance and Administration.</u>] The director is responsible for the maintenance and administration of all facilities and shall plan for the construction or acquisition of new facilities and

the remodeling of existing facilities.

COMMENT

This section specifically establishes the director's responsibility for the planning or acquisition of new facilities and the remodeling of existing facilities. The requirements for this planning or acquisition function are set out in the sections that follow.

SECTION 2-703. [Planning New Facilities.]

(a) Whenever the director determines that a new facility or new housing unit is necessary, he shall:

(1) develop a program statement describing,

(i) the type, purpose, and maximum capacity of the facility or housing unit;

(ii) the need for the facility or housing unit, including reasons a less-secure facility or housing unit will not satisfy the requirements of the department;

(iii) the type of person to be housed in the facility or housing unit;

(iv) the nature of the programs to be developed in the facility or housing unit;

(v) the likely location of the facility or housing unit and the manner in which the location is compatible with the programs to be developed therein;

(vi) the manner in which the facility or housing unit will meet the design principles established for new facilities and housing units (Section 2-704); and

(vii) the projected cost of the facility or housing unit; and

(2) adopt or amend the program statement in the manner and in accordance with the procedures established for the adoption of rules of the department.

(b) Funds may not be expended or obligated toward the final design or construction of a new facility or housing unit unless the Governor certifies in writing to the [Legislature] that there has been substantial compliance with this section.

COMMENT

Subsection (a) requires an initial planning effort prior to the design, construction, or acquisition of a new facility or housing unit. Initial planning is recommended by the Nat'l Advisory Comm'n Std. 11.1. The planning function and development of a program statement are steps generally required prior to the construction of a new building. This section formalizes that process as a statutory requirement.

Subsection (a)(1) lists factors which must be considered in developing the program statement. Subparagraph (iii) requires the director to incorporate into the statement a justification for the facility which demonstrates why programs requiring less security would not satisfy his needs. Since high security facilities are the most expensive and provide the least constructive environment for offenders, they should be built only as a last resort. See Nat'l Advisory Comm'n Std. 4.1 (recommending that prior planning for pretrial detention facilities consider alternative pretrial release programs). This is also consistent with the sentencing provisions of this Act which recognize confinement as the most severe and thus the sanction of last resort. See Section 3-102.

Subparagraph (vi) refers to the design principles established in Section 2-704. Although Section 2-704 does not require that the design principles be incorporated in every new

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facility, the combination of these principles and subparagraph (vi) suggests that they should be presumptively incorporated unless there is a justification for altering them and the justification is in the program statement.

Paragraph (2) requires that the program statement be adopted in the same manner as rules of the department. This would require notice and comment rule making under section 1-103.

Subsection (b) withholds authorization for the expenditure of funds until the provisions of this section are complied with. Payment prior to the Governor's certification would be ultra vires.

SECTION 2-704. [Design Principles for New Facilities.]

Whenever a new facility or new housing unit is constructed or otherwise acquired, its capacity and physical environment must facilitate security and the safety of confined persons, employees of the department, and the public. Consistent with the requirements of safety and security, the following design principles should be considered and, to the extent practicable, applied:

(1) There should be compliance with fire safety standards established by the [fire marshal] and health and sanitation standards established by the [department of health].

(2) Provision should be made for,

(i) appropriate space for counseling, education, vocational, work, and other programs and activities in which confined persons may participate;

(ii) appropriate space for visiting between confined persons and their visitors;

(iii) use of the facility by handicapped persons;

(iv) appropriate areas for unregimented dining;

(v) reasonable control of noise;

(vi) reasonable avoidance of sensory deprivation;

(vii) outdoor and indoor recreational areas;

(viii) reasonable access to natural light;

(ix) maximizing privacy and personal living space, including, to the extent feasible, single-occupancy living quarters;

(x) minimizing the need for regimentation, surveillance equipment, weapons, or obtrusive hardware; and

(xi) the facilitation and implementation of the provisions of this Act.

(3) A facility should not be designed for more than [400] confined persons. A living unit should not be designed for more than [30] persons. Housing or living units may share with other units dining areas, academic, vocational, and other program space as well as access to available employment.

(4) Living quarters should be designed to provide each occupant with at least [70] square feet.

(5) Whenever feasible the location of a facility should be selected on the basis of proximity to,

(i) the communities in which persons likely to be confined therein reside;

(ii) areas that have community resources to support treatment programs and provide employment and educational opportunities;

(iii) courts; and

(iv) public transporation.

COMMENT

This section establishes design principles for new facilities. The preceding section requires that the facility program statement indicate how these principles will be implemented in each new facility. See Nat'l Advisory Comm'n Std. 11.1. The section recognizes that both the capacity and the physical design of a new facility contributes to its ability to maintain a humane, safe and constructive environment.

See generally, ACA Manual at 327-50; Prison Violence (A. Cohen, G. Cole & R. Bailey eds. 1976). A few states have established design criteria by statute. La. Rev. Stat. Ann., §§ 15-751 to 763; (West 1967 & Supp. 1977); Ill. Ann. Stat. ch. 38, §§ 1003-7-1 to 4 (Smith-Hurd 1973). And several cases have determined that the physical environment of the facility is governed by the prohibitions against cruel and unusual punishment. Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (prisons): Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974), modified, 507 F.2d 333 (2d Cir. 1974) (pretrial detainees); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972) modified sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)(facilities for mentally ill and retarded).

Most of the principles established in this section were recommended by the Nat'l Advisory Comm'n Correc. Std. 11.1. Paragraph (1) establishes external safety and health standards that are traditionally applied to other public buildings. These standards would serve to protect both staff and confined persons. See also ACA Comm'n on Accreditation, Standards for Adult Correctional Institutions 4140-4149 (1977). The standards require, among other requirements, single cells in new construction and noise control.

Subparagraph (2)(i) is directed at program requirements. Too many existing facilities were designed solely to confine with no thought for providing program space. Courts have recognized the need for recreational space. Sinclair v. Henderson, 331 F. Supp. 1123 (E.D. La. 1971); Glenn v. Wilkinson, 309 F. Supp. 411 (W.D. Mo. 1970). And a New Hampshire court ordered state correctional officials to provide a variety of educational and vocational training programs. Laaman v. Helgemoe, 21 Crim. L. Rptr. 2375 (D. N.H. 1977). Courts have also imposed minimum standards for heating and cooling and access to natural light. Pugh v. Locke, supra; Miller v. Carson, 392 F. Supp. 515, and 401 F Supp. 835 (M.D. Fla. 1975); Rehm v. Malcolm, supra.

Privacy and personal space relate not only to psychological well-being but also to safety. Some studies suggest a correlation between living space and agression. Megargee, Population Density and Disruptive Behavior in a Prison Setting in Prison Violence, supra, at 135. Single-unit living quarters are proposed in Nat'l Advisory Comm'n Correc. Std. 2.5. Many recently constructed facilities have emphasized single cells. See Nat'l Clearinghouse for Correctional Programming & Architecture, Correctional Environments (1971). There are certain types of facilities such as half-way houses, forestry camps, and other buildings housing offenders in transitional programs where single cells would not be as necessary. There are also many examples of prison construction which demonstrate the feasibility of maintaining high degrees of security without the oppressive use or visibility of steel bars, catwalks, and sally ports.

Noise and other sensory deprivations have long characterized facilities. Both relate to the humaneness and safety of the facility and affect both confined persons and staff. See Nat'l Advisory Comm'n Correc. Std. 11.1. Courts have ordered the reduction of noise in some facilities. Miller v. Carson, supra; Rhem v. Malcolm, supra. See Environmental Protection Agency, Information on the Legals of Environmental Noise Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety, Document No. 550/0-74-004 (March 1975).

Paragraph (3) is based on the recommendation of the National Clearinghouse for Correctional Programming and Architecture. See also ACA Manual at 340-344. The Association notes that (1) "[i]deally, from the standpoint of safety, segregation, and a rehabilitative program, it's probably that the best results could be obtained . . . if prisoners were handled in groups not exceeding four hundred," and (2) [a]ny institution operating as a single unit becomes increasingly inefficient and unsafe as its population exceeds 1200." Id.

at 341. ACA Comm'n on Accreditation supra at 4140 (1977) requires decentralized units of no more than 500 inmates in existing facilities and Standard 4149 precludes new facilities of more than 500 inmates.

Paragraph (4) requires 70 square feet of living space per confined person. The size is derived from a number of sources. Ill. Ann. Stat. ch 38, § 1003-7-3 (Smith-Hurd 1973) requires 50 square feet. The court in Pugh v. Locke, supra, established 60 square feet as a constitutional minimum. The standards of the National Sheriffs Association recommends 70 square feet. National Sheriffs' Ass'n, Jail Architecture 63 (1975). The Nat'l Advisory Comm'n Correc. Std. 11.1 recommends 80 square feet. See also Building Officials & Code Ad. Int'l, Inc., BOCA Basic Building Code/1975 § 201.3 (6th ed. 1975) (Minimum "habitable" space is 70 square feet); Int'l Conference of Building Officials, Uniform Building Code, § 1307B (1973 ed.) (minimum habitable space is 90 square feet). The ACA Comm'n on Accreditation, supra at 4142 (1977) requires at least 60 square feet unless an inmate spends more than 10 hours per day in the cell in which case 80 square feet is recommended.

Paragraph (5) is an almost verbatim adoption of the proposal of the Nat'l Advisory Comm'n Correc. Std. 11.1 (1973). The ACA Comm'n on Accreditation, supra at 4147 requires new plants to be built within 50 miles of a civilian population center.

SECTION 2-705. [Remodeling Existing Facilities.]

(a) Whenever an existing facility is remodeled, the design principles for new facilities should be considered.

(b) The director, subject to available funds, may remodel existing facilities to comply with the design principles for new facilities.

(c) Whenever the director determines to remodel an existing facility and the remodeling is likely to cost

more than [$50,000], he shall develop, to the extent appropriate for the nature of the remodeling, a program statement comparable to that required for new facilities and otherwise comply with Section 2-703.

COMMENT

This section requires that to the extent applicable the design principles and program statement provision apply to extensive remodeling of existing facilities. The nature of remodeling can be so varied that the section is by necessity drafted in general terms. To the extent that a machine shop within a facility was being remodeled, many of the design principles or elements of the program statement would not be appropriate.

SECTION 2-706. [Other Provisions Preempted.] The provisions of this Part are in addition to any other provision of law applicable to the construction or acquisition of state buildings.

COMMENT

This section insures the continued application of general state building procedures to the department. Some states have planning and program statement requirements for all newly constructed buildings. Those procedures and requirements would be applicable in addition to those provided in this Act.

ARTICLE 3

SENTENCING

PREFATORY NOTE

Article 3 contains provisions relating to the selection, imposition, and execution of sentences for violation of criminal laws. The major basic policy decisions reflected in the Article are:

--the recognition of just deserts rather than rehabilitation or individual predictions of dangerousness as the major factor in sentencing and release decisions;

--the reduction and structuring of judicial sentencing discretion by establishment of a presumptively appropriate sentence to be imposed unless there is good cause not to do so; and

--the adoption of a flat-sentencing system for sentences to confinement by abolition of parole.

For many years the American system of sentencing has sought to achieve four goals: deterrence, rehabilitation, incapacitation, and retribution. Both the American Law Institute and the American Bar Association have proposed that all of these goals are legitimately considered in an appropriate case. ABA, Standards Relating to Sentencing Alternatives and Procedures, §2.2 (1968) (hereinafter cited as ABA Sentencing Standards); ALI, Model Penal Code §305.9 (Proposed Official Draft 1962) [hereinafter cited as Model Penal Code] x. See also Nat'l Council on Crime & Delinquency, Model Sentencing Act (rev. 1972) [hereinafter cited as Model Sentencing Act]; Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Corrections Std. 5.2 (1973) [hereinafter cited as Nat'l Advisory Comm'n].

This multigoal system of sentencing resulted in variations on one basic model within the states--judicial imposition of an indeterminate sentence and discretionary release by a parole board. This model sought to promote individualized treatment of offenders ("let the punishment fit the criminal not the crime"), to limit the coercive power of the state by requiring a utilitarian rather than a retributive end, and to protect society by applying just the right amount of coercion and cure to produce law abiding citizens and to deter others from criminal behavior.

The model also had practical advantages in administering correctional institutions. The parole release discretion provided a safety valve for overcrowded prisons. The system also allowed sentencing courts to announce relatively long sentences to satisfy public concern, but allowed the parole board to award early release to keep sentences within reasonable limits.

Recent examinations of the results of the sentencing system have called into question both its practical effectiveness and its theoretical justification. The thrust of the criticisms have been threefold:

--The current system is ineffective in that it neither rehabilitates offenders, isolates the offenders likely to commit future crimes, nor allows effective use of deterrence principles.

--The current system results in large scale disparity in sentences creating frustrations, tensions, and disrespect for the system in both the offenders and the public-at-large.

--The current system is philosophically unjust in that it oftentimes severs the relationship between the punishment imposed and the offense committed.

These arguments and proposals for change are fully discussed in the following sources which serve as the primary theoretical basis for the philosophy behind Article 3:

American Friends Service Comm., Struggle for Justice (1971); Citizens Inquiry on Parole and Criminal Justice, Prisons Without Walls (1975); M. Frankel, Criminal Sentences (1973); Lipton, Martinson, & Wilks, The Effectiveness of Correctional Treatment (1975); N. Morris, The Future of Imprisonment (1974); Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment (1976); D. Fogel, " . . . We are the Living Proof . . . "(1975); A. von Hirsch, Doing Justice (1976); Harris, Disquisition on the Need for a New Model for Criminal Sanctioning Systems, 77 W. Va. L. Rev. 263 (1975); McGee, A New Look at Sentencing: Part I, Fed. Probation, June, 1974, at 3; McGee, A New Look at Sentencing: Part II, Fed. Probation, Sept. 1974 at 3. Report on New York Parole (1975).

The acceptance of the need for basic systemic change in criminal sentencing is also reflected in the following:

--Maine and Indiana have enacted flat-sentencing systems by eliminating parole in most instances. Me. Rev. Stat. tit. 17-A, §§ 1253-54 (Pamphlet 1977); Ind. Code Ann., § 35-50-2-4 et. seq. (Burns Supp. 1977).

--California has both enacted a presumptive sentencing system and abolished discretionary release. Cal. Penal Code, § 1170 et seq. (West Supp. 1977).

--The Federal Parole Commission and Reorganization Act of 1976, 18 U.S.C.A.,§§ 4201-4218 (West Supp. 1977) 18 U.S.C. ch. 311 (Supp. 1977), made mandatory an earlier administrative decision to establish presumptive parole dates for federal prisoners.

--State legislatures are considering various forms of presumptive and flat sentencing proposals in, among others, Minnesota, Illinois, Ohio, Alaska and New Jersey.

--Several courts are experimenting with sentencing guidelines. See, Wilkins, Kress, Gotffredson, Calpin & Gelman, Sentencing Guidelines: Structuring Judicial Discretion (1976).

--The ABA Joint Comm. on the Legal Status of Prisoners has proposed for Association approval a modified flat sentencing system. 14 Am. Crim. L. Rev. 375 (1977) [hereinafter cited as ABA Joint Comm.]

The provisions of Article 3 reflect the use of "just desert" as the overriding philosophy justifying the imposition of criminal sanctions. This philosophy requires that the nature and severity of the santion imposed be deserved on the basis of the offense committed and certain limited mitigating and aggravating factors relating to the offender. This seeks to avoid the injustice that results from utilizing the other traditional purposes of punishment.

The use of rehabilitation as a relevant factor in sentencing has been accused of causing substantial disparity in sentencing.

> [I]f rehabilitation is the goal, and persons differ in their capacity to be rehabilitated, then two persons who have committed precisely the same crime under precisely the same circumstances might receive very different sentences, thereby violating the offenders' and our sense of justice. . . . Rigorously applied on the basis of existing evidence about what factors are associated with recidivism, this theory would mean that if two persons together rob a liquor store, the one who is a young black male from a broken family, with little education and a record of drug abuse, will be kept in prison indefinitely, while an older white male from an intact family, with a high school diploma and no drug experience, will be released almost immediately. Not only the young black male, but most fair-minded observers, would regard that outcome as profoundly unjust. J. Wilson, Thinking About Crime 171 (1975).

Recent studies have also called into question the effectiveness of coerced rehabilitation programs. Lipton, Martinson, and Wilks examined hundreds of studies testing the effectiveness of programs and concluded that in large measure they cannot be shown statistically to be successful. The rigidly structured environment of a prison does not provide a suitable educational experience for learning how to exist in a free society. See D. Glaser, The Effectiveness of a Prison and Parole System (1964). And even if rehabilitation worked, the justification for extending a sentence for rehabilitative purposes beyond what was "deserved" for the offense committed, breaks the tie between offense and sanction thus removing the offense as the justification for intervention into the life of the offender. The full implication of governmental intervention into the lives of its citizens unrelated to commission of a criminal offense runs counter to traditional freedom values and limited governmental power.

The abandonment of rehabilitation as a factor in determining the nature or length of a sentence does not abandon rehabilitation as a goal of the correctional system. Within the sentence imposed based on just desert, the Act requires that offenders be provided with programs and services to better themselves.

Another traditional goal of punishment has been to restrain or incapacitate those offenders predicted as likely to commit future crimes. This goal has been implemented for the most part through the parole system in which the parole board is authorized to release offenders from confinement when they are no longer dangerous or have been rehabilitated. In addition many systems provide enhanced sentences for those predicted to be dangerous. Although the theory of the system is plausible, in practice attempts to predict dangerousness have not been successful. The knowledge necessary to predict who will commit future crimes is undeveloped. As Professor von Hirsch noted: "With a predictive instrument of so little discernment and a target population so small, the forecaster will be able to spot a significant percentage of the actual violators only if a large number of false positives is also included." (emphasis in original). Doing Justice 22 (1976). This results in the unnecessary confinement of many offenders in order to isolate a few who are dangerous. The unreliability of our methods of prediction and the tendency to greatly overpredict likely recidivism suggests that predictive restraint should not be used to determine the nature or severity of the sanction imposed.

Within the limitations of the deserved punishment, deterrence of others is an appropriate goal to pursue. The present system largely relies for deterrent effect on the existence of an undifferentiated criminal sanction. Our knowledge and ability to fine tune the sentencing system for deterrence purposes is not well developed. Zimring & Hawkins, Deterrence (1973). In part, this results from the individualized treatment model which prevents any informed knowledge of criminal sanctions from being imparted to the public. The deterrence impact of a legislative increase in a sentence for a particular offense is largely muted by the discretionary sentencing practices of courts and parole boards.

Perhaps the major indictment of the current system is that it has lost public confidence. The sentencing system purports to do more than it can deliver--it claims to rehabilitate, isolate, and deter and thus attracts the blame for publicized crimes by ex-offenders and for the perceived increase in crime generally.

Discretionary release systems like parole also have counterproductive effects on the lives and attitudes of offenders. Persons subject to a parole board's discretion inevitably participate in a "con game" to convince the board they are ready for release. In addition, the uncertain nature of their sentence prohibits careful planning for release. Perhaps more important, however, the parole system intensifies disparity in sentences creating tension and hostility within correctional institutions and making actual rehabilitation more difficult.

OVERVIEW OF ARTICLE 3

The provisions of Article 3 attempt to speak to the concerns expressed with current sentencing practices. They are directed by the overriding attempt to reduce injustice and to implement a modest, attainable system of sentencing criminal offenders.

Part 1 of the Article establishes the general framework for sentencing. The purposes and principles of sentencing are articulated in the Act (Sections 3-101 and 3-102) and the sentencing alternatives and maximum possible sentences for categories of offenses are established.

A Sentencing Commission is created to develop sentencing guidelines. These guidelines will provide the presumptively appropriate sentence to be imposed in each case based on statutorily authorized factors relating to the offender and the severity of the offense. The guidelines will indicate the appropriate type of sentence, i.e., fine, community supervision, periodic confinement, continuous confinement, and the length of the sentence to be imposed. The sentencing court is obligated to impose the guideline sentence unless it finds that some other sentence would better serve the purposes and principles of sentencing. The court must also enter on the record the reasons for departing from the guidelines.

Part 2 of the Article establishes the procedures for imposing sentences. A presentence report is required in all cases, but the court may order a shortened report where there are no contested issues of mitigation or aggravation. A sentencing hearing is required and appellate review of sentences is authorized. Provisions authorize the victim of the offense to participate and make his own views known regarding the sentence to be imposed.

Parts 3 through 6 of the Article provide statutory detail for the various types of sentences authorized by the Act. Part 3 implements sentences to community supervision. The Act uses the language "community supervision" as a substitute for what has traditionally been called "probation" referring to supervision in the community under conditions imposed by the court. Part 4 relates to fines.

Part 5 provides for the elements of a sentence to confinement. Three types of sentences involving confinement are authorized: split-sentences, periodic confinement, and continuous confinement. Split sentences are sentences involving confinement for not more than 90 days followed by a term of community supervision. Periodic confinement involves confinement only during specified days or parts of days and supervision in the community at other times. A sentence for continuous confinement requires the offender to serve his entire sentence in a facility. There is no parole or other discretionary release, but each offender may earn one day of good time for each day he serves in confinement by avoiding violations of prison rules. Good time credits can be forfeited in a disciplinary proceeding; they are not awarded for program participation or on the basis of official judgments regarding rehabilitative progress. No supervision is provided after release from confinement but the department is authorized to provide services and assistance to released offenders on a voluntary basis.

Part 6 authorizes granting of restitution to victims of the offense.

ARTICLE 3
SENTENCING

PART 1
GENERAL PROVISIONS

SECTION 3-101. [Purposes.] The purposes of this Article are to:

(1) punish a criminal defendant by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense;

(2) assure the fair treatment of all defendants by eliminating unjustified disparity in sentences, providing fair warning of the nature of the sentence to be imposed, and establishing fair procedures for the imposition of sentences; and

(3) prevent crime and promote respect for law by,

(i) providing an effective deterrent to others likely to commit similar offenses;

(ii) restraining defendants with a long history of criminal conduct; and

(iii) promoting correctional programs that elicit the voluntary cooperation and participation of offenders.

COMMENT

This section establishes the purposes of Article 3. The section has a substantive impact on several other sections of the Article. The purposes listed here serve to limit the Sentencing Commission in establishing guidelines. More importantly, a sentencing judge who deviates from the guidelines must justify the

sentence he imposes by showing that it better serves the purposes announced in this section or the principles of sentencing in section 3-102. Thus this section not only describes the basis for the following sections but directs and limits decisions made under the Article.

Paragraph (1) establishes just deserts as the philosophical basis for criminal sentencing. See the Prefatory Note to this Article for the reasoning behind this policy choice. Some proponents of a just deserts model argue that only offense characteristics should affect sentences. Under this approach offender characteristics such as age, motive, and past offenses would be irrelevant unless made an element of the offense itself. The language "by him" in the paragraph is inserted to reject this rigid formulation of just deserts and to allow offender characteristics to be considered where they relate to deserved punishment. It is not intended to incorporate offender characteristics such as education, employment skills or other factors traditionally affecting sentences based on rehabilitation but unrelated to the intensity of punishment deserved.

Paragraph (2) establishes fairness as an essential element of a sentencing system. Three ingredients of fairness in this context are equal treatment, fair notice, and procedural regularity. One of the major goals of a just deserts model is to avoid unjustified disparity in sentencing. This does not contemplate that all offenders committing the same offense must be treated equally. Even under a just deserts punishment model, a number of factors involving both the offense and the offender can influence fair minded persons in selecting a sentence. Indeed, reasonable men can radically differ on which factors should be utilized and the weight to be accorded to each. While sentences based on "rehabilitation" or "deference" can at least theoretically be objectively measured and thus limited, sentences premised on punishment must reflect necessarily the felt necessities of the times. Within broad limits, the selection of factors and their appropriate weight, relevant to a sentence based on punishment, are political rather than scientific questions.

In this context, the different sentences may be disparate but not unjustifiably so. "Unjustified disparity" refers to differences based on unarticulated factors or resulting from attaching a different weight to the same factor in two or more cases. The provisions of this Article are directed not at establishing the theoretically "correct" sentence in every case, but at establishing a process through which these issues can be publically and uniformly resolved on a jurisdiction-wide basis rather than individually by each sentencing judge.

Paragraph (3) recognizes prevention of crime and respect for law as appropriate goals of a sentencing system. They are listed third in recognition of the limited capacity of the correctional system to influence the universality of crime. Only a very small percentage of persons who commit crimes are eventually sentenced, and our skills in implementing deterrence and rehabilitation are undeveloped. The paragraph lists three permissible means to attain the goals established.

Paragraph (3) (i) recognizes general deterrence of others as an appropriate element of crime prevention. The language "to others" would limit this provision and prevent it from authorizing sentences based on deterring the particular offender involved. The Article eliminates the play of predictive judgments of future criminality in sentencing decisions. However other provisions allow extended confinement where past conduct rather than predictive judgments suggests more intense punishment is appropriate. Subparagraph (3) (ii) implements this latter objective and would authorize isolation or incapacitation of offenders falling within a class defined by past behavior but would not authorize decisions based on a prediction that a particular offender will commit future crimes. The rationale for rejecting predictive restraint is set out in the Prefatory Note to this Article. Paragraph (3) (iii) authorizes rehabilitation and treatment programs on a voluntary basis. Notwithstanding the elimination of rehabilitation as a factor in selecting the type or length of sentences, it is contemplated that rehabilitative programs will be offered to offenders and that they will be more successful when applied to willing participants. Under systems utilizing parole release, program participation is inevitably tied to early release. The abolition of parole is a necessary ingredient in implementing this subparagraph.

The subparagraph is not intended to suggest that all inducements to program participation must be abandoned. The purposes here is to sever the link between sentencing and program participation. Other incentives, comparable to those provided free citizens to undertake self-betterment efforts, such as higher wages, would not violate the intent of this subparagraph.

Legislative guidance of sentencing policies has been long recommended. M. Frankel, Criminal Sentences (1973); Model Sentencing Act, §1; Nat'l Advisory Comm'n Correc. Std. 16.7; Presidents Comm'n on Law Enforcement and Adm. of Justice, The Challenge of Crime in a Free Society 143 (1967) [hereinafter cited as President's Comm'n on Law Enforcement]. See Me. Rev. Stat. tit. 17-A, § 1151 (pamphlet 1977) (from which some of the purposes listed in this section are derived). See also Cal. Penal Code, § 1170 (West Supp. 1977) (establishing purposes consistent with this section).

SECTION 3-102. [Principles of Sentencing.] To implement the purposes of this Article the following principles apply:

(1) The sentence imposed should be no greater than that deserved for the offense committed.

(2) Inequalities in sentences that are unrelated to a purpose of this Article should be avoided.

(3) The sentence imposed should be the least severe measure necessary to achieve the purpose for which the sentence is imposed.

(4) Sentences not involving confinement should be preferred unless:

(i) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(ii) confinement is necessary to avoid deprecating the seriousness of the offense or justly to punish the defendant;

(iii) confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses;

(iv) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant; or

(v) the purposes of this Article would be fulfilled only by a sentence involving confinement.

(5) The potential or lack of potential for the rehabilitation or treatment of the defendant should not be considered in determining the sentence alternative or length of term to be imposed, but the length of a term of community supervision may reflect the length of a treatment or rehabilitation program in which participation is a condition of the sentence.

(6) The prediction of the potential for future criminality by a particular defendant, unless based on prior criminal conduct or acts designated as a crime under the law, should not be considered in determining his sentence alternative or the length of term to be imposed.

COMMENT

The principles of sentencing set out in this section are intended to regulate both the development of sentencing guidelines by the Sentencing Commission and the sentences imposed by sentencing courts.

Paragraph (1) establishes just deserts as the predominant and limiting factor in determining sentence. It insures that, regardless of any other purpose sought to be served, the sentence will have an essential relationship to the offense committed. Thus although Section 3-101 authorizes the use of general deterrence and incapacitation as bases for sentences, this section would prohibit these factors from extending a sentence beyond what was otherwise "deserved." The interplay of Section 3-101 and this paragraph implement a system which uses just desert as the ceiling above which no sentence may extend but does not require that the maximum deserved punishment be imposed. There may be many reasons, including available correctional resources, that suggest less than the maximum deserved penalty be imposed.

Paragraph (2) implements the principle of equality in sentencing. As the comment to Section 3-101 notes, disparities in sentences should be justified by reference to one of the established purposes of the Article.

Paragraph (3) establishes a least drastic means principle for sentencing. Most modern sentencing proposals, regardless of their basic philosophy have urged a restrained use of governmental power in this context. Model Penal Code, § 7.01; Nat'l Advisory Comm'n Correc. Std. 5.2; Nat'l Comm'n on Reform of Fed. Criminal Laws, Study Draft of a New Federal Criminal Code, § 3101 (1970) [hereinafter cited as Proposed New Federal Criminal Code]. The principle would apply to both the nature of the sentence and the length of sentence. Thus while it might be argued that all offenders "justly deserve" confinement, the least drastic means test might suggest that supervision in the community is sufficient punishment.

Paragraph (4) announces a legislative determination that confinement ought to be used as a penalty of last resort. This has been a traditional position of proposals based on rehabilitation because the prison is a difficult environment in which to successfully conduct rehabilitative programs. Confinement is also the most disruptive and intrusive sanction short of the death penalty.

The shift to a punishment model of sentencing does not alter the force of the principle. In a society that places liberty as one of its highest values, any withdrawal of liberty has punitive results even if accomplished without punitive intentions. Thus all of the sentencing alternatives authorized by this Act have punitive content. There is no need to resort automatically to the most severe alternative, confinement, without good reason for doing so.

The reasons for imposing confinement are listed in paragraphs (4) (i)-(v). Subparagraph (i) allows confinement for classes of offenders whose past criminal conduct suggests a high risk of future criminality. This provision must be read in conjunction with paragraph (6) which prohibits individual predictions of future criminality unless based on past criminal conduct. Since the sentencing guidelines will enhance the sentence for past crimes, subparagraph (i) will have a major effect on the development of sentencing guidelines but will not have a substantial impact on individual judicial decisions. Subparagraph (ii) authorizes confinement where it is necessary to justly punish the offender. Subparagraph (iii) allows confinement for a general deterrent purpose but is limited by paragraph (1) which prohibits confinement, even for deterrent purposes, if confinement exceeds what is deserved for the offense.

Subparagraph (iv) allows confinement in the case of a person who, for example, has been sentenced to supervision in the community for past offenses but was unable to abide by the conditions imposed. If the person's past conduct demonstrates his inability to abide by

sanctions short of confinement, then confinement becomes the least drastic means available. It is also important to preserve the integrity and public confidence of community-based programs by reserving confinement as a threatened sanction. The subparagraph, on the other hand, does not authorize clinical predictive judgments about an individual's ability to adjust to less severe sanctions. The language does authorize the establishment of guidelines that utilize recent unsuccessful past experience in community-based programs as a factor supporting the imposition of confinement. The concept of "unsuccessfully" completing sanctions less severe than confinement refers only to the objective determination of whether the offender complied with the conditions, i.e., paid his fine, reported on schedule to his supervising officer, and does not authorize the subjective decisions as to whether the person "learned" from his participation or was otherwise "rehabilitated."

Paragraph (4) (v) is a catchall provision to link the provisions of this section with the purposes of the Article announced in Section 3-101.

Paragraph (5) specifically rejects rehabilitation as a permissible factor in imposing sentences. The only exception to the prohibition is in determining the length of a sentence to community supervision. It was thought appropriate for a certain limited class of cases, particularly involving drug offenders, to authorize the extension of a term of community supervision to be coextensive with a treatment program. The exception does not authorize subjective judgments regarding an offender's progress in the program, but utilizes the objective criteria of the program's length. The authorization is also limited by Section 3-304 which places a two-year maximum on treatment conditions. The rationale for eliminating rehabilitation as a factor in sentencing is explained in the Prefatory Note to this Article.

Paragraph (6) rejects the "predictive restraint" model of sentencing which bases sentences, at least in part, on either statistical or clinical judgments about a particular individual's future behavior. The language seeks to prevent predictive judgments about an individual's future behavior unless based on prior criminal conduct. There was a widely shared belief that prior criminal conduct was provable by sufficiently objective evidence as to avoid most of the difficulties with prediction. It is inevitable, in developing guidelines for sentencing classes of offenders, that the use of aggravating and mitigating factors will in part be influenced by perceptions of the ability of past behavior to predict future conduct. When applied to categories of offenders based on prior conduct, some of the vagaries of individual predictive judgments are eliminated. Any sentence resulting from categorical or individual predictive judgments would be limited by paragraph (1) of this section which prohibits sentences beyond that deserved for the offense.

The language "acts designated as a crime under the law" was inserted to insure that acts by juveniles that would have led to a conviction for a crime had the offender been an adult could be considered under this paragraph even though there is no formal "conviction."

SECTION 3-103. [Sentencing Alternatives.]

(a) A person convicted of a felony or a misdemeanor in this State must be sentenced in accordance with this Act.

(b) The following sentencing alternatives are authorized:

(1) payment of a fine either alone or in addition to any other sentence authorized by this subsection;

(2) service of a term of community supervision;

(3) service of a split sentence of confinement followed by a term of community supervision;

(4) service of a term of periodic confinement;

(5) service of a term of continuous confinement;

(6) making restitution alone or in addition to any other sentence authorized by this subsection.

(c) This Article does not deprive a court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose costs and other monetary obligations if specifically authorized by law.

[(d) This Article does not prevent a court from imposing a sentence of death specifically authorized by law.]

COMMENT

The purpose of this section is to collect in a single list the authorized sentencing alternatives. The section is an exclusive list

of available alternatives although its terms make reference to other consequences that may follow a conviction.

Subsection (a) makes this Act the exclusive authority for sentencing felons and misdemeanants. States which may have abandoned the traditional felony-misdemeanor classifications will need to alter the language. Many states in adopting new criminal codes have classified offenses into discreet groups for sentencing purposes and oftentimes very minor offenses are termed "infractions" or other designations. It is the intent of the section to exclude these minor offenses often resulting from municipal or county ordinances or traffic violations. Section 3-112 (c) is a formulation of such an exclusion that eliminates from the Act's coverage sentencing for any minor offense that does not provide for confinement as an available sanction.

Subsection (b) lists the authorized sentencing alternatives. Each alternative is more fully defined and implemented in subsequent parts of the Article: community supervision (Part 3); fines (Part 4); split-sentences, periodic confinement, and continuous confinement (Part 5); and restitution (Part 6).

Subsection (c) insures that the exclusive thrust of the Article does not repeal by implication other sections that authorize civil penalties for commission of a crime. Thus authority for a court or an executive agency to cancel a driver's license for accumulated traffic offenses would not be affected by this Act. Part 6 of Article 4 of this Act does limit the nature of the civil penalties that can be imposed. This subsection is also intended to preserve existing state law with regard to the assessment of costs.

Subsection (d) is an optional provision for those states that have the death penalty. This Act does not speak to the advisability of the death penalty or to the form such a provision should take. Throughout the Article optional references have been included to alert drafters in states with the death penalty to necessary modifications in the provisions of this Act. Part 2 of this Article does adopt a number of procedural provisions providing defendants increased opportunity to contest facts relating to his sentencing and otherwise to participate in the sentencing process. It is likely that equal protection doctrines would require a state to provide at least similar opportunities to those facing a death sentence, even though the Supreme Court may not have required such provisions in death penalty cases alone.

The Act does not authorize a "life sentence." Under many systems with parole, a person sentenced to life imprisonment becomes eligible for parole after a legislatively established term, usually from 10 to

15 years. A sentence to "life" does not mesh with other provisions of this Act which substitute a relatively fixed system of good-time credits for parole release. States that prefer to retain "life imprisonment," perhaps as an alternative for the jury in capital cases, will need some mechanism to translate the sentence into a term of years for purposes of awarding goodtime credits.

Advocates of rehabilitative sentences have long urged adoption of a variety of sentencing alternatives in order to better tailor the sentence to the individual. Flexibility in alternatives is equally appropriate for punishment models. In many cases confinement is too severe a punishment and lesser sanctions should be available. This section implicitly recognizes these lesser sanctions as having a punitive element. For similar provisions see Ill. Ann. Stat. ch. 38, § 1005-5-3 (Smith-Hurd Supp. 1977); Model Penal Code, § 6.02; Proposed New Federal Criminal Code, § 3001.

SECTION 3-104. [Maximum Sentences.]

(a) The maximum term of a sentence to continuous confinement imposed for conviction of an offense is:

(1) [unless a sentence of death is imposed,] for [murder in the first degree], [years], but the maximum is [2 times the maximum term for murder in the first degree] for a persistent offender or an especially aggravated offense.

(2) for Class A felonies other than [murder in the first degree], [years], but the maximum is [2 times the maximum term for Class A felonies other than murder in the first degree] for a persistent offender or an especially aggravated offense.

(3) for Class B felonies, [years], but the maximum is [2 times the maximum term for Class B felonies] for a persistent offender;

(4) for Class C felonies, [years], but the maximum is [2 times the maximum term for Class C felonies] for a

persistent offender;

(5) for Class A misdemeanors, [year], but the maximum is [2 times the maximum term for Class A misdemeanors] for a persistent offender; and

(6) for Class B misdemeanors, [months], but the maximum is [2 times the maximum term for Class B misdemeanors] for a persistent offender.

(b) The maximum term of a sentence to periodic confinement, a split sentence of confinement and community supervision, or community supervision is [years] for a felony or [year] for a misdemeanor. For the purpose of determining the maximum term under this subsection, the term of a sentence to periodic confinement or a split sentence includes both the time spent in confinement and the time spent in the community under supervision.

(c) The maximum of a fine imposed for conviction of an offense is:

(1) for a Class A or a Class B felony, [$];

(2) for a Class C felony, [$];

(3) for a Class A misdemeanor, [$]; and

(4) for a Class B misdemeanor, [$].

(d) If the defendant is an organization, the maximum amount of a fine imposed for conviction of an offense is 50 times the amount authorized in subsection (c). As used in this subsection "organization" means a legal entity other than an individual.

(e) In lieu of a fine imposed under subsection (c) or

(d), a defendant who has been convicted of an offense through which he derived pecuniary gain or by which he caused personal injury or property damage or loss may be sentenced to a fine not exceeding twice the gain derived or twice the injury, damage, or loss caused. Whenever a person is convicted of an offense that is one of several transactions constituting a continuing scheme of criminal activity, the court in determining the amount of gain, injury, damage, or loss under this subsection may consider that resulting from the entire scheme.

COMMENT

The section establishes the maximum authorized sentence for each of the sentencing alternatives for which a maximum is appropriate. The maximum provides a ceiling on both the sentencing guidelines developed by the Sentencing Commission and any sentence imposed by a sentencing court. All maximums are collected in this section, and are drafted to be consistent with the optional offense classification scheme established in Section 3-112 consisting of 3 classes of felonies and 2 classes of misdemeanors. States with different existing classifications should alter the language accordingly.

Subsection (a) establishes the maximums for sentences to continuous confinement. For each class two separate maximums are provided. "Persistent offenders" are defined by Section 3-105 and "especially aggravated offenses" are defined by Section 3-106.

Most studies of American sentencing practices have concluded that sentences imposed are too long, and have suggested drastically reducing the authorized maximum for sentences to confinement. Under most state systems a substantial maximum is established by legislation with the implicit expectation that courts will reserve the top range of potential sentences for the most egregious cases. This approach provides a broad range of discretion which in turn results in disparity of sentences. Recent proposals for sentencing reform including the Model Penal Code, the National Advisory Commission on Criminal Justice Standards and Goals, and the American Bar Association Joint Committee Standards Relating to Sentencing Alternatives and Procedures have urged enactment of lower maximums for ordinary circumstances with authorization in particularly

aggravated cases for the court to extend the maximum. This latter approach is followed in the Act.

The section must also be evaluated in relation to the change in sentencing philosophy and structure embodied in the Act. Most American jurisdictions have indeterminate sentencing; the sentence imposed by the court bears little relationship to actual time served. Parole boards are authorized to release offenders when they are "rehabilitated" or no longer represent a societal risk. Under this Act, there is no discretionary release; the sentence imposed by the court is the sentence actually served, reduced only by earned good time.

No proposed maximum sentences are recommended; each state should develop its own scale relating to its view of the extent of the sanction necessary to fulfill the purposes of sentencing. The process of arriving at maximums for continuous confinement should be derived from an evaluation of major national proposals for sentencing reform and the average time actually served by offenders under existing indeterminate sentencing systems. Comparisons are particularly difficult to make since in indeterminate sentencing schemes, the parole discretion is relied upon to reduce authorized maximums. Also maximums must be evaluated against any enhancing sections, such as habitual criminal statutes, which authorize increased maximums for particularly dangerous or persistent offenders.

Maximums under indeterminate proposals:

Model Penal Code, §§ 6.06, 6.08

Class	Maximum Allowed
Felony first degree	Life
Felony second degree	10 years
Felony third degree	5 years
Misdemeanor	1 year
Petty misdemeanor	30 days

Proposed New Federal Criminal Code, § 3201, 3204

Class	Maximum Allowed
Class A felony	30 years
Class B felony	15 years
Class C felony	7 years
Class A misdemeanor	6 months
Class B misdemeanor	30 days

Illinois Ann. Stat. Ch. 38, § 1005-8-1 (Smith-Hurd Supp. 1977).

Class	Maximum Allowed
Murder	Life
Class 1 felony	Life
Class 2 felony	20 years
Class 3 felony	10 years
Class 4 felony	3 years

Class A misdemeanor	1 year
Class B misdemeanor	6 months
Class C misdemeanor	30 days

National Advisory Commission. Correc. Stds. 5.2, 5.3.

"State penal code revisions should include a provision that the 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. . . ."

Extended terms are authorized not to exceed 25 years, except for murder.

ABA Sentencing Standards, § 2.1

Sentences for felonies "ought not to exceed ten years except in unusual cases and normally should not exceed five years."

Maximums under flat sentence proposals:

Development of the maximum sentences may be advanced by examining the maximum sentences authorized under existing flat sentencing systems. Absolute comparisons are again not possible since each scheme takes a different approach to the use of factors that will enhance a sentence. Also each system differs on the nature and amount of good time reductions that will reduce actual time served.

Me. Rev. Stat. Maine tit. 17-A, §§ 1251-54 (Pamphlet 1977)
Effective May 1, 1976

Class	Maximum allowed	With maximum good-time potential
Murder One	Life	25 years
Class A	20 years	12.4 years
Class B	10 years	6 years
Class C	5 years	3 years
Class D	1 year	7.2 months
Class E	6 months	4 months

Ind. Code Ann. Indiana, §§ 35-50-2-3 to 8;
§§ 35-50-6-3 to 4 (Burns Supp. 1977)
Effective October 1, 1977

Class	Maximum allowed	With maximum good-time potential
Murder One	60 years	
Class A	50 years	25 years
Class B	20 years	10 years
Class C	8 years	4 years
Class D	4 years	2 years

California
Cal. Penal Code, §§ 1170 to 1170.1a (West Supp. 1977)
Effective July 1, 1977

Catetory	Maximum allowed
Murder One	Life
Category 1	7
Category 2	5
Category 3	4
Category 4	3

National sentencing studies

To compare properly maxima authorized by this section with present sentencing practices, studies showing average time actually served for particular offenses must be examined.

Table 1 reproduced below shows the mean and median time actually served by persons prior to release on parole. Table 2 shows a state by state breakdown in the relationship between sentence imposed and time served.

TABLE 1
Mean and Medium Years Served Before Parole
United States 1965-70

Offense	Prior Record		No Prior Record		Combined	
	Median Term	Mean Term	Medium Term	Mean Term	Medium Term	Mean Term
Homicide	4.7	6.4	5.0	6.9	4.8	6.6
Manslaughter	1.9	2.6	1.7	2.3	1.7	2.4
Armed Robbery	2.9	3.9	2.4	3.5	2.8	3.7
Aggravated Assault	1.3	1.9	1.2	1.9	1.3	1.9
Burglary	1.4	1.9	1.2	1.7	1.4	1.9
Theft or Larceny	1.1	1.5	1	1.3	1.1	1.4
Vehicle Theft	1.2	1.5	1	1.4	1.2	1.5
Check Fraud	1.3	1.6	1	1.4	1.2	1.5
Other Fraud	1	1.4	.9	1.2	1	1.3
Forcible Rape	4.4	5.7	3.7	5.8	4.0	5.7
Statutory Rape	1.9	2.8	2	3.2	1.9	2.9
Other Sex Offenses	2.2	3	2	2.7	2.1	2.9
Narcotics Offenses	1.8	2.1	1.3	1.9	1.7	2.3

The Table is derived from LEAA, Source book of Criminal Justice Statistics, Table 6.53 at 485 (1974).

TABLE 2

Length of Sentence and Time Served of Persons First Released From Correctional Institutions in 35 States, 1970

State	Total first releases	Percent of total sentenced to less than 5 years	Percent of total sentenced to 5 to 10 years	Percent of total sentenced to 10 or more years	Percent of total who served less than 5 years	Percent of total who served 5 to 10 years	Percent of total who served 10 or more years
Arizona	759	34.56	42.44	23.00	88.54	9.22	2.24
California	5,337	15.21	66.51	9.49	81.32	16.13	2.55
Colorado	906	21.30	32.45	46.25	95.70	3.42	.88
Connecticut	888	51.59	42.39	6.02	97.86	1.58	.56
Delaware	223	87.00	10.31	2.24	98.65	.90	.45
Georgia	1,804	56.68	27.84	15.47	88.80	9.48	1.72
Hawaii	94	4.26	17.02	78.72	80.85	13.83	5.32
Idaho	147	47.26	32.88	19.86	94.56	3.40	2.04
Illinois	2,837	48.47	30.16	21.37	89.00	8.00	3.00
Kansas	683	8.50	39.44	52.05	91.51	6.73	1.76
Kentucky	1,212	72.55	12.20	15.25	94.14	5.28	.58
Louisiana	1,443	56.98	26.97	16.04	88.84	9.84	1.32
Maine	333	76.95	13.26	9.80	95.20	3.00	1.80
Maryland	1,450	78.97	15.12	5.91	97.17	2.14	.69
Massachusetts	649	14.66	65.43	19.91	92.30	6.47	1.23
Minnesota	310	21.94	39.35	38.71	5.81	31.61	62.58
Mississippi	538	63.38	19.89	16.73	87.36	6.69	5.95
Missouri	1,568	74.81	19.39	5.80	96.05	2.74	1.21
Montana	298	54.70	25.17	20.13	95.30	4.03	.67
Nevada	231	38.53	29.87	31.60	93.51	6.49	0.00
New Hampshire	90	54.44	34.44	11.11	97.78	2.22	0.00
New Mexico	397	8.54	47.49	43.97	86.65	10.83	2.52
New York	3,546	57.40	28.26	15.86	89.79	7.61	2.59
North Dakota	111	68.47	19.82	11.71	96.40	2.70	.90
Ohio	4,235	5.43	19.95	74.62	84.77	10.74	4.49
Oklahoma	1,468	73.81	17.82	8.37	95.57	3.61	.82
Oregon	822	65.90	25.09	9.01	95.62	4.26	.12
South Carolina	989	64.42	20.46	15.12	92.62	5.16	2.22
South Dakota	210	86.19	38.10	4.29	95.24	4.29	.48
Tennessee	1,296	61.70	19.46	18.84	90.20	8.33	1.47
Utah	199	10.55	21.11	68.34	90.45	9.55	0.00
Vermont	27	70.37	25.93	3.70	100.00	0.00	0.00
Washington	947	3.06	2.75	94.19	95.78	3.06	1.16
West Virginia	288	0.00	10.10	89.90	87.15	10.76	2.08
Wyoming	137	73.72	16.06	10.22	94.89	3.65	1.46

The Table is reproduced from LEAA, Sourcebook of Criminal Justice Statistics, Table 6.45 at 478 (1974).

Subsection (b) establishes the maximum terms for sentences involving some element of community supervision. If the offense severity or offender characteristics call for a sentence involving community supervision, the maxima provided should be relatively low. A person deserving longer state supervision, deserves a sentence to continuous confinement. See Alaska Stat., § 12.55.090 (1972) (5 years); Me. Rev. Stat. tit. 17-A, § 1202 (Pamphlet 1977) (Class A & B crimes--3 years; Class C--2 years; Class D & E--1 year); Model Penal Code, § 301.2 (5 years for felony; 2 years for misdemeanor); Proposed New Federal Criminal Code, § 3102 (5 years for felony; 2 years for misdemeanor. For split sentences and sentences to periodic confinement, the term of the sentence is determined by including both the time spent in confinement and the time spent under supervision in the community. The maxima in subsection (b) apply to the total time the offender is subject to state supervision regardless of the form that supervision takes.

Subsection (c) establishes the maximum fines assessable for the various classes of offenses. The punitive intensity of a fine varies in relationship to the wealth of the offender. Offenders who deserve monetary sanctions greater than the authorized maxima deserve some sentence in addition to or in lieu of a straight monetary sanction. Model Penal Code, § 6.03 (felony 1 or 2, $10,000; felony 3, $5,000; misdemeanor, $1,000; petty misdemeanor, $500); New Federal Criminal Code, § 3301 (Class A or B felony, $10,000; Class C felony, $5,000; Class A misdemeanor, $500).

Subsection (d) authorizes extended limits for fines imposed on organizations. The section only applies when the organization itself is the defendant charged. The extended limits on fines for organizations is based on the fact that organizations cannot be confined. In the case of an individual where the punishment deserved for an offense exceeds the maximum fine, confinement may be imposed. In addition in many cases the maximum amounts authorized for individuals may diminish in significance when applied to large corporations. The American Bar Association noted that "it may be desirable to devote special attention to the problems of fining in connection with offenses by corporations." ABA Sentencing Standards, § 2.7, comment (h). The following contain separate schedules of fines for organizations: Me. Rev. Stat. tit. 17-A, S 1301 (Pamphlet 1977); N.Y. Penal Law, § 80.10 (McKinney 1975).

Subsection (e) allows the court to determine the amount of the fine in relation to the gain or loss resulting from the criminal activity without limitation. See Proposed New Federal Criminal Code, § 3301 from which this subsection was derived. See also Model Penal Code, § 6.03 authorizing fines up to double the "pecuniary gain derived from the offense." The court is authorized to take into account transactions which are part of a scheme of criminal activity but not formally charged. This is a new provision added

to existing models. In a scheme to defraud involving numerous victims, the court could set the fine in relationship to the gain derived from the entire scheme even though only one of the fraudulent transactions is formally charged as a criminal offense. The determination of the amount of gain or loss and the existence and extent of a scheme would be subject to other procedural provisions of the Act requiring finding based on substantial evidence in the record. The use of uncharged offenses as the basis of a sentence appears to be constitutional. See comment to section 3-115. But see People v. Richards, 17 Col. 3d 614, 552 P. 2d 97, 131 Cal. Rptr. 537 (1976). (limiting restitution to loss from offense charged).

SECTION 3-105. [Persistent Offenders.]

(a) A "persistent offender" is a person who has at least 2 prior felony convictions for offenses committed within the 5 years immediately preceding commission of the instant offense. In establishing the 5-year period, time spent in confinement may not be included but convictions for offenses committed during the period of confinement must be counted as prior convictions.

(b) Convictions that have been set aside in post-conviction proceedings or for which a full executive pardon has been granted are not included as convictions for purposes of this section.

(c) The conviction for 2 or more felonies committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective constitutes one conviction for purposes of this section, but offenses resulting in bodily harm to another person committed while attempting to escape detection or apprehension are not part of the same criminal objective.

(d) Consistent with this section, the sentencing com-

mission may adopt more specific criteria relating to sentencing persistent offenders.

COMMENT

The section authorizes an enhanced sentence for persistent offenders as defined in the section. Section 3-102 doubles the authorized maximum for these offenders. Under traditional indeterminate sentencing schemes, the statutory maximum is set to accommodate the most severe case. Modern reform proposals have urged that the statutory maximums for ordinary offenders be more limited and that extended terms be authorized where appropriate. ABA Sentencing Standards, § 2.1 Model Penal Code, §§ 6.06-607; Model Sentencing Act; Nat'l Correc. Std. 5.2. Advisory Comm'n.

The section is in lieu of a habitual offender provision. These provisions have been criticized generally on three grounds: (1) they require a prediction of dangerousness or mental illness in addition to a finding of past offenses; (2) many are mandatory requiring an enhanced sentence without regard to mitigating factors or the nature, recency or frequency of the prior offenses; and (3) the term imposed is unrelated to the offense for which the person is sentenced.

The applicability of this section is based solely on the objective facts of past convictions. No prediction of dangerousness or mental illness is required. The rationale for eliminating predictions of this type is set out in the Prefatory Note to this Article. A sentencing system based on just deserts or deterrence should authorize enhancement of punishments for multiple offenders.

In the sentencing criteria for ordinary sentences, a past history of criminal activity is an aggravating factor. (Section 3-109). Thus guidelines for sentencing within the ordinary maximums will provide for more severe sentences for a multiple offender whose record does not meet the requirements of this section. This section serves as a continuum for the more persistent offenders.

On the other hand, the section does not require an enhanced sentence for all offenders fitting the definition of a persistent offender; it merely provides a greater range of sanctions to be used by the Sentencing Commission and sentencing courts. The authority given the Sentencing Commission in subsection (b) to adopt more specific guidelines would allow it to define in greater detail the types of felonies, the recency of their commission, and aggravating and mitigating factors to be utilized in applying this section. The more severe portion of the range authorized for persistent offenders is related to the offense committed by doubling the statutory maximum for that offense. The essential link between offense and punishment is preserved while at the same time implementing society's justified interest in extended punishment for multiple offenders.

Other proposals: Model Penal Code, § 6.07 provides for extended terms for felonies as follows: Felonies of the first degree, maximum of life; felonies of the second degree, maximum of 20; felonies of the third degree, maximum of 10. Criteria for extended terms include: persistent offenders who will be dangerous to the public if released; professional criminals; dangerous, mentally abnormal persons; multiple offenders. Id. § 7.03.

The Model Sentencing Act, S 6 authorizes sentences up to 30 years for "dangerous offenders" who are defined as felony offenders who suffer from a "severe mental or emotional disorder indicating a propensity toward continuing dangerous criminal activity" or professional criminals.

The Proposed New Federal Criminal Code, S 3202 provides for extended terms of not more than 20, 7, and 5 years for the classes of felonies for persons who are persistent felony offenders (defined comparable to the proposed draft), professional criminals, and dangerous mentally abnormal offenders.

Nat'l Advisory Comm'n. Correc. Std. 5.3 (1973) authorizes extended terms of not more than 25 years for the same classes as the Proposed New Federal Criminal Code.

ABA Sentencing Standards § 3.3 is comparable to the proposed draft but requires, in addition, a prediction of dangerousness.

See also, Alaska Stat., § 12.55.050 (1972) (doubling term when there is a prior felony); N.Y. Penal Law, § 70.06 (McKinney 1975) (second felony offender provision).

Some enhancing provisions place an age limit on the prior convictions that can be considered requiring that prior convictions be counted toward an enhanced sentence only if committed after the offender's 17th birthday. No age limit is provided in this section. In most jurisdictions juvenile offenses are not technically convictions and would not be included under this section in increasing a sentence. In some jurisdictions juveniles can be waived into adult court and convicted of felonies. In these instances, such past convictions would be included in determining whether this section applied. The five-year limitation retained in the provision would in most cases preclude using offenses committed by the very young.

The phrase "full executive pardon" in subsection (b) is to distinguish the pardon granted generally by the governor from statutory provisions which authorize the setting aside of convictions in certain cases.

SECTION 3-106. [Especially Aggravated Offenses.]

(a) An "especially aggravated offense" is:

(1) a felony resulting in death or great bodily harm or involving the threat of death or great bodily harm to another person if,

(i) the defendant knowingly created a great risk of death to more than one person;

(ii) the offense manifested exceptional depravity; or

(iii) the defendant was previously convicted of [murder] or a felony resulting in death or great bodily harm or involving the threat of death or great bodily harm to another person; or

(2) murder in the first degree if,

(i) the defendant committed the offense for himself or another for the purpose of pecuniary gain;

(ii) the offense was knowingly directed at an active or former judicial officer, prosecuting or defense attorney, law enforcement officer, correctional employee or fireman during or because of the exercise of his official duties; or

(iii) at the time the murder was committed, the defendant committed another murder.

(b) Consistent with this section, the sentencing commission may adopt more specific guidelines relating to sentencing for especially aggravated offenses.

COMMENT

The section defines especially aggravated offenses for which substantially longer sentences are authorized. The maximum established for these offenses is twice the maximum otherwise applicable. Subsection (c) allows the Commission to promulgate guidelines within the authorized range to structure the sentencing court's discretion.

The especially aggravated offenses all involve violence or potential violence to persons. The nature of the offense characteristics listed in the section are derived primarily from existing statutes authorizing the death penalty. Most of the provisions are derived from the Georgia death penalty statute upheld in Gregg v. Georgia, 428 U.S. 153 (1976). These in turn were modeled after the provisions recommended in Model Penal Code, § 210.6. States will need to insure that the provisions of this section do not overlap or conflict with the definition of particular offenses in the state's criminal code.

The nature of the circumstances that should justify the authorization of enhanced sentences is one upon which fair minded persons might differ. The provisions should be relatively precise to prevent abuse.

The second offense for a violent offense should be sufficient to enhance the authorized sanction. The punishment deserved for the offense as well as society's interest in incapacitating the offender are increased.

Society has a substantial interest in imposing enhanced punishment where the act creates a risk of a substantial number of victims suffering death. The section is limited to "knowing" acts. For example, the kidnapping and confinement of a large number of school children in a buried cage should result in greater punishment than the kidnapping of one child.

Society also reacts with horror at particularly heinous offenses which appear to lack any semblance of rationality. That sense of fear ought not be ignored by the criminal justice system. The punishment deserved for such an offense is enhanced as well as society's claim to incapacitation.

Subsection (b) provides three aggravating factors for the offense of murder. Committing the crime for pecuniary gain is an offense particularly subject to deterrence principles. Deterrence principles are also operative for offenses against public officials because they are required to make decisions for which retaliation is a more likely occurrence. And a multiple murder is also sufficient to enhance the punishment. Under the concurrent sentencing provision it is possible that the sentences for two murders would run concurrently without this section.

SECTION 3-107. [Concurrent and Consecutive Sentences.]

(a) If multiple sentences are imposed on a defendant or if a sentence is imposed on a defendant already subject to an undischarged sentence, the sentences shall run consecutively; but the sentences shall run concurrently if (1) they are imposed for 2 or more offenses committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective; or (2) one of the acts constituting a separate offense is taken into account to enhance a sentence on the other offense.

(b) Notwithstanding subsection (a), a sentence, when combined with all other undischarged sentences and remaining undischarged parts of prior sentences, may not exceed twice the maximum term of the most serious offense involved. The phrase "the maximum term of the most serious offense" as used in this subsection means the statutory maximum term of the offense carrying the longest maximum term, but does not include the additional term that could be imposed on a persistent offender or for an especially aggravated offense.

(c) Notwithstanding subsection (b) a sentence imposed on a defendant for an offense committed while serving a sentence of continuous confinement for a prior offense shall run consecutively to the remaining part of the sentence for the prior offense.

(d) In all cases in which consecutive sentences are imposed the sentencing court shall direct that the sentence most restrictive of the person's liberty shall be served first.

COMMENT

The traditional approach to multiple sentences taken in sentencing systems based in part on rehabilitative purposes has been to establish a presumption in favor of concurrent sentencing. Concurrent sentences greatly facilitate the exercise of parole discretion. In a sentencing system that focuses primarily on the offense, consecutive sentencing for multiple offenses is required. On the other hand, requirements for consecutive sentences can greatly enhance the impact of the prosecutor's charging discretion on the sentence imposed. By accumulating separate counts or offenses a prosecutor can enhance the sentence far beyond what is appropriate or desirable. This section seeks to reach an accommodation on this difficult question.

Multiple sentences arise in at least three separate contexts. First, an offender may, in the process of seeking one criminal objective, actually commit several technical offenses. The burglar may be guilty of burglary, possession of burglary tools, possession of stolen property, flight to avoid arrest, and conspiracy to commit burglary. Second, an offender may engage in a pattern of behavior constituting a series of separate offenses, such as passing a number of bad checks or embezzling small amounts of money over an extended period of time. Third, an offender can commit multiple offenses in separate, unrelated episodes.

In the first class of case, the use of consecutive sentences allows the prosecutor to enhance the sentence far beyond the maximum limits intended to apply to what is essentially one offense. Subsection (a) provides that in such instances, sentences should run concurrently. The language derives from an alternative suggestion of the National Commission on Reform of Federal Criminal Laws. See Proposed New Federal Criminal Code, § 3206 comment. See also N.Y. Penal Law, § 70.25 (2) (McKinney 1975).

Subsection (a) (2) forbids the use of one act both to enhance the sentence for another offense through application of the sentencing guidelines and at the same time support the imposition of an additional sentence.

Subsection (b) is designed to place an outer limit on the accumulation of consecutive sentences. At some point the marginal impact of an extended sentence, even under a just deserts model, is outweighed by

the counterproductive aspects of long sentences both on the offender and the correctional system. Subject to subsection (c), subsection (b) insures that at no point in time will an offender face a sentence to be served longer than twice the maximum sentence of his most serious offense. Following are some examples of the operation of this subsection.

Example 1: An offender is charged and convicted of 4 separate Class B felonies. The maximum total sentence that could be imposed would be 10 years which is twice the maximum sentence (5 years) authorized for Class B felonies.

Example 2: An offender is charged with a Class B felony and sentenced to 3 years. After serving one year of that sentence he is convicted of 2 more Class B felonies. Since he has 2 years remaining on his original sentence, themaximum total sentence he could receive for the two subsequent offenses would be 8 years.

Example 3: An offender is convicted of a Class B felony and is sentenced as a persistent offender to a term of 8 years. He is subsequently convicted of two additional Class C felonies. The maximum total sentence he can receive for the Class C felonies is 2 years.

Example 4: A person is convicted of an especially aggravated Class A felony and as a persistent offender. The maximum sentence he may receive is twice the statutory maximum for Class A felonies (2 X 10 = 20 years).

Examples 3 and 4 result from the language that excludes the additional term authorized for persistent offenders or especially aggravated offenses from the term "the maximum term of the most serious offense."

A limitation on the accumulation of sentences has been included in most reform proposals. ABA Sentencing Standards, § 3.4; Model Penal Code, § 7.06; Proposed New Federal Criminal Code, § 3206 (limits consecutive sentences to the maximum of the most serious felony).

Subsection (c) establishes an exception to the limitation in (b) for offenses committed while serving a sentence of continuous confinement. The subsection is one of a number of provisions in the act designed to encourage the public prosecution of offenses committed in correctional institutions. Many correctional officials complain that overburdened prosecutors place low priority on prison offenses, in part because of the availability of administrative sanctions such as good time revocation. This reluctance to prosecute is increased if the ultimate sentence runs concurrently with the existing sentence since it involves no major change in the status of the offender. Similar provisions exist in some states: Mo. Rev. Stat., § 222.020 (1962); Nev. Rev. Stat., § 176.035 (1975).

Subsection (d) insures that the most restrictive sentence will be served first. Where different types of sentences are imposed consecutively, such as community supervision and continuous confinement, they should be served to produce a gradual lessening of control. The section would authorize the court, in the case of an offender sentenced to continuous confinement for an offense committed while on community supervision, to interrupt the community supervision with the term of confinement, the remainder of the community supervision to be served after release from confinement.

SECTION 3-108. [Mitigating Factors.] If appropriate for the offense, mitigating factors may include:

(1) the defendant's criminal conduct neither caused nor threatened serious bodily harm;

(2) the defendant did not contemplate that his criminal conduct would cause or threaten serious bodily harm;

(3) the defendant acted under strong provocation;

(4) substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(5) the defendant played a minor role in the commission of the offense;

(6) before his detection, the defendant compensated or made a good faith attempt to compensate the victim of criminal conduct for the damage or injury the victim sustained;

(7) the defendant because of his youth or old age lacked substantial judgment in committing the offense;

(8) the defendant was motivated by a desire to provide necessities for his family or himself;

(9) the defendant was suffering from a mental or physical condition that significantly reduced his culpability for the offense;

(10) the defendant assisted authorities to uncover offenses committed by other persons or to detect or apprehend other persons who had committed offenses;

(11) the defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct; and

(12) any other factor consistent with the purposes of this Article and the principles of sentencing.

COMMENT

The section provides a list of factors the Sentencing Commission or the sentencing court may utilize to mitigate the punishment. The list is not exclusive; paragraph 12 allows other factors to be considered as long as they relate to the purposes of the Article (Section 3-101) and the principles of sentencing (Section 3-102). The weight to be attached to these factors is left to the discretion of the Commission and the courts and nothing in the section requires that proof of one of the factors entitles an offender to a reduction in sentence.

The introductory clause requires the factor to be appropriate to the offense. Appropriateness may have at least two connotations. The definition of the offense itself may contemplate the existence or non-existence of one or more of the factors--thus the fact that the defendant's conduct did not cause seriously bodily harm would not mitigate the penalty for petit larceny. Second, the offense may be so severe that the existence of one of the mitigating factors is not sufficient to warrant a reduced sentence.

Paragraphs (1)-(4), (6) and (8) are derived from Model Penal Code, § 7.01. Paragraphs (5), (7), and (9)-(11) were proposed in Twentieth Century Fund's Task Force on Criminal Sentencing, Fair and Certain

Punishment 44-45 (1975). The Model Penal Code provisions were largely adopted in the Proposed New Federal Criminal Code, § 3102.

The abandonment of rehabilitation and predictive restraint as goals of sentencing have resulted in the absence of some traditional formulations of mitigation and the following factors proposed in the Model Penal Code would not be consistent with Sections 3-101 and 3-102:

"(1) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(2) the defendant is particularly likely to respond affirmatively to probationary treatment;

(3) the defendant's criminal conduct was the result of circumstances unlikely to recur;

(4) the imprisonment of the defendant would entail excessive hardship to himself or his dependents."

SECTION 3-109. [Aggravating Factors.] If appropriate for the offense, aggravating factors, if not themselves necessary elements of the offense, may include:

(1) the defendant has a recent history of convictions or criminal behavior;

(2) the defendant was a leader of the criminal activity;

(3) the offense involved more than one victim;

(4) a victim was particularly vulnerable;

(5) a victim was treated with cruelty during the perpetration of the offense;

(6) the harm inflicted on a victim was particularly great;

(7) the offense was committed to gratify the defendant's desire for pleasure or excitement;

(8) the defendant has a recent history of unwillingness to comply with the conditions of a sentence involving supervision in the community; and

(9) any other factor consistent with the purposes of this Article and the principles of sentencing.

COMMENT

This section provides a list of factors the Sentencing Commission or the sentencing court may utilize to enhance the punishment. The list is not exclusive; paragraph (9) allows other factors to be considered as long as they relate to the purposes of the Article (Section 3-101) and the principles of sentencing (Section 3-102). The weight to be attached to these factors is left to the discretion of the Commission and the courts and nothing in the section provides that proof of one of the factors requires the sentence to be enhanced.

The introductory clause requires the factor to be appropriate to the offense and prohibits the double use of factors that duplicate elements of the offense.

Paragraphs (2) through (7) were derived from those proposed in Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 44 (1975).

Paragraph (1) allows prior offenses to serve as aggravating factors. This is based not so much on the force of prior offenses as predictive instruments for future behavior but on the fact that a multiple offender deserves more punishment than a first offender. This philosophy is carried through for persistent offenders in section 3-105.

Paragraph (1) authorizes the use of past "criminal behavior" as well as criminal convictions to enhance the penalty. This would authorize the court and the Commission to utilize allegations of criminal conduct or the underlying criminal behavior of convictions that were set aside as constitutionally invalid. The United States Supreme Court has not resolved the constitutionality of such a provision. In United States v. Tucker, 404 U.S. 443 (1972) the court remanded for resentencing a case in which the sentencing court took into account past convictions in imposing sentence and only subsequently learned they had been unconstitutionally obtained. There is language in the

opinion suggesting that it was not the use of invalid convictions but the use of convictions unknown to be invalid that required resentencing. Some recent cases suggest even hearsay evidence of prior criminal conduct not amounting to a conviction may be considered in sentencing. United States v. Cardi, 519 F.2d 309 (7th Cir. 1975). See also Henry v. State, 20 Md. App. 296, 315 A.2d 797 (1974), Modified, 273 Md. 131, 328 A.2d 293 (1974) permitted use of offenses for which the defendant was acquitted; People v. Martin, 48 Mich. App. 437, 210 N.W.2d 461 (1973) aff'd, 393 Mich. 145, 224 N.W. 2d 36 (1974) (permitted the use of arrest records not leading to a conviction 1). The use of criminal conduct not resulting in a conviction as the basis for enhancing sentences has been criticized. See Rubin, The Law of Criminal Correction 95 (1973).

The use of the term "criminal behavior" is also intended to allow use of past criminal conduct by juveniles that resulted in any adjudication of delinquency as long as state law allows that information to be disclosed to criminal courts. Section 3-204 (4) of this Act allows such information, once obtained, to appear in the presentence report.

Paragraph (8) would allow the Commission and sentencing courts to refuse to impose a sentence of community supervision, even though appropriate to the offense, if the particular offender has a recent history of violation of the conditions of community supervision. In most instances a record of prior offenses would make confinement an appropriate sentence in any event, but for minor offenses continued use of community supervision might be appropriate. The paragraph allows the Commission and the courts in these instances to preserve the integrity and public confidence in the system of community supervision by denying it to those who have demonstrated by their past conduct an unwillingness to comply with imposed conditions.

SECTION 3-110. [Sentencing Commission; Creation.] A sentencing commission is created in the office of the Governor. It consists of the director of corrections and [8] additional members appointed by the Governor [with the advice and consent of the Senate]. Three members must be active trial judges of courts having criminal jurisdiction, one must be a prosecuting attorney, one must be a practicing attorney having substantial recent experience representing criminal defendants, and the remaining members must be from the public at large. The Governor shall designate one of the members of the commission as chairman.

[Alternatives for States in which active judges cannot sit on policy-making commissions in annother branch of government.]

[ALTERNATIVE A]

[(a) A Sentencing Commission is created in the office of the Governor. It consists of the director of corrections and [5] additional members appointed by the Governor [with the advice and consent of the Senate]. One member must be a prosecuting attorney, one must be a practicing attorney having substantial recent experience representing criminal defendants, and the remaining members must be from the public-at-large. The Governor shall designate one of the members of the Commission as chairman.

(b) The [Chief Justice of the Supreme Court] shall appoint a judicial advisory panel consisting of [3;5] active trial judges of courts having criminal jurisdiction. The panel shall meet with the commission and advise it on the discharge of its responsibilities. Members of the panel may not vote on matters before the commission.]

[ALTERNATIVE B]

[(a) A sentencing Commission is created in the judicial branch. It consists of 5 trial judges serving on courts having criminal jurisdiction appointed by the [Chief Justice of the Supreme Court]. The [Chief Justice] shall designate one of the members of the commission as chairman.

(b) The [Chief Justice of the Supreme Court] shall appoint an advisory panel consisting of [5] members. One member must be a prosecuting attorney, one must be a practicing attorney having substantial recent experience representing criminal defendants, and the remaining members must be from the public at large. The panel shall meet with the commission and advise it on the discharge of its responsibilities. Members of the panel may not vote on matters before the commission.]

COMMENT

The section creates a sentencing commission whose major task will be to establish the presumptive sentences for application to criminal offenders. The commission concept was proposed in Frankel, Criminal Sentences (1972) and has been accepted in recent efforts to revise the federal criminal laws. S .1427, 95th Cong., 1st Sess.
The Act rejects the idea, advanced by some proponents of models based on just deserts, to have the legislature codify either mandatory or presumptive sentences. D. Fogel, ". . .We Are the Living Proof. . ." (1975); A. von Hirsch, Doing Justice (1976). See also Cal. Penal Code, § 1170 (West Supp. 1977).

The use of an administrative mechanism rather than legislative enactment has several advantages. It provides greater flexibility to develop and, where necessary, adjust sentences to accommodate changing societal views toward various offenses and the current availability of resources. Furthermore, a specialized sentencing agency insures a continuing examination of sentencing practices and their effect on crime, offenders, and correctional programs.

The commission consists of both official and public members. A just deserts model of sentencing suggests a broadly based composition in order to establish a severity ranking for offenses and the appropriate sentence. The composition differs from proposals based on rehabilitation or dangerousness where a heavy input of psychologists and other social science professionals would be appropriate.

Two separation of powers objections to the proposal may be raised. In some states, active trial judges may not serve on commissions or other policy formulating groups. In others, the sentencing

function may be seen as exclusively within the judicial sphere. Alternative A seeks to accommodate the first objection while retaining the perspective of sentencing judges. Alternative B avoids the second objection by placing the commission's functions within the judicial branch and providing for an extended advisory panel to insure public input.

The placement of a prosecuting attorney and a defense counsel on the commission may be seen by some as creating a potential conflict-of-interest between their responsibilities as a commissioner and their activities in pending cases. For the most part the conflict is avoided because commission sentencing guidelines would only affect crimes committed after their effective date. See Section 3-116 (c). The perspective of defense and prosecution lawyers is important in developing sentencing policies. The dilution of their influence within a 9 member commission should serve to alleviate any remaining fears involving conflicting interests.

Directors of Corrections have often served on parole boards and their knowledge of the realities of various sentences supports their participation in developing sentencing policies.

California has enacted a presumptive sentencing system which in part authorizes the Judicial Council to promote sentencing guidelines. Cal. Penal Code, § 1170.3 (West Supp. 1977).

SECTION 3-111. [Terms of Sentencing Commission.]

(a) The members of the sentencing commission shall serve for staggered terms of [6;4] years or until they cease to hold the office or position that qualified them for appointment and until their successors are appointed and have qualified, but of the members first appointed the chairman must be appointed for a term of [6;4] years and the other members must be appointed in equal numbers to 2- and 4-year terms. Their successors must be appointed in the manner provided for the members first appointed, and a vacancy occurring before expiration of a term must be similarly filled for the unexpired term.

The [Governor; Chief Justice] may remove a member of the commission only for disability, neglect of duty, incompetence, or malfeasance in office. Before removal, the member is entitled to a hearing.

(b) Members of the commission [and the advisory panel] not employed by the State or its political subdivisions are entitled to receive a per diem to be established by the Governor for days actually spent in the performance of their duties and all members shall be reimbursed for expenses necessarily incurred in the performance of their duties.

COMMENT

The section establishes the term of members of the sentencing commission. The commissioners should serve a term extending beyond that of the Governor in order to reduce dramatic shifts in sentencing policy after each election. A 6-year term is preferred. Some state constitutions may require that the term of an appointee be no longer than the Governor. The members of the commission are removable only for cause and are entitled to a hearing.

The commission consists of part time members. This preserves the multi-perspective nature of the commission. It will require that the commission establish broad policy leaving the operational details to its staff.

SECTION 3-112. [Duties of Sentencing Commission.]

(a) The sentencing commission shall:

(1) appoint, and it may remove in accordance with law, an executive director having appropriate training and experience to conduct statistical studies of sentencing prac-

tices, interpret and explain social science information relating to sentencing, and construct sentencing guidelines as provided by this Act;

(2) appoint, and it may remove in accordance with law, other employees of the commission as required;

(3) adopt in a form determined by the commission sentencing guidelines as provided by this Act;

(4) collect, develop and maintain statistical information relating to sentencing practices and other dispositions of criminal complaints;

(5) cooperate with sentencing courts in developing instructional programs for judges relating to sentencing;

(6) explain sentencing practices and guidelines to the public; and

(7) exercise all powers and perform all duties necessary and proper in discharging its responsibilities.

Optional Provisions

[The following subsections are provided for states that have not classified offenses for sentencing purposes by legislation.]

[(b) The sentencing commission shall classify all criminal offenses on the basis of their severity into one of the following categories:

(1) Class A felonies, which shall include felonies characteristically involving aggravated forms of violence or the risk of violence against the person;

(2) Class B felonies, which shall include felonies characteristically involving less-severe offenses against the person, aggravated offenses against property, or aggravated offenses against public administration or order;

(3) Class C felonies, which shall include all felonies not otherwise classified as Class A or B;

(4) Class A misdemeanors, which shall include misdemeanors characteristically involving or risking aggravated breaches of the peace or those directed against a person or public administration or order; and

(5) Class B misdemeanors, which shall include all misdemeanors not otherwise classified as Class A.

(c) Notwithstanding subsection (b), the commission may classify as "infractions" minor offenses that do not provide for imprisonment as a possible penalty. A person convicted or otherwise found to have committed an offense classified as an "infraction" may not be sentenced in accordance with this Article but may be penalized in accordance with other applicable law.

(d) The commission shall classify immediately any new offense enacted into law for which the [Legislature] has not stated a classification.

(e) Rules of the commission classifying offenses pursuant to this section must be adopted pursuant to the same procedures and are effective in the same manner as sentencing

guidelines.

(f) After the effective date of the classification of offenses by the commission, the substantive provision establishing the criminal offense continues to be effective, but persons convicted of the offense are subject to the penalties provided in this Act.]

COMMENT

This section establishes the duties of the sentencing commission--the most critical for the success of the sentencing system is appointment of an executive director. Development of sentencing guidelines and evaluation of sentencing practices will require experience with statistical techniques and social science methodology.

Paragraph (3) allows the commission to determine the form in which sentencing guidelines are developed. Most existing presumptive sentencing efforts have used matrices. This paragraph allows the commission to experiment with other forms. See Section 3-113.

Paragraphs (4), (5) and (6) require the commission to carry on research, training and public education programs relating to sentencing. The just deserts model developed in this Act has not been thoroughly tested in practice and it is important that evaluation of its impact be continually undertaken. One of the objectives of this Act is to build public confidence by authorizing public access to information regarding the actual operation of the system.

[Optional provisions--Comment]

In jurisdictions that have recently revised their criminal codes, offenses have been classified into a few discreet classifications for sentencing purposes. Earlier legislative tradition called for each criminal offense to be accompanied by its own penalty provision. This resulted in substantial inconsistency in sentencing provisions. The classification of all offenses into a few categories allows the legislature to make a consistent evaluation of the relative severity of offenses. For those jurisdictions that have classified offenses the optional provisions are unnecessary.

In some jurisdictions criminal code revision has been delayed because of a lack of consensus on the definitions of particular offenses. The optional provisions provide a mechanism for a jurisdic-

tion to categorize its offenses without undertaking total criminal code revision. One of the major purposes of this Article (Section 3-101) is to avoid disparity in sentences and this cannot be completely fulfilled until legislatively authorized sentences are worked into a rational structure.

The optional provision may face constitutional obstacles in states with rigidly interpreted prohibitions against repeals by implication. In these jurisdictions there may be no substitute for legislative classification of offenses.

The classification of offenses is a prerequisite to the adoption of Section 3-104 which establishes maximum sentences.

The classification scheme proposed in this section--three classes of felonies and two classes of misdemeanors--is derived from Model Penal Code, § 6.01, 6.08. Some states have adopted more categories. See Ill. Ann. Stat., ch. 38, § 1005-5-1 (Smith-Hurd 1973) (4 felonies and murder, and 3 misdemeanors); Tex. Penal Code Ann. tit 3, §§ 12.03-12.04 (Vernon 1974) (capital felonies, 3 felonies and 3 misdemeanors); N. Y. Penal Law, § 55.05 (McKinney 1975) (5 felonies and 3 misdemeanors).

The definition for each category of offense is not designed to be rigid. It purports to give some legislative guidance to the commission in classifying offenses without creating a legal question as to whether the commission in each case properly classified an offense. As an example of the types of offenses which would normally be in the various classes, the Model Penal Code makes the following classifications:

> Class A felonies include murder in the first degree, kidnapping unless the victim was returned safely, rape with resulting serious bodily harm, and robbery with an attempt to kill or inflict serious bodily harm.
>
> Class B felonies include manslaughter, aggravated assault with extreme indifference to human life, rape without resulting bodily harm, burglary of a dwelling at night or with resulting bodily harm, and robbery other than when in Class A.
>
> Class C felonies include negligent homicide, aggravated assault with a deadly weapon, burglary other than when in Class B, bribery of public officials, perjury, and theft over $500.

Class A misdemeanors include simple assult, passing bad checks, fraud, and theft under $500 but more than $50.

Class B misdemeanors include theft under $50 without a threat of force, and assault resulting from a fight begun with mutual consent.

Subsection (c) authorizes minor offenses to be classified as "infractions." There are in most jurisdictions minor offenses relating to business or traffic regulation or resulting from municipal ordinances where the penalty imposed for violation constitutes a civil penalty not involving confinement. This Article should only be applied to those offenses where confinement is an authorized penalty. This result is consistent with § 1.04(5) of the Model Penal Code. See also N.Y. Penal Law, § 55.10 (McKinney 1975) (defining "violation" as involving fine or imprisonment not in excess of 15 days and also exempting "traffic infractions" from criminal enforcement).

The last sentence of the subsection is intended to insure that classification of an offense as an infraction does not implicitly repeal the penalty established for that offense by other applicable law. Thus if a municipal ordinance defined an offense punishable only by fine, classification of that offense as an "infraction" would leave unaffected the authority to impose a fine for its violation. Drafters should not include as part of the repealer to this Act statutes authorizing and establishing procedures for applying sanctions for these types of offenses. In those states that may constitutionally prohibit legislative interference with ordinances adopted by home-rule cities, drafters should exempt such ordinance violations from this Act.

Subsection (d) allows continuing classification of new offenses where the legislature does not on its own make a classification. It is expected, however, that once a classification system is established, the class appropriate to each new offense would be specified in legislation.

Subsection (e) stipulates the procedural method of adopting offense classifications. The procedures are set out in Section 3-116. They provide for a public notice and comment rule-making procedure to insure public opportunity to participate in the classification process. The classifications become effective, pursuant to Section 3-116, 20 days after filing with the appropriate official. The effective date of classifications is critical because the constitutional prohibition against ex post facto laws would prevent application of the classification system, if it enhanced the penalty, to offenses commited prior to its effective date.

Subsection (f) is a savings clause to insure that classification of an offense by the commission is not construed to implicity repeal the substantive criminal offense but merely to alter the authorized punishment.

SECTION 3-113. [Sentencing Guidelines; Non-Monetary Sentencing Alternatives.]

(a) The sentencing commission shall adopt guidelines for the following decisions relating to the imposition of sentences involving supervision or confinement:

(1) selection among the various sentencing alternatives; and

(2) determination of the length of terms for each of the alternatives.

(b) Guidelines adopted pursuant to subsection (a) establish for the sentencing court, on the basis of the combination of offense and defendant characteristics in each case, the presumptively appropriate sentencing alternative and the length of term to impose.

(c) For a sentence involving community supervision, the commission shall propose a maximum term of confinement to be imposed if the defendant violates the conditions of his supervision.

COMMENT

This section requires the sentencing commission to construct sentencing guidelines for two different decisions: the sentencing alternative to be imposed and the length of term for which it is

imposed. Thus for each set of offense and offender characteristics the guidelines would provide the sentencing alternative, i.e., community supervision, split-sentence, or continuous confinement, and its length.

The idea of a sentencing matrix was first implemented by the United States Board of Parole to direct their hearing examiners in granting or denying paroles. The development of parole release guidelines was subsequently required by the Congress. Parole Commission and Reorganization Act of 1976, 18 U.S.C., § 4203 (1976). The Commission's matrix provides a range of time an offender should spend in confinement before parole based on a mix of offense and offender characteristics. Part of the Board's matrix is reproduced below. The first chart shows the "salient factor" score which reflects offender characteristics. The second chart lists offenses by relative severity. By locating the offense and salient factor score for a particular offender, the chart indicates a range in months of confinement prior to release on parole. Decisions outside these guidelines are allowed, but are structured with more procedural restrictions.

U.S. PAROLE COMMISSION GUIDELINES FOR PAROLE RELEASE
28 C.F.R., §2.20 (1977)

SALIENT FACTOR SCORE

Item A..... ☐
(No prior convictions adult or juvenile)=3.
1 prior conviction=2.
2 or three prior convictions=1.
4 or more prior convictions=0.

Item B..... ☐
No prior incarcerations (adult or juvenile)=2.
1 or two prior incarcerations=1.
3 or more prior incarcerations=0.

Item C..... ☐
Age at first commitment (adult or juvenile).
(26 or older)=2.
(18 to 25)=1.
(17 or younger)=0.

Item D..... ☐
Commitment offense-did not involve auto theft or check(s)=1.
Otherwise=0.

Item E..... ☐
Never had parole revoked or been committed for a new offense while on parole, and not a probation violator this time=1.
Otherwise=0.

Item F..... ☐
No history of heroin or opiate dependence=1.
Other=0.

Item G..... ☐
Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community=1.
Otherwise=0.

Total score..... ☐

[42 FR 31786, June 23, 1977]

[Guidelines for decisionmaking, customary total time to be served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
MODERATE				
Bribery of a public official (offering or accepting) Counterfeit currency (passing/possession $1,000 to $19,999). Drugs: Marihuana, possession with intent to distribute/sale (small scale (e.g., less than 50 lbs.)) "Soft drugs", possession with intent to distribute/sale (less than $500) Escape (secure program or institution, or absent 7 d or more—no fear or threat used). Firearms Act, possession/purchase/sale (single weapon—not sawed-off shotgun or machinegun). Income tax evasion ($10,000 to $50,000) Mailing threatening communication(s) Misprision of felony Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) $1,000 to $19,999. Smuggling/transporting of alien(s) Theft of motor vehicle (not multiple theft or for resale)	12 to 16 mo.	16 to 20 mo.	20 to 24 mo.	24 to 32 mo.
HIGH				
Counterfeit currency (passing/possession $20,000-$100,000). Counterfeiting (manufacturing) Drugs: Marihuana, possession with intent to distribute/sale (medium scale) (e.g., 50 to 1,999 lb.)) "Soft drugs", possession with intent to distribute/sale ($500 to $5,000). Explosives, possession/transportation Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Mann Act (no force—commercial purposes) Theft of motor vehicle for resale Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) $20,000 to $100,000.	16 to 20 mo.	20 to 26 mo.	26 to 34 mo.	34 to 44 mo.

The matrix required by this section would be more sophisticated since it would deal with more than the single alternative of release from confinement. This section makes mandatory the development of guidelines for sentences involving both supervision and confinement. Section 3-102 contains four sentencing alternatives: (1) supervision in the community (which is the same as "probation" under most systems); (2) split sentences (confinement followed by community supervision); (3) periodic confinement (term of confinement to be served on weekends or evenings); and continuous confinement. The section requires the guidelines to be precise enough so that given the facts of any case the court can look to the guidelines to tell it which alternative to select and for what period of time.

Because the U.S. Board of Parole's experience proved successful, work has begun on the development of sentencing matrices for the front end of the sentencing system. Sentencing Guidelines: Structuring Judicial Discretion (project funded by LEAA and conducted by

the Criminal Justice Research Center, Albany, New York). Sentencing commissions established under this Act will have a base of methodology from which to proceed. In some jurisdictions initial matrices were developed using average sentences imposed over a time period by judges in a particular jurisdiction. This avoids disruptive initial changes in sentencing practices. A hypothetical matrix which would comply with this section is reproduced below as an example of the form the guidelines might take.

Sample Matrix for Armed Robbery

OFFENDER CHARACTERISTICS

OFFENSE CHARACTERISTICS

	-5 -1	0 - 2	3 - 8	9 - 12	13 +
9-10	C 1 year	C 2 years	C 4 years	C 6 years	C 10 years
7-8	Split C 90 days S 2 years V 6 mos.	C 1 year	C 3 years	C 4 years	C 7 years
5-6	Split C 90 days S 2 years V 6 mos.	C 90 days S 2 years V 1 year	C 1 year	C 3 years	C 6 years
3-4	S 2 years V 6 mos.	Split C 90 days S 1 year V 1 year	C 8 mos.	C 2 years	C 4 years
0-2	S 1 year V 6 mos.	S 2 years V 6 mos.	Split C 90 days S 1 year V 1 year	C 1 year	C 3 years

Symbols: C = Continuous confinement; S - Supervision in Community;
V = Continement for violation of conditions.

Offense Characteristics:

Deadly weapon used	+10
Several victims	+ 4
Vulnerable victim	+ 4

Offender Characteristics:

Prior violent offenses	+ 5/off.
Prior felonies	+ 2/off.
Prior revocations	+ 1/viol.
Made restitution	- 1
Under 18 years of age	- 1

The discretion of the sentencing commission in establishing sentencing matrices is structured by a variety of procedural and substantive provisions. The commission is bound by the purposes and principles of sentencing announced in Sections 3-101 and 3-102. The Act articulates factors which the commission may utilize in establishing the guidelines, sets maximum terms for offenses, and requires public notice and comment rule making in promulgating the guidelines. (Section 3-116).

Subsection (c) requires the guidelines to state the length of confinement appropriate for violation of a condition of community supervision. Under traditional law "probation" resulted only after the court suspended the imposition or execution of a sentence of confinement. Under the Act, what is now probation is a sentence and not dependent on any other sentence being suspended. However to insure equality of treatment and fair notice, the potential liability of an offender for breach of his conditions of supervision is structured as well. The appropriate length of confinement for violation of a condition of supervision relates both to the nature of the underlying offense and the nature of the violation. The Commission is directed to establish a "maximum" term for violation. Since this remains a guideline the court is authorized to go beyond this maximum if it complies with Section 3-207. The statutory maximum for a violation is established in Section 3-310(b).

SECTION 3-114. [Monetary and Non-Monetary Conditions of Sentencing Guidelines.] The sentencing commission may adopt guidelines for the following decisions relating to the imposition of sentences:

(1) imposition of a fine or a requirement to make restitution, including the amount thereof;

(2) imposition of conditions as part of a sentence involving community supervision; and

(3) imposition of sanctions for violation of conditions of community supervision.

COMMENT

This section provides discretionary authority for the commission to adopt guidelines relating to other sentencing issues not included in Section 3-113. The discretionary nature of this section is designed to allow the commission to concentrate its efforts on the more critical issues of sentencing alternative and length of sentence before developing guidelines for other sentencing decisions.

Paragraph (1) would authorize the development of guidelines relating to the amount of fines and restitution, the relevant evidence and factors to be used in imposing fines or restitution, and any other aspects of these sentencing alternatives. The language is broad enough to allow experimentation with the "day fine" which is a fine based on the daily wages of the defendant, or other techniques designed to make the punitive aspects of fines more uniform across classes of defendants. See Jobson, Fines, 16 McGill L.J. 633 (1970); Note, The Use of the Fine as a Criminal Sanction in New Jersey: Some Suggested Improvements, 28 Rutgers L. Rev. 1185 (1975). Paragraph (2) would allow the commission to seek more uniformity in the application of conditions of community supervision. This might be particularly useful for application of community service conditions and other conditions unrelated to treatment or the individual characteristics of the defendant. Paragraph (3) would allow the commission to refine its guidelines relating to sanctions imposed for violation of community supervision beyond the guidelines establishing a maximum term for confinement required in section 3-113

Until the commission adopts guidelines under this section, sentencing courts are free to make their own decisions pursuant to the procedures required in Part 2 of this Article. When guidelines are adopted under this section, they have the same force as guidelines adopted under Section 3-113 and must be followed unless the sentencing court complies with Section 3-207.

SECTION 3-115. [Sentencing Guideline Requirements.]

(a) Sentencing guidelines shall be consistent with the purposes of this Article and the principles of sentencing.

(b) In adopting sentencing guidelines the commission shall take into account characteristics of offenses and of defendants that relate to the purposes of this Article and the

principles of sentencing. It shall consider:

(1) the nature and characteristics of the offense;

(2) the severity of the offense in relation to other offenses;

(3) the characteristics of the defendant that mitigate or aggravate the seriousness of his criminal conduct and the punishment deserved therefor; and

(4) the available resources of the department.

(c) The sentencing commission shall include with each set of guidelines a statement of its estimate of the effect of the guidelines on the resources of the department.

COMMENT

This section establishes requirements for the development of sentencing guidelines. Subsection (a) requires the guidelines be consistent with Sections 3-101 and 3-102.

Subsection (b) provides four categories of factors which should be taken into account in the guidelines. The language "nature and characteristics of the offense" in subsection (b) (1) authorizes the commission to utilize and the sentencing court to consider offense behavior rather than the offense for which the defendant was ultimately convicted. The major purpose of the provision is to reduce disparity resulting from the effect of plea bargaining. See Comments to Section 3-206.

Any system that reduces the sentencing discretion of the courts is likely to shift the discretion to the prosecuting attorney. If guidelines are based on the offense charged, the prosecuting attorney is given substantial leverage in dictating the sentence. This section authorizes the court to go behind the offense charged to determine the offense characteristics. This does not reduce plea bargaining's impact on sentencing entirely. If the guideline sentence for a particular offense is 3 years of continuous confinement and a prosecutor reduces the charge to a Class C felony which carries a maximum sentence of 2 years, the guideline sentence could not be imposed.

The United States Parole Commission regulations and guidelines have been applied to offense behavior rather than offense charged and this procedure, subsequently authorized by statute, has been upheld by the courts against constitutional attack. See Billiteri v.

United States Bd. of Parole, 541 F.2d 938 (2d Cir. 1976); Grattan v. Sigler, 525 F.2d 329 (9th Cir. 1975); Lupo v. Norton, 371 F. Supp. 156 (D. Conn. 1974). See also Parole Commission and Reorganization Act of 1976, 18 U.S.C., §§ 4201 to 4218 (1976).

Paragraph (2) would require the commission to rank order offenses in terms of severity and paragraph (3) requires the consideration of mitigating and aggravating factors.

Paragraph (b) (4) makes explicit that available correctional resources should affect the development of sentencing guidelines. In many discretionary release systems, the parole release discretion has been used to avoid overcrowding facilities. Under a flat sentencing system, this difficulty must be taken into account at the front end of a sentencing system. A commission system of presumptive sentencing will allow adjustment of sentences where resources become scarce. Unlike current systems, this adjustment can be made across categories of offenders and with regard to priorities relating to offense severity. For example it may be initially determined that third offense petit larceny should presumptively carry a jail term. If the jails in a state become overcrowded, the guidelines could be modified to provide community supervision for future offenders of this type while retaining the scarce resource of the prison for more serious offenses. Since the intensity of the sanction in a just deserts model is largely a political decision, the philosophy is not offended by taking into account available resources.

The shift from an indeterminate to a flat sentencing system will inevitably result in a period of adjustment relating to the public perception of sentences. The familiarity with relatively long sentences under an indeterminate sentence where offenders only serve a portion of the sentence imposed, may make it difficult for the public to accept the announcement of relatively shorter sentences even though the actual time served under the latter may be longer than under the former. The experience may result in a substantial increase in persons sentenced to confinement. The availability of resources is one check on that development.

A legislature or the sentencing commission may wish to adopt a policy that would couple the development of sentencing guidelines with a statistical projection of the resources required for their implementation. That policy might also include an attempt to develop initial sentencing guidelines that would not increase the confined population by more than a stated percentage, i.e., 10 percent, over the first few years of the operation of the Act. In this way the shift from indeterminate to flat sentencing can take place with the least amount of dislocation.

SECTION 3-116. [Promulgation of Sentencing Guidelines.]

(a) The commission shall hold at least one public hearing before final adoption of sentencing guidelines. The commission shall publish its proposed guidelines at least 30 days before the hearing. The commission shall afford interested persons reasonable opportunity to present data, views, or arguments at the hearing relating to the proposed guidelines, or to submit data, views, or arguments in writing before the hearing. The commission shall consider fully all written and oral submissions respecting the proposed guidelines and, if the guidelines are adopted, issue a concise statement of the principal reasons for or against adoption, incorporating therein its reasons for rejecting contrary views.

(b) Upon adoption of the guidelines the commission shall file them in the office of the [appropriate state depository for filing of administrative actions].

(c) Guidelines adopted by the commission become effective 20 days after filing and apply to sentences for offenses thereafter committed.

(d) The commission may modify the guidelines and shall follow the procedures of this section in so doing. At least once every 2 years the commission shall hold a hearing, consistent with subsection (a), to allow the public to comment on existing guidelines.

COMMENT

The section requires a form of public notice and comment rule-making for the adoption of sentencing guidelines. This will allow the public an opportunity to participate in the development of sentencing policies and the ordering of offenses by severity. It will also publicize the limitations of existing resources on sentencing practices.

The section is derived in large part from the Model State Administrative Procedure Act, §§ 3-4 (1961). The Parole Commission and Reorganization Act of 1976, 18 U.S.C., § 4218 (1976), makes the federal Administrative Procedure Act procedures applicable to the adoption of parole release guidelines in the federal system.

Subsection (d) allows the commission to modify sentencing guidelines and requires that existing guidelines be reopened every 2 years for public comment.

Part 2

PROCEDURES FOR IMPOSING SENTENCE

SECTION 3-201. [Presentence Service Officers.]

(a) The director of corrections shall appoint presentence service officers for each [court, division of a court] having criminal jurisdiction. Presentence service officers shall conduct investigations and make reports and recommendations to sentencing courts relating to the imposition of sentences on criminal defendants.

(b) With permission of the [district, circuit] court, the presentence service officer may:

(1) assist courts or other judicial officers in developing information relating to the setting of bail or other pretrial release or detention decisions; and

(2) develop information about offenders relating to the selection of an offender for particular correctional programs.

[(c) The Supreme Court shall adopt rules providing for office space, supporting staff, equipment, and other administrative provisions for presentence service officers.]

COMMENT

This section requires the director of corrections to appoint presentence service officers for each sentencing court. These officers are primarily responsible for developing presentence reports. Subsection (b) authorizes them to perform other investigatory functions.

This section reflects the recommendations of others that all probation services should be administered on the state level in order to provide coordinated and efficient utilization of manpower, to implement state-wide standards for training and operational procedures, and to insure jurisdiction-wide availability of services. See Model Penal Code, §§ 405.1 to 405.4; Nat'l Advisory Comm'n Correc. Std. 10.1. The American Correctional Association reports that as of October, 1975, nine states or territories retained local control of adult probation, 32 had state administered systems, and 12 had a combination of state and local systems. ACA, Directory: Juvenile and Adult Correctional Departments, Institutions, Agencies and Paroling Authorities (1975-76).

It has been argued that probation services should be administered by courts to insure a high level of confidence between the court and the person advising him on sentencing policy. However, the more limited discretion provided to courts under the sentencing provisions of this Act make this interest less compelling. Investigative skills become paramount in presentence service officers. It has also been argued that in receiving advice on sentencing, courts need the independent judgment of an officer not directly responsible to them.

In many states probation officers serve both as investigators compiling presentence reports and as supervisors for persons placed under supervision in the community. However, studies of time spent by probation officers with dual functions demonstrate that investigation and report writing always take priority over supervision even though most officers prefer the challenge of supervision. D. Glaser, The Effectiveness of a Prison and Parole System 442-47 (1964). Although nothing in the Act directly prevents one individual performing both functions, the separate statutory treatment accorded the appointment and duties of presentence service officers in this section and community service officers in Sections 2-203 and 2-204 dramatizes the differing nature of the tasks.

Subsection (b) authorizes the presentence service officer to perform other tasks within the criminal justice system with court approval. These additional functions are consistent with the officer's role as an investigative arm of the courts assisting it to make discretionary decisions. A jurisdiction may find it more economical to have one person or agency responsible for investigations related to bail and pretrial diversion decisions.

Subsection (c) provides for office space and other administrative support for presentence service officers. In many states, the expenses of providing support to judicial officers is split between state and local governments. Drafters should evaluate this subsection to insure its compatability with existing financial arrangements. Ideally the presentence service officers should be supported in the same manner as other judicial officers.

SECTION 3-202. [Presentence Procedures.]

(a) If the prosecuting attorney believes that a defendant should be sentenced for an especially aggravated offense or as a persistent offender, he shall file a statement thereof with the court before trial or acceptance of a plea of admission.

(b) In all other cases, upon acceptance of a plea of admission or upon a verdict or finding of guilty the court may require that:

(1) the prosecuting attorney file a statement with the court setting forth any aggravating or mitigating factors he believes should be considered by the court; and

(2) the defendant file a statement with the court setting forth any mitigating factors he believes should be considered by the court.

COMMENT

The section requires the parties to give notice of any aggravating or mitigating factors they wish to assert relating to the sentence. The section sets the stage for two subsequent provisions: Section 3-203 which provides for independent evaluation and verification of these factors by the presentence service officer and Section 3-206 which requires a sentencing hearing. Requiring the parties to notify the court of these factors should make both the investigation and the hearing more efficient.

Where the prosecutor seeks to substantially enhance the sentence through use of the persistent offender or especially aggravated offense provisions, the section requires the notice prior to trial or acceptance of the plea. The section is in part modeled after the procedure of the Organized Crime Control Act of 1970, 18 U.S.C., § 3575 (1976), which requires the notice within a "reasonable time before trial or acceptance of . . . . a plea of guilty." Imposing a reasonableness standard on notice invites litigation. Notice prior to trial or plea provides adequate time considering the delays due to the presentence investigation and the right of either party to obtain a 10 day delay after filing of the presentence report. The severity of the potential sanction sought by the prosecutor dictates that the notice in these two cases be provided prior to trial or acceptance of the plea. The knowledge that a substantially enhanced sentence is sought may alter trial strategy and may alert the court to the need for greater scrutiny in accepting a plea of guilty.

It is inappropriate to require the defendant prior to a finding or plea of guilty to disclose mitigating factors in any case.

The section is consistent with the thrust of the Uniform Rules of Criminal Procedure (1974) to insure broad pretrial disclosure in criminal cases. Rule 422(a) requires automatic pretrial disclosure of information known to the prosecutor that would tend to mitigate the punishment and Rule 422(b) requires disclosure of prior offenses on request of the defendant. Rule 423 requires only limited disclosure by the defendant prior to trial.

SECTION 3-203. [Presentence Investigation and Report.]

(a) Upon acceptance of a plea of admission or upon a verdict or finding of guilty, the court shall in the case

of a felony and may in the case of a misdemeanor direct the presentence service officer to make a presentence investigation and report. The presentence service officer shall conduct any investigation he deems appropriate or the court directs and independently verify the factual basis for any aggravating or mitigating factors asserted by the parties.

(b) With the concurrence of a defendant, a court may direct the presentence service officer to begin the presentence investigation before adjudication of the guilt of the defendant. Nothing discovered by the presentence investigation may be disclosed to the prosecution, the court, or the jury before acceptance of a plea of admission or a verdict or finding of guilty unless the defendant concurs.

COMMENT

The first sentence of subsection (a) is modeled after Rule 612 of the Uniform Rules of Criminal Procedure. Rule 612 provides three alternatives for adoption by the states: (1) a mandatory requirement for a presentence report, (2) a discretionary authorization for the court to order a presentence report, and (3) a discretionary authorization with a mandatory provision for certain specific offenses. The section of the Act adopts alternative 3 and requires in every felony case a presentence investigation and report. However, Section 3-204, which defines the contents of the presentence report allows a short form to be utilized where neither party asserts mitigating or aggravating factors. The short-term report requires only the information necessary to apply the sentencing guidelines. The use of presentence reports in misdemeanor cases is discretionary with the court.

Under a sentencing guideline system, the guidelines will only reduce disparity of sentences if the underlying factual basis against which they are applied is accurate. On the other hand, a just deserts model of sentencing will in most instances simplify the extent of the investigation required since psychological and motivational testing relating to rehabilitative potential will not be required. This change in thrust and structure of judicial sentencing dictates that presentence reports, of some form, be required in every major case. In many misdemeanor cases the facts are so clear, the range of sentencing discretion so limited, and the administrative burden so substantial that no report should be required.

The Model Penal Code, § 7.07 requires a presentence investigation in all felony cases or where the defendant is less than 22 years of age or is to be sentenced to imprisonment. The ABA Sentencing Standards, § 4.1 requires presentence reports in felony cases or where the defendant is under 21 years of age or is a first offender unless the court orders no report be made. The Nat'l Advisory Comm'n Correct. Std. 5.14 recommends a presentence report in all cases involving incarceration, felonies, or minors. The Commission reported that the federal courts utilize presentence reports in almost 90 percent of the cases while in some state systems they are infrequently used. See Comment, Texas Sentencing Practices: A Statistical Study, 45 Tex. L. Rev. 471 (1967).

The American Bar Association found three major patterns of statutory provisions: (1) Statutes making presentence reports mandatory in certain classes of offenses: Cal. Penal Code, § 12-3 (West Supp. 1977) (all felony convictions for which the offender is eligible for probation); Mich. Comp. Laws Ann., § 771.14 (West 1966) (all felonies); Ohio R. Crim. P. 32.2 (all felonies). (2) Statutes making presentence reports discretionary with the court: Minn. Stat. Ann., § 609.115(1) (West 1964); Wash. Rev. Code Ann. 29.95.200 (1977). (3) Statutes making use of reports discretionary but precluding certain types of sentences unless a report is prepared: Ala. Code tit. 42, § 21 (1958); Wyo. Stat., § 7-319 (Supp. 1975). See also Huntley v. State, 339 So. 2d 194 (Fla. 1976) (statute requiring presentence report in all felony cases invades the rulemaking authority of the court and is not effective); Fed. R. Crim. P. 32(c) (1) (requiring a presentence report in every case unless the defendant waives the report or the court finds there is information in the record "sufficient to enable the meaningful exercise of sentencing discretion").

The second sentence of subsection (a) requires the presentence service officer to make an independent evaluation of the factual basis of aggravating or mitigating factors asserted by the

parties. The sentencing guidelines will give aggravating and mitigating factors objectively measurable influence on the ultimate sentence to be imposed. The necessity for an independent evaluation is to overcome the force of plea bargaining on disposition. Throughout the Act provisions are included to limit the role of the prosecutor in determining sentence. See generally Nat'l Advisory Comm'n Courts Stds. 3.1 (recommending abolition of plea bargaining) and 3.8 (recommending that guilty pleas not affect sentencing).

Subsection (b) authorizes the initiation of the presentence investigation prior to the actual adjudication of guilt with the consent of the defendant. The provision is modeled after Fed. R. Crim. P., § 32; Fla. R. Crim. P., 3.711; ABA, Standards Relating to Probation, § 2.4 (1970); and Nat'l Advisory Comm'n Correct. Std 5.15. The latter standard would authorize the procedure only if the defendant were incarcerated pending trial. Early initiation of the report reduces the time between a finding of guilt and the imposition of sentence. In some instances a defendant who ultimately may be sentenced to community supervision may be confined awaiting final disposition. In all cases, a means should be available to reduce the uncertainty prior to sentencing. Information in the report cannot be disclosed to the prosecution, court, or the jury prior to a finding of guilty. Much of the information contained in the report will emanate directly or indirectly from the defendant and it is unlikely many would concur in early initiation of the process without some assurance that the information will not affect the determination of their guilt or innocence.

SECTION 3-204. [Requirements of Presentence Reports.]

(a) The presentence report must set forth:

(1) the characteristics and circumstances of the offense committed by the defendant;

(2) information relating to any aggravating or mitigating factors asserted by the parties and its source;

(3) the defendant's record of prior convictions;

(4) information relating to any aggravating or mitigating factor which may affect the sentence imposed although not asserted by the parties and the source from which the information was obtained;

(5) past sentencing practices relating to persons in circumstances substantially similar to those of the defendant;

(6) an analysis of the guidelines of the sentencing commission applicable to the particular defendant;

(7) if a sentence not involving confinement is likely, information to assist the court in imposing conditions for community supervision, including the nature and extent of programs and resources available to the defendant;

(8) if requested by the court, information to assist the court in imposing a fine or restitution including the financial resources of the defendant, the financial needs of the defendant's dependents, and the gain derived from or loss caused by the criminal activity of the defendant;

(9) any statement relating to sentencing submitted by the victim of the offense or the investigative agency; and

(10) consistent with the purposes of this Article and the principles of sentencing, any other information the presentence service officer or the court considers relevant.

(b) In misdemeanor cases and in cases in which neither party asserts the existence of aggravating or mitigating factors the court may direct the presentence service officer to include in the report only the information required in paragraphs (1), (6), (9), and (10) of subsection (a).

COMMENT

This section details the contents of the presentence report. Most other proposals regarding the report are premised on a sentencing system based on rehabilitation and accordingly require more information relating to the medical and social background of the defendant and the availability of treatment programs. See ABA, Standards Relating to Probation, § 2.3 (1970); Model Penal Code, § 7.07 (3); Nat'l Advisory Comm'n Correct. Std. 5.14.

Subsection (a) (1) requires the presentence service officer to examine the offense committed by the defendant. The language requires him to go behind the offense charged or the offense for which the defendant was ultimately convicted. The application of sentencing guidelines is based on the underlying criminal activity of the defendant and not on the formal charge or conviction.

Subsection (a) (2) requires the presentence service officer to independently verify sentencing factors asserted by the parties. The determination of the sentence should not be left to the agreement of the parties because of the high potential for disparity and abuse.

Subsection (a) (3) & (4) provide for independent collection of past convictions, an important sentencing factor under the Act, and an independent investigation for other factors relevant to sentencing.

Subsection (a) (5) requires inclusion in the report of past sentencing practices relating to similar defendants. In most instances where defendants were sentenced in accordance with the guidelines, notation of that fact will be sufficient. The court should be aware, on the other hand, of those cases where factors not articulated in the guidelines have been used to deviate from the guidelines. This will reduce disparity of treatment. The sentencing commission or the opinions of the appellate courts in sentencing appeals would be a major source for information required by this paragraph. The paragraph is not limited to past sentencing practices of the particular judge and should be read in light of the purposes of the Article and the principles of sentencing which seek jurisdiction wide uniformity in sentencing policy.

Subsection (a) (6) requires the report to contain an analysis of the sentencing guidelines as applicable to the defendant. There may be many instances in which disputes will arise as to the proper application of the guidelines. The analysis of the presentence service officer will provide a focus for the sentencing hearing in resolving these disputes.

Subsections (a)(7) and (a)(8) require inclusion of facts necessary for the imposition of particular sentencing alternatives.

Subsection (a)(9) allows a statement from the victim or the investigative agency relating to sentencing to be included in the report. Inclusion of the victim's statement is part of an attempt throughout the Act to make the victim feel that his interests are of concern to the criminal justice system. See Fla. Stat. Ann, § 921.143 (West Supp. 1977) authorizing the victim to make a written statement or a statement under oath in criminal cases relating to sentencing. "Investigative agency" includes the prosecuting attorney and the police or other law enforcement agency involved. The American Bar Association is on record as disapproving prosecutorial recommendations on sentences. ABA, Sentencing Standards, § 5.3. The Association argues that prosecutorial recommendations place undue pressure on sentencing courts and may induce too much reliance by the court on prosecutorial judgment. The shift from rehabilitation to just deserts and the development of a guideline sentencing system which reduces judicial discretion would appear to reduce the potential disadvantages of the prosecutorial recommendation.

Subsection (a)(10) authorizes inclusion of other information in the report as long as it is related to the purposes and principles of sentencing enunciated in Sections 3-101 and 3-102.

Subsection (b) allows the court to order a short-form presentence report in some cases. The short-form report has been recommended by ABA, Standards Relating to Probation, § 2.3 (1970); Nat'l Advisory Comm'n Correct. 5.14. The required report would include an analysis of the offense and the applicable guidelines. The latter analysis may require additional investigation of potential aggravating or mitigating factors and a collection of prior convictions. The statement of the victim and investigative agency is also included.

SECTION 3-205. [Disclosure of Presentence Reports.]

The presentence report must be filed with the court and copies made available to the parties before sentencing. The court may order that the presentence report or any part thereof not be available for public inspection.

COMMENT

The section requires the filing of the presentence report with the court and the disclosure of the report to the parties. Full disclosure of the presentence report is provided in Rule 612

of the Uniform Rules of Criminal Procedure (1974) and in the following: Cal. Code, § 1203; Colo. R. Crim. P. 32 (a) (2) (1973); Va. Code, § 53-278.1 (1974). Full disclosure is recommended in Nat'l Advisory Comm'n Correct. Std. 5.16.

Other jurisdictions provide some exceptions to disclosure. Fed. R. Crim. Proc. 32 does not require disclosure of "diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons . . ." See Me. R. Crim. P. 32 (1977) (confidential sources withheld); Nev. Rev. Stat., § 176.156 (1975) (only confidential sources of information withheld); ABA, Sentencing Standards, § 4.4 (recommendation similar to Federal Rules). See the comments to the ABA standard for a summary of the arguments over the extent of disclosure of presentence reports.

The section provides for full disclosure in order to remain consistent with the Uniform Rules of Crim. Procedure. The shift to a "just deserts" model of sentencing with objectively based criteria for sentencing reduces the likelihood that presentence reports will contain the type of information exempted from disclosure by the Federal Rules.

Although the defendant's interest in seeing the presentence report overcomes the interest in confidential disclosures, the public's interest in reviewing the report is minimal. The second sentence authorizes the court to prohibit public inspection of all or any part of the report.

SECTION 3-206. [Sentencing Hearing.]

(a) Before imposing sentence or making other disposition upon acceptance of a plea of admission or upon a verdict or finding of guilty, the court shall conduct a sentencing hearing without unreasonable delay. The court, upon the request of either party, shall postpone the sentencing hearing until at least 10 days after the filing of a presentence report.

(b) At the hearing the court shall afford the parties and the victim of the offense the opportunity to be heard and

present evidence relevant to the sentencing of the defendant. The court may allow the parties to subpoena witnesses and call or cross-examine witnesses, including the person who prepared the presentence report and any person whose information contained in the presentence report is relevant to the sentencing decision.

(c) In imposing sentence the court shall:

(1) consider the evidence received at the trial and the sentencing hearing:

(2) consider the presentence report; and

(3) review the appropriate sentencing guidelines.

(d) In determining the appropriate guideline to follow, the court shall consider the nature and characteristics of the criminal conduct involved without regard to the offense charged. However, in the event that the guideline sentence is greater than the maximum sentence provided for the class of offense charged, the court may sentence the offender to no more than the maximum for the class of offense charged.

(e) A record of the sentencing hearing must be kept and preserved in the same manner as trial records. The record of the sentencing hearing is part of the record of the case and must include specific findings of fact upon which application of the sentencing guidelines was based.

(f) Whenever a defendant is sentenced to the custody of the department, the sentencing court shall transmit to the director a copy of the defendant's presentence report and the record of the sentencing hearing.

COMMENT

The first sentence of subsection (a) is modeled after Rule 613 of the Uniform Rules of Criminal Procedure. It requires a hearing without unreasonable delay. The second sentence provides for a continuance for a 10-day period to allow the parties to examine and prepare to challenge the presentence report. With objective sentencing guidelines based on announced facts, the sentencing hearing becomes much more important than under traditional sentencing practices with broad judicial discretion.

Rule 613 provides that the parties shall be given an "opportunity to be heard." Subsection (b) goes further to specifically authorize cross-examination of witnesses including those providing information in the presentence report. See Va. Code, § 53-278.1 (1974) (authorizing defendants to cross-examine the presentence officer). The provision is consistent with other recommendations. See ABA Sentencing Standards, § 5.4; Nat'l Advisory Comm'n Correct. Std. 5.17.

The purpose of subsection (d) is to reduce the impact of plea bargaining on the sentencing process. Any system that reduces the sentencing discretion of the courts is likely to shift the discretion to the prosecuting attorney. If guidelines are based on the offense charged, the prosecuting attorney is given substantial leverage in dictating the sentence. This section requires the court to utilize the guidelines relating to the offense committed without regard to that officially charged. In the case of a guilty plea, the facts relating to the offense would be proved at the sentencing hearing. This process would not totally eliminate the prosecutor's ability to influence the sentence. For example, assume the crime committed was a Class B felony and the guideline for that felony provides a presumptive sentence of five years of continuous confinement. If the prosecutor reduces the charge to a Class C felony for which there is a statutory maximum sentence of two years, the appropriate guideline sentence (5 years) could not be imposed. The second sentence of subsection (d) provides that the most severe sentence that could be imposed in the hypothetical case is 2 years.

Serious constitutional objections would be raised if the court were authorized to impose a sentence in excess of that authorized by statute for the offense charged. Indeed, the system envisioned by subsection (d) may at first seem to have the same deficiency. However, it is reasonably likely that under current sentencing practices, courts do take into account unproved and uncharged criminal behavior in imposing sentence. Under this Act, these uncharged criminal acts will have to be proved by substantial evidence. And in an analogous context a similar procedure has been approved. The United States Parole Commission regulations and guidelines have been applied to offense behavior rather than offense

charged and this procedure has been upheld against constitutional attack by the courts and subsequently authorized by statute. See Billiteri v. United States Board of Parole, 541 F.2d 938 (2d Cir. 1976); Grattan v. Sigler, 525 F.2d 329 (9th Cir. 1975); Lupo v. Norton, 371 F. Supp. 156 (D. Conn. 1974). See also Parole Commission and Reorganization Act of 1976, 18 U.S.C., § 4201 to 4218 (1976).

SECTION 3-207. [Imposition of Sentence.]

(a) In imposing sentence the sentencing court shall follow the sentencing guidelines unless it concludes that another sentence better serves the purposes of this Article and the principles of sentencing.

(b) The court may not suspend the imposition or execution of a sentence except the court may suspend the execution of a sentence for a period not to exceed 30 days to allow a defendant to order his affairs. This section does not limit the power of a court to stay its sentencing order pending appeals.

(c) Whenever the court imposes a sentence not in accordance with the guidelines, it shall place on the record its findings of fact and reasons for deviating from the guidelines.

(d) In cases other than those involving especially aggravated offenses or persistent offenders, a sentence must be based on substantial evidence in the record of the sentencing hearing and the presentence report.

(e) A person may not be sentenced for an especially aggravated offense or as a persistent offender unless:

(1) the prosecuting attorney has filed the statement with the court required by Section 3-202;

(2) the court finds that facts necessary to support the sentence have been proved beyond a reasonable doubt; and

(3) the court places on the record its findings of fact justifying the sentence.

COMMENT

The section requires the sentencing court to impose the sentence authorized by the guidelines of the sentencing commission unless the court can improve upon the sentence in fulfilling one of the purposes and principles of sentencing. These purposes and principles (Sections 3-101 and 3-102) govern both the development of guidelines and the exercise of judicial discretion. The court must conclude that his sentence better serves the purposes and principles. The definition of what is a "just desert" for any offender and offense can never be precise. Thus, a standard which merely authorizes the court to follow the purposes and principles of sentencing in imposing sentences not in accordance with the guidelines would authorize too much discretion.

Subsection (c) requires that the court must record its findings of fact and reasons for any deviation from the guideline sentence. The court must articulate how it believes its sentence will better serve the purposes and principles of sentencing and the facts upon which it bases that judgment. The recording of the court's findings and reasons is an essential prerequisite for appellate review of sentences.

Subsections (d) and (e) establish the burden of proof required in sentencing hearings. In standard cases the court must have substantial evidence on the record to impose a sentence. This standard, to be employed in the appellate review process, relates to any material fact necessary for application of the guidelines or in justification for a deviation from the guidelines.

In those instances where sentences can be enhanced (especially aggravated offenses or persistent offenders) more substantial procedural requirements are imposed. In these cases the prosecuting attorney must provide notice of the potential for enhanced sentencing, the court must find the facts beyond a reasonable doubt, and the court must in every case place its findings on the record.

Under existing constitutional law, the procedures and proof required for sentencing are unclear. In Williams v. New York, 337 U.S. 241 (1949), the Supreme Court refused to impose due process protections on the sentencing process. It has been assumed that

courts are relatively free to exercise their discretion in evaluating and finding aggravating and mitigating factors and in determining sentence. Only when a sentencing court expressly bases a sentence on misinformation do the appellate courts overturn a sentence. Townsend v. Burke, 334 U.S. 736 (1948); United States v. Tucker, 404 U.S. 443 (1973). This Act provides more structured discretion, more opportunity for articulated premises, and accordingly intensifies the constitutional issues which have been submerged in the traditional discretionary system.

A major issue, in its simplest form, is the extent to which the fact finding process for determining punishment is required to follow due process guidelines traditionally required for determing guilt or innocence. More specifically the troubling problems relating to findings on aggravating factors is whether notice of charges, findings beyond a reasonable doubt, and jury trial are required. The answers are complex and confused.

There seem to be three relevant cases relating to burden of proof. In In re Winship, 397 U.S. 358 (1970) the Supreme Court held that proof beyond a reasonable doubt was constitutionally required in criminal cases and applied the standard to an adjudication of delinquency for a minor accused of committing an act which if committed by an adult would have been a crime. In Mullaney v. Wilbur, 421 U.S. 684 (1975), the Court considered a Maine statutory scheme defining the crime of felonious homicide. Maine had adopted the old common law approach which provided for a finding of murder if the homicide resulted from malice aforethought and manslaughter if the homicide was committed in a "heat of passion". However, malice was presumed upon showing intent and once intent was shown, the defendant had the burden of proof to show by a preponderance of the evidence that he acted under "heat of passion." The defendant argued that this shift in the burden of proof was unconstitutional under Winship. The state argued, pursuant to an interpretation by the Maine Supreme Court, that actually there was only one offense, felonious homicide, and the existence of "heat of passion" went merely to the extent of punishment, i.e. was a mitigating factor relating to sentence, since once intent was shown the defendant was guilty of some crime.

The United States Supreme Court, accepting the Maine interpretation of the statute, nonetheless held the procedure unconstitutional. The Court, fearful that states could circumvent Winship by defining offenses broadly and then making all of the elements of the offense factors relating to punishment, held that in the particular case due process required the prosecutor show lack of "heat of passion" beyond a reasonable doubt. However, in a footnote the Court stated:

> Relying on Williams v. New York . . .and McGautha v. California . . . petitioners seek to buttress this contention by arguing that since the presence or absence of the heat of passion on sudden provocation affects only the extent of punishment it should be considered a matter within the traditional discretion of the sentencing body and therefore not subject to rigorous due process demands. But, cf. United States v. Tucker. . . . There is no incompatibility between our decision today and the traditional discretion afforded sentencing bodies. Under Maine law the jury is given no discretion as to the sentence to be imposed on one found guilty of felonious homicide. If the defendant is found to be a murderer, a mandatory life sentence results. On the other hand, if the jury finds him guilty only of manslaughter it remains for the trial court in the exercise of its discretion to impose a sentence within the statutorily defined limits. 421 U.S. at 697, n. 23.

The Supreme Court backed away from Mullaney in Patterson v. New York, 97 Sup. Ct. 2319 (1977) in which it validated a New York homicide statute that required the defendant to prove the offense was a result of "extreme emotional disturbance" in order to avoid a second-degree murder conviction. The impact of Mullaney and Patterson on sentencing procedures is far from clear. .Mullaney in its entirety could be interpreted to construct a spectrum of factual findings ranging from traditional elements of offenses to defendant characteristics utilized in sentencing with reasonable doubt applying at the former extreme, few limitations applying at the other extreme, and the line being drawn ad hoc in between. On the other hand Patterson suggests that pure sentencing facts need not be proved beyond a reasonable doubt.

Another relevant case is Proffitt v. Florida, 428 U.S. 242 (1976) which upheld the Florida death penalty. The Florida scheme provided for certain capital offenses and listed aggravating and mitigating factors. If the defendant was found guilty of a capital offense a hearing was held before judge and jury. The jury was instructed to find the existence of the statutory factors, to determine whether the mitigating factors "outweighed" the aggravating factors and "based on these considerations" to recommend whether the death penalty should be imposed. The jury verdict, reached by a majority vote, was advisory only. The sentencing judge was required to make the same findings on aggravating and mitigating factors, to consider the advice of the jury, and to impose sentence.

The statutory scheme established no burden of proof on the findings relating to aggravating and mitigating factors. The scheme also allowed the judge to determine the existence of these factors. However, the United States Supreme Court noted that the Florida

court had held that if a jury recommends life imprisonment, the judge should impose death only where the factors are so "clear and convincing that virtually no reasonable person could differ." Id. at 249.

The issue of reasonable doubt and jury trial are only implicitly raised in Proffitt. The case upholds a sentencing procedure in death cases in which findings on sentencing factors are not governed by reasonable doubt standards and in which a jury trial is not required. Mullaney is not cited in the Proffitt opinion.

The Act does not require proof beyond a reasonable doubt on aggravating or mitigating factors in the standard case but does require such proof when the prosecutor seeks to enhance the sentence beyond the maximum by showing the offense is especially aggravated or the offender is a persistent offender. In the standard cases, the factors are more comparable to those traditionally employed by sentencing courts in determining appropriate sentences. However, where the maximum sentence can be enhanced to twice the regular maximum, the aggravating factors become more closely analogous to "elements" of an offense and reasonable doubt seems more appropriate.

See also United States v. Stewart, 531 F.2d 326 (6th Cir. 1976) upholding the provisions of the Federal Organized Crime Control Act of 1970, 18 U.S.C., § 3575 (1976), authorizing an enhanced sentence if the court found by a "preponderance of the information" that an offender was a "dangerous special offender."

SECTION 3-208. [Appellate Review of Sentences.]

(a) Either party to a criminal case may appeal from the length or nature of the sentence imposed by the trial court. An appeal pursuant to this section must be taken within the same time and in the same manner as other appeals in criminal cases.

(b) An appeal from a sentence may be on one or more of the following grounds:

(1) The sentencing court misapplied the sentencing guidelines.

(2) The sentencing court deviated from the sentencing guidelines and the sentence imposed (i) is unduly

disproportionate to sentences imposed for similar offenses on similar defendants, or (ii) does not serve the purposes of this Article and the principles of sentencing better than the sentence provided in the guidelines.

(3) The sentence was not imposed in accordance with this Act.

(4) The applied sentencing guidelines are inconsistent with the purposes of this Article and the principles of sentencing.

(c) If a sentence is appealed, the [Supreme Court; Court of Appeals] may:

(1) dismiss the appeal;

(2) affirm, reduce, increase, modify, vacate, or set aside the sentence imposed;

(3) remand the case or direct the entry of an appropriate sentence or order; or

(4) direct any further proceedings required under the circumstances.

COMMENT

This section authorizes either the defendant or the prosecution to seek appellate review of a sentence. The appeal authorized by this section is to be taken in the same manner as other appeals in criminal cases, and it is expected that, if a defendant appeals from both his conviction and his sentence, all issues would be raised in a single appeal.

Most study groups and commissions have recognized the anomaly that in many jurisdictions an imposed sentence is not reviewable. It is one of the few areas where the trial judge's discretion is final. It has been argued that reaching an appropriate disposition in a criminal case involves such intangible factors that no reviewing court can effectively examine a trial court's findings. However, even in jurisdictions in which sentencing remains premised on rehabilitation, appellate review has been authorized either by legislation

or court decree. In 1978 the American Bar Association found 21 states with appellate review of sentencing in some form but only 15 in which review was realistically available in all cases. ABA, Standards Relating to Appellate Review of Sentences 13 (1968).

Appellate review of sentencing is a fundamental aspect of the act's presumptive sentencing system. Although courts are generally instructed to follow the guidelines of the sentencing commission, Section 3-207 authorizes departures from the guidelines if the sentencing judge believes it would better serve the purposes and principles of sentencing. The discretion of the sentencing court was retained because of the difficulty a legislature or the sentencing commission would face if it were obliged to consider in advance all of the potential cases that could arise. Appellate review of each sentencing court's decisions in these matters will insure that departures from the guidelines are consistent with the standards established in the act and also that new situations will be uniformly handled throughout a state. Appellate review will facilitate the development of a "common law of sentencing" to buttress and supplement the guidelines of the commission.

Subsection (b) states the grounds on which the appeal of a sentence may be taken. Paragraph (1) provides a check on the application of sentencing guidelines. Paragraph (2) regulates departures from the sentencing guidelines. The appellate court is authorized to review whether a sentence departing from the guidelines in fact better serves the purposes and principles of sentencing. The appellate court is also authorized to insure that departures are not disproportionate to other similar cases. Thus it is possible that a sentence could in fact better serve a purpose of sentence but still be modified on appeal as disproportionate to other sentences. Paragraph (3) authorizes review of the procedure utilized by the sentencing court to impose the guidelines. Paragraph (4) allows the appellate court to review the guidelines themselves to insure that the commission has remained consistent with the statutory standards established for the exercise of its discretion.

The appellate court is authorized to either reduce or increase a sentence imposed. The issue of whether to allow an appellate court to increase a sentence is a controversial one. On the one hand, it is argued that to authorize an increase will construct a substantial disincentive to appeal. On the other hand, prohibiting an increase would provide incentives for frivolous appeals and would make equality of sentencing more difficult to obtain. The construction of sentencing guidelines and the resulting reduction in sentencing discretion makes it easier to authorize the prosecutor to appeal and the appellate court to enhance a sentence.

For proposals on appellate review see generally ABA, Standards Relating to Appellate Review of Sentences (1968); Nat'l Advisory Comm'n Correct. 5.11. For legislative attempts to implement appellate review in the federal system see Kutak & Gottschalk, In Search of Rational Sentence: A Return to the Concept of Appellate Review, 53 Neb. L.Rev. 463 (1974).

PART 3
COMMUNITY SUPERVISION

SECTION 3-301. [Community Supervision; Nature.]

A sentence to community supervision requires the defendant to reside in the community subject to the supervision of the division of community-based services pursuant to conditions imposed by the sentencing court in accordance with this Act.

COMMENT

This section defines a sentence to community supervision. This sentence is the Act's counterpart to what is traditionally known as "probation." The word "probation" has a tentative connotation and was generally imposed during a suspension of the imposition or execution of some other sentence. In the Act, the sentence to supervision in the community is a full-fledged sentencing alternative.

SECTION 3-302. [Term and Conditions.]

(a) Whenever a court sentences an offender to community supervision, the court shall specify the term of the supervision and may require the offender to comply with one or more of the following conditions:

(1) meet his family responsibilities;

(2) devote himself to a specific employment or occupation;

(3) perform without compensation services in the community for charitable or governmental agencies;

(4) undergo available medical or psychiatric treatment, and enter and remain in a specified institution

whenever required for that purpose;

(5) pursue a prescribed secular course of study or vocational training;

(6) refrain from possessing a firearm or other dangerous weapon unless granted written permission;

(7) remain within prescribed geographical boundaries and notify the court or the community service officer of any change in his address or employment;

(8) report as directed to the court or a community-service officer; and

(9) satisfy any other conditions reasonably related to the purpose of his sentence and not unduly restrictive of his liberty, incompatible with his freedom of conscience, or otherwise prohibited by this Act.

(b) The court may order the associate director of the division of community-based services to:

(1) provide the offender with reasonable services, programs, or assistance as specified by the court;

(2) provide the offender with an amount of vouchers for purchasing services in the community up to the amount the offender would have received had he been sentenced to confinement; or

(3) report as directed to the court on the progress of the offender.

(c) The court shall comply with applicable guidelines of the sentencing commission and the provisions of Section 3-207 in exercising its powers pursuant to this section.

COMMENT

This section authorizes the judicial imposition of conditions of community supervision. The list of permissible conditions is derived from the Model Penal Code, § 301.1 and follows the general recommendations contained in ABA, Standards Relating to Probation, § 3.2 (1970) and Nat'l Advisory Comm'n Correct. 16.11. All of these proposals recommend a statutory listing of permissible conditions and all reject the statutory requirement that one or more conditions be imposed in all cases.

The list of conditions, broadened by the catch-all provision in paragraph (9), must reflect the purposes and principles of sentencing. In general, the Act eliminates rehabilitation as a permissible criteria in establishing the nature and extent of a penalty. However, Section 3-102 does authorize the court to consider the length of a rehabilitative program in determining the length of a sentence to community supervision. The list of permissible conditions provided in this section contains some which can be linked to a rehabilitative purpose. On the other hand, any coerced condition of community service limits the liberty of the offender and can be perceived as punishment.

Paragraph (3) specifically authorizes what some courts have experimented with in recent years: community service orders. The offender is obliged, as a condition of his community release, to perform services for the community or for a charitable organization during his leisure time. This sentencing alternative was carefully studied and formally implemented in England in 1972. See, Bergman, Community Service in England: An Alternative to Custodial Sentence, Fed. Prob., March, 1975, at 43; Brown, Community Service as a Condition of Probation, Fed. Prob. Dec. 1977 at 7., Griffiths, Community Service by Offenders, 126 New L. J. 169, 193 (1976). See N.C. Gen. Stat., § 15-199 (15) (Supp. 1975) (authorizing as condition of probation the performance of "reasonable and useful community activities").

Some traditional probation conditions have not been specifically included in the list. A condition that the offender consent to search at the request of an officer was not included. Some courts have concluded such a condition without appropriate safeguards is unconstitutional. United States v. Consuelo-Gonzalez, 521F.2d 259 (9th Cir. 1975). See generally Note, Fourth Amendment Limitations on Probation and Parole Supervision, 1976 Duke L. J. 71 (1976); Note, Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers, 51 N.Y.U. L. Rev. 800 (1976.

Other traditional conditions such as prohibiting associations with known criminals have constitutional limitations. To the extent they are permitted they can be imposed under paragraph (9).

SECTION 3-302
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SECTION 3-304

The imposition of a fine or a restitution order is not included in the listed permissible conditions. Part 4 and Part 6 specifically authorize fines and restitution as separate sentencing alternatives.

Subsection (b) recognizes that an order to community supervision is directed both at the offender and the department of corrections and contemplates action on both their parts: on the offender to abide by the conditions and on the department to provide adequate supervision and assistance.

Subsection (c) authorizes the sentencing commission to develop guidelines for the imposition of conditions. The commission is authorized to promulgate criteria relating to the selection of particular conditions. For example, the commission could impose guidelines for the type of community service orders that could be imposed and the number of hours offenders could be required to devote to them. Section 3-207 would still allow the court to deviate from any commission guideline if it better served the purposes and principles of sentencing.

SECTION 3-303. [Provision of Programs and Services.]

Throughout an offender's term of community supervision the associate director of community-based services may provide him with:

(1) access on a voluntary basis to programs or services; and

(2) vouchers for the purchase of programs or services.

SECTION 3-304. [Expiration of Conditions.]

(a) Except for conditions requiring an offender sentenced to community supervision to refrain from possession of firearms, remain within prescribed geographical boundaries, or report to the court or a community service officer, all conditions expire at the end of 2 years.

(b) Notwithstanding subsection (a), if the court after a hearing finds that an offender violated a condition of his supervision within the 2-year period, one or more of the expired conditions may be reimposed for one additional period not exceeding 2 years.

(c) This section does not extend the applicability of conditions of supervision beyond the term of the sentence to community supervision imposed.

COMMENT

This section represents the compromise between eliminating coerced rehabilitation from the correctional system and the utilization of rehabilitation as a relevant factor in determining conditions of release to the community. Subsection (a) places a two-year limitation on conditions which force persons into programs. Conditions relating solely to security and custodial interests may remain in effect throughout the term of community supervision. The power of the court to compel program participation for two years seems adequate; if the program cannot attract the voluntary participation of the offender after that time, then further coercive measures would seem fruitless.

Subsection (b) does allow an extension of the conditions if there is a violation within the first two-year period. This is to insure that some sanction short of confinement remains for violations. Although the condition may be extended for an additional two-year period, subsection (c) insures that no condition may extend beyond the term imposed by the court in the first instance.

SECTION 3-305. [Discharge from Supervision.]

(a) During the term of community supervision, the sentencing court, on its own motion, or on application of the associate director of community-based services or the offender, may:

(1) modify any condition;

(2) remove a condition; or

(3) discharge the offender from further

supervision.

(b) The court may not make the conditions of supervision more onerous than those originally imposed except pursuant to a revocation proceeding under this Act.

(c) Whenever the court finds that the division of community-based services is unwilling or unable to comply with an order issued it pursuant to Section 3-302, the court shall modify the order or discharge the offender from further supervision.

(d) The court shall discharge the offender from supervision when the term of community supervision and any extensions of that term have expired.

COMMENT

This section authorizes the court to modify or remove a condition during the term of community supervision. Particularly with program conditions, the circumstances existing at the time of imposition may radically change during the term of supervision. The offender may prove not to need the particular program imposed; or it may be determined that he cannot satisfactorily complete it. This section gives the court the flexibility to respond to these changing conditions.

Subsection (b) prohibits a court from making the conditions more onerous except after a revocation hearing. As long as the offender complies with the initial conditions imposed it would be unfair to subsequently increase his conditions just as it would be unfair and unconstitutional to enhance an offender's sentence after it was once imposed.

The "extensions of term" referred to in subsection (d) can be imposed pursuant to Section 3-310 as a sanction for violation of conditions.

SECTION 3-306. [Transfer of Jurisdiction.]

(a) Whenever a court authorizes an offender sentenced to community supervision to reside in this State but outside

the jurisdiction of the sentencing court, the court may:

(1) retain jurisdiction over the offender; or

(2) transfer jurisdiction over the offender to an appropriate court in the jurisdiction in which the offender will reside. A court to which jurisdiction is transferred has the same powers as the sentencing court.

(b) [Reserved for ratification of the Interstate Compact for the Supervision of Parolees and Probationers.]

COMMENT

This section authorizes the transfer of persons on community supervision throughout the state. Although a person may be sentenced by a court in a location far from the offender's home, it may be appropriate to have him serve his term of supervision in his home community. Since community supervision involves a higher degree of judicial supervision than sentences involving confinement, it is important that a judge in the locality be empowered to exercise supervision.

Subsection (b) is reserved for ratification of the Interstate Compact for the Supervision of Parolees and Probationers. The Compact approved by the states and Congress, provides a mechanism for the transfer of a person on community supervision to another state for supervision.

SECTION 3-307. [Violation of Conditions.]

(a) Whenever a community service officer believes that an offender sentenced to community supervision has violated a condition of his supervision, he shall submit a written report to the sentencing court.

(b) Whenever the sentencing court believes that an offender sentenced to community supervision has violated a condition of his supervision, it may:

(1) suspend with an appropriate notation in the record any further proceeding on the alleged violation;

(2) instruct the community service officer to handle the matter informally without instituting formal revocation procedures;

(3) request the offender to meet informally with it to review the offender's obligations under the sentence;

(4) issue an order for the offender to appear at a time, date, and place for a hearing on the violation; or

(5) if the offender does not comply with the order to appear at the hearing or it otherwise appears unlikely that he will comply, issue a warrant for the arrest of the offender. Any law enforcement officer authorized to serve criminal process in this State to whom a warrant issued under this subsection is delivered shall execute the warrant by arresting the offender.

(c) An order or warrant issued under this section must be accompanied by written notice of:

(1) the conditions alleged to have been violated and the facts and circumstances surrounding the alleged violation;

(2) the right to a preliminary hearing upon detention and the rights and procedures applicable to that hearing;

(3) the right to a revocation hearing and the rights and procedures applicable to that hearing;

(4) the manner in which he may secure appointed

legal counsel, if eligible; and

(5) the possible sanctions that may be ordered by the sentencing court if it finds a violation of the conditions of supervision has occurred.

(d) Whenever the court issues an order or warrant pursuant to this section, it shall notify the prosecuting attorney who shall represent the state.

COMMENT

This section establishes the procedures to be followed in the event of a suspected violation of a condition of community supervision . One of the major values of a sentence back to the community is that it allows the offender to retain his community ties including family and employment. An arrest and detention merely on suspicion of a condition violation, many of which do not involve criminal conduct, defeats one of the gains from such a sentence. Further, in many cases where a violation has in fact occurred, it may not be significant enough to warrant a sentence of confinement. This section is structured to provide mechanisms to prevent disruption of the offender's life during the revocation procedures unless necessary for public security.

Subsection (a) requires a written report to be submitted to the sentencing court when a violation is suspected. The community service officer is not authorized to arrest or otherwise detain an offender on his own motion. He does retain the powers of arrest granted to a private citizen and thus could in appropriate instances arrest an offender caught in the act of committing a criminal offense. Short of that however, judicial permission must be obtained.

Subsection (b) formalizes the procedures utilized in most states by specifically authorizing the court to take a measured approach to alleged violations. The subsection is modeled after Neb. Rev. Stat., § 29-2266 (Reissue 1975). The court may informally handle the alleged violation without initiating formal revocation procedures. Paragraph (1) allows the court to suspend further proceedings. This may be appropriate if the court does not believe evidence of a violation exists or if the violation is of a minor nature and unlikely to reoccur. The language "with an appropriate notation" requires the court to make a record of his action. In some instances repeated minor violations may warrant more formal action and this insures a record of such incidents.

Paragraphs (2) and (3) authorize the court or the community service officer to informally counsel an offender concerning a violation. In some instances the violation will result from misinterpretation of the condition or circumstances not contemplated when the condition was imposed. These situations can often be worked out without the necessity for formal procedures.

Paragraph (4) authorizes the issuance of an order in the nature of a summons for the offender to appear for a revocation hearing. Paragraph (5) authorizes the arrest of the offender pending revocation proceedings if it is unlikely that he will appear at the hearing. This section does not limit other procedures authorizing the arrest of an offender charged or accused of committing a criminal offense. Rules applicable to all citizens would apply.

Subsection (c) specifies that an order or warrant issued to initiate revocation proceedings be accompanied by notice of the elements listed. The due process requirements applicable to revocation procedures were outlined specifically by the United States Supreme Court in Morrissey v. Brewer, 408 U.S. 471 (1972). The Court required notice of the hearing and its purpose and of the violations alleged to have occurred. The section goes slightly farther and requires the notice to contain the nature of the procedural rights due the offender at the various hearings and the potential sanctions if a violation is proved. The section is patterned after: Nat'l Advisory Comm'n Correct. Std. 16.1.

SECTION 3-308 [Preliminary Hearing.]

(a) If an offender is not detained before a hearing on the alleged violation, he shall appear at the time, date, and place in the order directing him to appear.

(b) Upon the arrest and detention of an offender for violation of a condition of his supervision, a (magistrate) without unnecessary delay shall hold a preliminary hearing to determine whether there is probable cause to believe that a violation has occurred.

(c) At the preliminary hearing:

(1) the state and the offender may offer evidence, subpoena witnesses, call and cross-examine witnesses, and pre-

sent arguments; and

(2) the offender is entitled to be represented by legal counsel and, if indigent, to have legal counsel appointed for him.

(d) If the [magistrate] determines from the evidence that there is probable cause to believe that the offender violated a condition of his supervision, he shall determine whether the offender is eligible for bail or other form of release in the manner authorized for a person accused of an offense and awaiting trial.

(e) If the [magistrate] determines there is not probable cause, he shall discharge the offender and further proceedings relating to the alleged violation terminates.

COMMENT

Morrissey v. Brewer, 408 U.S. 471 (1972) holds that due process requires a preliminary hearing for persons detained on accusations of parole violations. These due process considerations were made applicable to probation in Gagnon v. Scarpelli, 411 U.S. 778 (1973). This section implements that due process requirement.

Subsection (b) provides that the preliminary hearing be conducted by a "magistrate" of some similar judicial official. The Supreme Court has indicated that a judicial hearing officer is not required although the hearing officer must be impartial and cannot be the supervising officer making the accusation. Since the revocation of community supervision, unlike parole, involves the judicial branch and since magistrates or similar officers are already available to make similar probable cause determinations it seems appropriate and efficient to allow them to do so here.

The standard, "probable cause to believe that a violation has occurred" is adopted by the Supreme Court in Morrissey. The Court in Morrissey suggested that confrontation and cross-examination could be eliminated by the hearing officer if an informant would be subjected to a risk of harm. The section provides no similar escape clause. The serious nature of the potential sanc-

tion which can be imposed on the offender -- withdrawal of liberty -- requires that the facts be accurately tested.

In Gagnon, the Court did not impose an absolute requirement of legal counsel in a probation revocation proceeding. Instead, the Court held that due process only required legal representation when the offender's "version of a disputed issue can fairly be represented only by a trained advocate." The American Bar Association rejected this "case by case" approach in ABA, Standards Relating to Probation, § 5.4 (a) (1970) noting that "it is not possible to examine a record after the event and determine with any accuracy whether the defendant was 'hurt' by the absence of counsel." The Court had earlier required counsel in a revocation proceeding when the imposition of sentence had been suspended. Mempa v. Rhay, 389 U.S. 128 (1967). Legal representation is recommended in Nat'l Advisory Comm'n Correct. Std. 16.11.

SECTION 3-309. [Revocation Hearing.]

(a) Within 30 days after issuance of an order to appear or the arrest of the offender, the court having jurisdiction over the offender shall hold a hearing to determine whether a violation of a condition of supervision has occurred and, if so, whether revocation of community supervision is warranted.

(b) At the hearing:

(1) the state and the offender may offer evidence, subpoena witnesses, call and cross-examine witnesses, and present arguments;

(2) the offender is entitled to be represented by legal counsel and, if indigent, to have legal counsel appointed for him; and

(3) the court shall assure a full and complete record of the hearing.

(c) The court shall render a decision on the record

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at the hearing or in writing within 14 days after the hearing. The court shall place on the record its findings of fact and reasons for its decision.

COMMENT

The section establishing the procedures at the revocation hearing is in large measure dictated by Morrissey v. Brewer, 408 U.S. 471 (1972). The section does extend the right to counsel and confrontation of witnesses slightly beyond the Court's ruling. See comment to Section 3-308. The Supreme Court required a written decision at the revocation hearing.

SECTION 3-310. [Sanctions for Violation.]

(a) If the court finds that the offender violated a condition of community supervision, it shall, consistent with what is reasonably likely to promote the purpose of the sentence and the effectiveness of a system of supervised release:

(1) continue supervision in the community under the conditions previously imposed;

(2) intensify supervision with an increased reporting requirement;

(3) impose additional conditions of supervision authorized by this Act;

(4) impose a fine not to exceed the fine that could originally have been imposed for the offense committed;

(5) extend the term of supervision;

(6) require service of a term of periodic confinement; or

(7) require service of a term of continuous confinement.

(b) The court shall comply with applicable guidelines of the sentencing commission and the provisions of Section 3-207 in exercising its powers under this section. An order under this section may not extend the total period of supervision and confinement beyond the maximum term of supervision authorized by law for the offense for which the offender was originally sentenced.

COMMENT

This section provides a list of sanctions available to a sentencing court for persons violating conditions of community supervision. The selection of the appropriate sanction is based on two factors: the purpose of the sentence and the effectiveness of a system of supervised release. The former refers to the purposes of sentencing announced in Section 3-101. Thus, the sanction should be consistent with the underlying purpose of the original sentence. The second factor recognizes that sanctions are necessary to maintain the orderly administration of community supervision. Above what might be required to fulfill the purpose of the sentence, the system's needs can also be taken into account to keep the threat of revocation credible. Thus a sanction might be imposed to deter future violations of conditions.

The list of alternative sanctions is a recitation of the original sentencing alternatives. This reflects the practice in most jurisdictions of suspending the imposition or execution of a sentence and granting probation. If probation is violated, the offender comes back to the court for sentencing as though probation had not been granted. The Act makes community supervision a sentencing alternative without requiring suspending another sentence.

Subsection (b) provides a limitation on the sanction that can be imposed. The second sentence insures that in no case will the maximum sentence established by the legislature be exceeded. For example, if a person was convicted of an offense with a 5 year maximum for community supervision and was sentenced to community supervision for 3 years, upon violation of a condition that person could be sentenced to confinement for a maximum of 2 years.

Subsection (b) also authorizes the sentencing commission to establish guidelines for imposing sanctions for violations. It may be possible for a guideline matrix to be developed similar to that available for the original sentence, which would provide more uniformity and fairness to the process.

SECTION 3-311. [Revocation Proceedings; Simultaneous Proceedings.]

(a) Whenever criminal proceedings are pending against an offender serving a term of community supervision for an offense arising out of a transaction also involving a violation of a condition of his supervision, a revocation hearing to revoke his supervision shall be stayed until the criminal proceedings are concluded.

(b) Testimony or other information given by an offender at a revocation hearing on a charge of violation of a condition of his community supervision or any information directly or indirectly derived from that testimony or information may not be used against the offender in any criminal prosecution.

(c) Evidence adduced at the criminal proceedings and the outcome of the proceedings is admissible at a revocation hearing if otherwise relevant.

COMMENT

This section seeks to resolve the dilemma often faced by offenders who are charged with a violation of their community supervision which also involves potential criminal liability. It is difficult at best to carry on a defense in both proceedings at the same time. There are instances when an offender may wish to preserve his fifth amendment rights for purposes of the criminal prosecution and yet can either

be forced to testify in a revocation proceeding or would want to do so. In Baxter v. Palmigiano, 425 U.S. 308 (1976) the Supreme Court permitted an adverse inference to be drawn from an offender's silence in a disciplinary proceeding. It is uncertain whether the same rule would apply in a revocation proceeding.

Subsection (a) gives priority to a criminal prosecution and requires that a revocation proceeding be stayed if a prosecution is pending. Ordinarily it would be wise for the sentencing court to obtain some statement from the prosecuting attorney as to whether he intends to prosecute before initiating revocation proceedings. On the other hand, presecutorial delay should not prevent a revocation proceeding from going forward.

Subsection (b) removes the dilemma faced by an offender charged both with a crime and a violation of his community supervision. The subsection grants use immunity for any statement made during the revocation proceeding in any subsequent criminal prosecution.

Subsection (c) insures that the findings and evidence adduced at a criminal trial are admissible in a revocation proceeding. This would apply both to findings of guilt as well as innocence. The provision does not give estoppel affect to the findings in the criminal proceeding because of the different standards of proof involved.

SECTION 3-312. [Appellate Review of Revocation Proceedings.] Whenever a court imposes a penalty under Section 3-310 for violation of a condition of community supervision, the penalty shall be treated as an imposition of sentence for purposes of appellate review pursuant to Section 3-208.

COMMENT

The act makes community supervision, formerly probation, a sentencing alternative rather than an incident of a suspended sentence. Since the revocation is a judicial function, however, it seems appropriate to authorize the same form of appellate review as available for sentencing decisions. It is unlikely a defendant will appeal from a minor sanction because the appellate court has the power to enhance the penalty. The prosecution also has the authority to appeal from too light a penalty.

PART 4
FINES

SECTION 3-401. [Fines; Imposition.]

(a) A court shall comply with applicable guidelines of the sentencing commission and the provisions of Section 3-207 in imposing fines.

(b) The court shall specify the time for payment of a fine and may permit payment in installments. The court may not establish a payment schedule extending beyond the statutory maximum term of community supervision that could have been imposed for the offense.

(c) In determining the amount and method of payment of a fine, the court shall consider the financial resources and future ability of the offender to pay the fine and the likely adverse effect a fine will have on his ability to make restitution and on dependents of the offender. The court may not impose a fine that will prevent the defendant from making court-ordered restitution.

(d) If an offender is sentenced to pay a fine, the court may not impose at the same time an alternative sentence of confinement to be served in the event the fine is not paid.

COMMENT

This and the following sections outline the elements of a sentence to pay a fine. The decision to impose a fine and the amount are governed by sentencing commission guidelines.

Subsection (b) authorizes the court to specify the time and method of payment and to permit payments in installments. The use of fines as a criminal sanction raises difficult questions of equal treatment, particularly when indigent or nearly indigent persons are involved. The use of installment payments eases the pressure on the offender and makes the fine a more flexible and more realistic sanction. Installment payments are authorized or recommended in ABA Sentencing Standards, § 2.7(c); Model Penal Code, § 302.1(1); Nat'l Advisory Comm'n Correc. Std. 5.5; Proposed New Federal Criminal Code, § 3302(1). See also Frazier v. Jordan, 457 F.2d 726 (5th Circ. 1972); Note, Fines and Fining--An Evaluation, 101 U. Pa. L. Rev. 1013 (1953).

The payment schedule for installment payments may not extend beyond the statutory maximum term of community supervision. This provision combined with the requirement in subsection (c) that the financial resources of the offender be considered in establishing the amount of a fine, places an outside limit on the fine that can be imposed. Extending payment schedules beyond the maximum term because of the indigency of the offender would be unconstitutional. Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

Subsection (c) establishes factors to be considered in imposing fines and by doing so creates a priority claim against the resources of the offender for restitution over payment of fines. This priority is based on a balancing of the interests involved. For purposes of imposing a punishment on the defendant, it does not matter whether he is required to pay the amount to the victim or the state. As between the state and the victim, the Act gives priority to the victim's claim for compensation. There is a growing recognition that the criminal justice system has often ignored the plight of criminal victims and many states are developing victim compensation programs. See Uniform Crime Victims Reparations Act. In many instances, direct payment from the offender to the victim will alleviate or reduce the state's obligation under a victim compensation or general welfare program.

Subsection (d) prevents the traditional sentence of "30 dollars or 30 days." A sentence framed in this manner would be unconstitutional as applied to indigent defendants. Tate v. Short, 401 U.S. 395 (1971). The sentence appears not to provide a mechanism for showing that the failure to pay is not due to indigency. Section 3-404 of this Act allows the use of incarceration for failure to pay a fine only after a showing that the offender had the means or reasonably could acquire the means to satisfy the fine. See also Frazier v. Jordan, 457 F.2d 726 (5th Cir. 1972); State v. Tackett, 52 Haw. 601, 483 P.2d 191 (1971).

SECTION 3-402. [Trust for Civil Judgments.]

(a) Whenever a fine could be imposed on an offender based on gain derived from or loss caused by his offense, the court, as an alternative to imposing the fine, may require the offender to establish a trust and to pay into the trust an amount equal to the amount of the fine. The trust shall be established and a trustee appointed in a manner approved by the court.

(b) The provisions of the trust shall authorize the trustee to pay out of the trust any judgment obtained against the offender in a civil action, commenced within 3 years after the date the sentence becomes final, for loss arising out of the offense or any transaction which is part

of the same continuous scheme of criminal activity. The trustee may make payments from the trust based on a settlement agreement between the offender and a victim if approved by the court. If the trust is insufficient to pay all claims arising out of the offense or scheme of criminal activity, the court may approve a formula for partial payment.

(c) If the court determines that it is unlikely the funds will be needed to pay civil judgments rendered against the offender, the court shall order the funds remaining in the trust to be paid to the State.

(d) The court may order the defendant to give notice of the availability and the terms of the trust to the class of persons or the members of the public likely to have suffered loss because of the offense or the scheme of which the offense was a part.

(e) Payment of any civil judgment from the trust satisfies the judgment to the extent of the payment. This section does not prevent a judgment creditor from enforcing the judgment or any unpaid portion directly against the offender. Payment directly by the offender of any civil judgment arising out of the offense subrogates the offender to the judgment creditor's claim against the trust.

(f) The trust is not an asset of the offender and is not subject to attachment, garnishment, or other enforcement proceedings.

(g) Failure to comply with an order pursuant to this section is treated in the same manner as non-payment of a fine.

COMMENT

This section further implements the policy of the Act to favor victim compensation by giving the victim a higher claim to the defendant's assets than the state. The section allows the court, in lieu of a fine imposed on the basis of gain or loss caused by the criminal conduct, to require the defendant to establish a trust to pay civil judgments of victims arising out of his criminal behavior. The tendency in most states is to specify, either by statute or constitutional provision, the purpose to which the income from fines is to be put. The section is drafted as a sentence in lieu of a fine in order not to upset these other provisions.

There is only scattered precedent for this section. A now repealed New York provision provided that some fines could be paid to the county clerk and held in trust for victim compensation. N.Y. Penal Law, § 1302 (McKinney 1909). And a Virginia federal court required as a condition of probation that a company convicted of polluting a river establish a trust to be used to rectify the resulting damage and for environmental research. Richmond Times Dispatch, August 25, 1977. The idea of a trust for victims is inherent also in the federal provisions allowing state attorney generals to sue on behalf of the state's consumers for violations of the federal antitrust laws. 15 U.S.C., § 15c (1976).

Subsection (b) limits claimants to judgment creditors. The requirement of a civil judgment is to avoid unnecessary conflict with the civil system. Payments based on a settlement agreement must be approved by the court to insure some protection where there are multiple claimants.

Subsection (c) directs that funds remaining in the trust after payment of claims to be forfeited to the state. The amount of the initial payment by the offender remains a sanction for criminal activity based on deserved punishment. There should be no reduction in the punishment deserved because of the failure of some victims to obtain judgments in civil cases. On

the other hand, the victims of offenses should not receive a windfall and thus recovery from the trust does satisfy claims against the offender. And subsection (e) allows the offender who pays a civil judgment directly to recover the amount from the trust in order to insure he is not required to pay the same amount twice.

SECTION 3-403. [Modification or Waiver.]

An offender at any time may petition the sentencing court to adjust or otherwise waive payment of any fine imposed or any unpaid portion thereof. If the court finds that the circumstances upon which it based the imposition or amount and method of payment of the fine no longer exist or that it otherwise would be unjust to require payment of the fine as imposed, the court may adjust or waive payment of the unpaid portion thereof or modify the time or method of payment. The court may extend the payment schedule, but a payment schedule may not require a payment on a date beyond the statutory maximum term of community supervision that could have been imposed for the offense.

COMMENT

The section allows periodic monitoring and modification of a fine after it is imposed. The economic circumstances of the offender may radically change during the payment period. Because a person cannot be punished for failure to pay a fine if the person is indigent or unable to reasonably obtain funds to do so, greater flexibility is provided if the court may modify or if necessary waive future payments. Other proposals have recognized the necessity for modification authority. ABA Sentencing Standards, § 6.5; Model Penal Code, § 302.3; Nat'l Advisory Comm'n Correc. Std. 5.5; Proposed New Federal Criminal Code, § 3303.

SECTION 3-404. [Nonpayment.]

(a) If an offender sentenced to pay a fine defaults in payment, the court upon the motion of the prosecuting attorney or its own motion may issue an order requiring him to show cause why he should not be confined for nonpayment. The court may order him to appear at a time, date, and place for a hearing or issue a warrant for his arrest. The order or warrant must be accompanied by written notice of his right to a hearing and the rights and procedures applicable thereto. The procedures and rights of the offender at the hearing are the same as those applicable to a hearing to revoke community supervision.

(b) Unless the offender shows that his default was not attributable to an intentional refusal to obey the sentence of the court or to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the offender to serve a term of periodic or continuous confinement not to exceed [years] if imposed for conviction of a felony or [year] if imposed for conviction of a misdemeanor. The term runs consecutively with any other term of confinement being served by the offender. The court may provide in its order that payment or satisfaction of the fine at any time will entitle the offender to his release from confinement or, after entering

the order, at any time for good cause shown may reduce the term of confinement, including payment or satisfaction of the fine.

(c) The court shall comply with applicable guidelines of the sentencing commission and the provisions of Section 3-207 in imposing confinement for nonpayment of a fine.

(d) If a fine is imposed on an organization, it is the duty of any person authorized to order the disbursement of assets of the organization, and his superiors, to pay the fine from assets of the organization under his control. The failure of a person to do so renders him subject to an order to show cause why he should not be confined.

(e) The court may order [a community service officer] to supervise the payment of the fine and to report to the court a default in payment.

(f) A fine constitutes a judgment rendered in favor of the State. Following a default in the payment of a fine or any installment thereof, the sentencing court may order the fine to be collected by any method authorized for the enforcement of other money judgments rendered in favor of the State.

COMMENT

This section establishes the procedure for enforcement of fines. In some jurisdictions, fines are imposed as a condition

of probation and nonpayment is treated as a violation of probation. In others, failure to pay a fine may be viewed as a contempt of court and treated accordingly. The former approach is adopted here, to provide a more flexible procedure.

Subsection (a) authorizes the initiation of the procedures upon a showing of nonpayment. Once that showing is made the burden of proof shifts to the defendant to show that the nonpayment is not attributable to an intentional refusal to pay. The shift of the burden seems appropriate here since most of the evidence regarding his financial status and his ability to acquire funds is in his possession. The requirement that sanctions be imposed only for an intentional refusal to pay a fine has been widely accepted as an appropriate standard. See ABA Sentencing Standards, § 6.5; Model Penal Code, § 302.2; Nat'l Advisory Comm'n Correc. Std. 5.5; Proposed New Federal Criminal Code § 3304.

The court is authorized to impose a term of periodic or continuous confinement if an intentional refusal to pay the fine is shown. The section leaves blank the maximum term that could be imposed; states may wish to insert here the same terms authorized for sentences to community supervision. The court is also authorized to order that the offender be discharged from confinement if he pays the fine.

Subsection (d) provides a method of enforcing fines against organizations. The provision is modeled after Model Panel Code § 302.2; Nat'l Advisory Comm'n Correc. Std. 5.5; Proposed New Federal Criminal Code, § 3304. Subsection (f) authorizes the collection of fines in the same manner as other judgments in favor of the state. The provision is similar to ABA Sentencing Standards, § 6.5; Model Penal Code, § 302.2.

PART 5
CONFINEMENT

SECTION 3-501. [Sentences to Confinement; Good Time Reductions.]

(a) A sentence to a term of confinement must be for a definite period prescribed by this Act.

(b) An offender's term of continuous confinement must be reduced for good behavior by one day for each day or part of a day he serves unless withheld for disciplinary purposes under this Act.

(c) For split sentences, reductions for good behavior are credited only for time spent in confinement and reduce the portion of the sentence involving confinement. Good time may not be credited for sentences to periodic confinement.

(d) The director shall release an offender who has served the sentence imposed minus reductions for good behavior.

COMMENT

This section establishes the basic elements of a sentence to confinement. The Act provides for definite terms of confinement abolishing discretionary release through parole. The sentencing court is required to impose a set term of years, i.e., one year, rather than the maximum and minimum sentences now common in many jurisdictions.

Subsection (b) authorizes the reduction in the term imposed by the court unless the offender fails to abide by the rules of the facility. The subsection allows a credit of one day for each day served unless the credit is withheld for disciplinary purposes. Thus an offender sentenced to a one year term would be released after 6 months if he had no disciplinary infractions.

Almost all jurisdictions currently utilize some form of good behavior credits. See ABA Resource Center on Correctional Law and Legal Services, Sentencing Computation Laws and Practice (1974) (survey disclosed only 4 states not utilizing good-time credits). In some, these credits are automatically given to each offender and can then be forfeited or withheld. In some jurisdictions an offender must earn his good-time, generally by avoiding disciplinary offenses but occasionally by participating in rehabilitative programs or performing charitable acts such as blood donations.

One of the basic policies of the Act is to avoid coerced rehabilitation programs. Subsection (b) is drafted to insure that good-time credits will not be utilized to encourage participation or deter non-participation in programs. The concept of good-time is retained solely to provide a substantial disciplinary punishment in order to maintain order in facilities. Procedures for withholding or forfeiting good-time for disciplinary infractions are established in Article 4.

Subsection (c) insures that on a split-sentence, one in which the offender initially serves a short term of continuous confinement followed by a term of community supervision, reductions for good behavior apply only to the initial term of confinement. Thus a split-sentence of 90 days confinement with one year community supervision would require, absent disciplinary infractions, the offender to serve 45 days of confinement with a full year of supervision. Offenders serving sentences of periodic confinement or confinement during leisure hours are not entitled to reductions for good behavior. The use of "good-time" is not needed in community-based settings as a sanction to maintain order because authorities have the potential sanction of reincarceration for violations of conditions.

Subsection (d) specifically authorizes the offender's release at the end of the sentence imposed minus reductions for good behavior.

SECTION 3-502. [Computation of Term of Confinement.]

(a) A sentence to a term of confinement commences on the date the offender is received by the department pursuant to the sentence unless the sentence is to be served concurrently with another sentence to be served in the custody of another jurisdiction, in which case the term commences on the date he is received by the other jurisdiction or the date the sentence is imposed, whichever is later.

(b) An offender must be given credit against his sentence for all time spent in confinement before being received by the department pursuant to the sentence as a result of the offense for which the sentence was imposed.

(c) If an offender is arrested on one charge and later prosecuted on another charge growing out of conduct occurring before his arrest, he must be given credit against his sentence resulting from that prosecution for all time spent in confinement under the former charge which has not been credited against another sentence.

(d) If an offender is subject to multiple sentences and one is set aside as the result of direct or collateral attack, he must be given credit against his remaining sentences for all time served pursuant to the sentence set aside which has not been credited against another sentence.

(e) If a sentence is set aside and the offender is reprosecuted or resentenced for the same offense or for

another offense based on the same conduct, he must be given credit against his new sentence for all time served pursuant to the prior sentence which has not been credited against another sentence.

(f) Credit given an offender for time served before being received by the department must include an additional credit for good time credited while confined. A person confined before commencement of his sentence earns good time reductions and otherwise is subject to Section 3-501(b) as if he were an offender.

COMMENT

This section establishes the date on which a sentence to confinement begins and authorizes credit against the sentence for time spent in custody prior to the commencement of the sentence. A sentence to confinement begins when the offender is received by the department. Section 2-405(f) provides for the commencement of a sentence if the offender is sent to a local jail during the transition from local to state administration of all facilities.

Subsection (b) provides for credit against the sentence for all time spent in custody before receipt by the department. In most cases, confinement prior to trial results from an inability to make bail and fairness would seem to require that credit be given for this time on any eventual sentence to confinement. A 1974 study by the American Bar Association found that 41 states provide some form of at least partial credit for jail time. ABA Resource Center on Correctional Law & Legal Services, Sentencing Computation Laws and Practice 14 (1974). The method of granting credit varies among the states. In some states credit for jail time is required; in others it is discretionary with the trial judge. In some credit is given for time spent in confinement prior to sentencing but not during appeals although the latter probably violates the equal protection clause. See Pruett v. Texas, 470 F.2d 1182 (5th Cir. 1973),

aff'd. mem. 414 U.S. 802 (1973). Various state statutes are examined in ABA, Sentencing Alternatives and Procedures 187 (1968); Schornhorst, Presentence Confinement and the Constitution: The Burial of Dead Time, 23 Hastings L.J. 1041 (1972).

Some courts have held that to deny credit for jail time is a violation of equal protection because it discriminates against those unable to make bail. Ham v. North Carolina, 471 F.2d 406 (4th Cir. 1973); United States v. Gaines, 449 F.2d 143 (2d Cir. 1971). See also Schornhorst, supra.

Subsection (c) responds to the not unusual situation in which an offender is arrested on one charge and subsequently prosecuted on another charge. This subsection insures that time spent in confinement on the earlier charge be credited against the sentence on the later prosecution. The last clause insures that an offender does not receive credit for the same time more than once. Identical language is recommended in ABA, Sentencing Alternatives and Procedures, § 3.6 (1968).

Subsection (d) allows in addition to the actual time served a credit for good time earned during such confinement. Thus if a pretrial detainee served 30 days in jail prior to his trial he would be entitled to a credit amounting to those 30 days plus 30 days good-time. This assumes, of course, that he did not forfeit good time for disciplinary infractions. The use of the credit for good time as well as time served provides added incentive for pretrial detainees to abide by institutional rules.

SECTION 3-503. [Split Sentence.]

(a) A court may impose a split sentence of continuous confinement for not more than 180 days, or periodic confinement during a period of not more than 180 days, followed by a term of community supervision.

(b) In imposing a split sentence of continuous confinement and community supervision the court shall:

(1) specify that the term of confinement be served in the custody of the department's division of

community-based services, or division of jail administration; and

(2) establish the term of the confinement and the term and conditions of community supervision.

(c) In imposing a split sentence of periodic confinement and community supervision the court shall:

(1) place the offender in the custody of the division of community-based services; and

(2) establish the term and conditions of the periodic confinement and community supervision.

(d) At the expiration of a term of continuous or periodic confinement, the offender shall be transferred to the custody of the division of community-based services for supervision in the community.

(e) The court shall comply with applicable guidelines of the sentencing commission and the provisions of Section 3-207 in exercising its powers under this section.

COMMENT

This section outlines the elements of a split sentence of confinement and community supervision. The section authorizes two different forms of split sentence: in the first the offender serves a short term of continuous confinement followed by community supervision. The use of a mixed confinement-supervision sentence is to provide a wider range of sentencing alternatives in order to reduce the dependency on continuous confinement.

Proposals for split sentences have engendered some opposition. President's Comm'n on Law Enforcement & Criminal Justice, Task Force on Corrections, Appendix A, 206 (1967); Barkin,

Sentencing the Adult Offender, 26 Fed. Prob., June, 1962, at 11-12. On the other hand the concept of split sentences was accepted in ABA, Sentencing Alternatives and Procedures, § 2.4(a)(iii)(1968); Fla. Stat. Ann. 948.01 (West 1976); N.C. Gen. Stat., § 15-197.1 (1975). It is also likely that even without specific authority, courts by using their power to suspend part of a sentence have imposed split sentences.

The major objection to a split sentence is based on the premise that probation should be exclusively rehabilitative. It avoids the disruption of an offender's contacts with the community. An initial jail sentence prior to supervision is seen as counter productive toward that end. This Act rejects rehabilitation as a permissible purpose of sentencing. The use of a short term of confinement may have a deterrent effect or in some cases be an appropriately deserved sentence. Absent authorization of these intermediate sentences, the likelihood is that sentences of continuous confinement would be imposed.

Subsections (b) through (d) designate the appropriate division within the department to maintain custody over persons serving split sentences. The sections do not authorize the confinement portion to be served in the division of facility-based services which is responsible for long-term offenders. By keeping the confinement portion of the sentence in community-based facilities, the section facilitates the maintenance of community ties during the confinement stage of the sentence.

Subsection (e) authorizes the sentencing commission to develop guidelines for split sentences which would regulate the discretion of sentencing courts in the same manner as other guidelines.

SECTION 3-504. [Periodic Confinement; Effect.]

Under a sentence to the custody of the division of community-based services for a term of periodic confinement the offender serves the sentence of confinement on specified days or during specified parts of days, or both, in a correctional facility with the remainder of the time to be spent at liberty in the community subject to the supervision of the division under conditions imposed by the sentencing court.

COMMENT

This and the following sections outline the elements of a sentence to periodic confinement. Periodic confinement requires the offender to spend part or all of his leisure time in confinement and the remainder of the time subject to community supervision. The alternative provides another midrange penalty as an alternative to either outright release or continuous confinement. The sections are modeled in part after Ill. Ann. Stat., § 1005-7-1 (1972 draft).

SECTION 3-505. [Term and Conditions of Periodic Confinement.]

(a) If the court sentences an offender to a term of periodic confinement, it may attach one or more of the conditions authorized for a sentence to community supervision and shall specify:

(1) the term of periodic confinement, which may not exceed the maximum sentence prescribed for the offense; and

(2) the days or parts of days the offender is to be confined.

(b) The court shall comply with applicable guidelines of the sentencing commission and the provisions of Section 3-207 in exercising its powers under this section.

SECTION 3-506. [Violation of Conditions of Periodic Confinement.] Whenever an offender sentenced to a term of periodic

confinement fails to return to his place of confinement at the time specified in his sentence or violates any condition imposed, he shall be treated as if he were in violation of a condition of community supervision.

COMMENT

The section makes failure to return to confinement as required in a sentence to periodic confinement subject to revocation procedures as though it were a violation of a condition of community supervision. This incorporates into this section the procedures established in Part 2.

In some work-release programs, failure to return is treated as though it were an escape from confinement. A sentence to periodic confinement so closely resembles community supervision that it appears appropriate to use the more flexible revocation procedures for failure to return. On the other hand, an actual escape from a facility during the period of confinement would be treated as an escape.

SECTION 3-507. [Pre-release and Post-release Programs.]

(a) The director shall establish:

(1) a pre-release assistance program to assist confined persons about to be released; and

(2) a post-release assistance program for released persons.

(b) The pre-release and post-release assistance programs shall provide counseling and other services and, to the extent feasible, shall utilize existing resources from the community.

(c) A person released from confinement may participate

in a post-release assistance program for one year after his release.

(d) Within legislative appropriation therefor, the director may provide economic assistance to released persons conditioned upon their participation in release assistance programs.

COMMENT

This section requires the director of corrections to establish release assistance programs. Pre-release programs would consist of counseling and other programs directed at persons in confinement and about to be released. Post-release assistance programs would be directed at persons already released and would be made available in the free community. In both instances programs could be directed to assist the person in securing employment, reestablishing his family and other social relationships, and obtaining treatment for physical or emotional disorders including alcoholism and narcotic addiction. Psychotherapy may also be provided.

Persons will participate on a voluntary basis in programs offered under this section. There is no coercive sanction provided. The success of the programs will be determined by the extent to which they are perceived by confined persons to be helpful. This section carries through on one of the act's themes of elimination of coerced self-improvement programs.

The idea of a release assistance program is not new. Indeed much of the current parole system is based on the articulated premise that the parole supervisor will provide assistance to persons released from confinement in order to help him make a gradual, and more successful reentry into the free community. In traditional parole systems the function of assistance was combined with the function of supervision. The parole officer was not only required to provide programs but also to supervise the behavior of the released person during the parole term. It has been recognized that service and surveillance tend to predominate. D. Glaser, The Effectiveness of a Prison and Parole System (1964); Nat'l Advisory Comm'n Correc. Std. 12.7; Studt, Surveillance and Service in Parole (1972). See also ABA Joint Comm. at 607-08.

The Act does not prescribe a term of supervision following release from confinement. To do so would require the use of reconfinement as a sanction for failure to comply with the conditions of supervision. Confinement should be reserved as a

sanction for criminal behavior. On the other hand, there may be a need to provide some incentives for released persons to sample post-release programs. Subsection (d) authorizes the use of economic incentives. Traditionally a lump sum of cash, generally quite modest, is given to each released offender. Subject to the availability of funds, the director may offer substantially more financial assistance under this section conditioned on participation in release programs.

See generally ACA Comm'n on Accreditation, Standards for Adult Correctional Institutions 4445-55 (1977) (recommending specific pre-release programs).

SECTION 3-508. [Release of Confined Persons.]

(a) Upon final release of a confined person from a facility after a period of confinement exceeding 6 months, the chief executive officer of the facility shall provide him, if he is unable to provide them himself, sufficient resources to meet the person's immediate needs including:

(1) clothing appropriate to the season of the year; and

(2) transportation to the place where he can reasonably be expected to reside.

(b) If at the time of release a confined person is too ill or feeble or otherwise unable to care for himself upon release, the chief executive officer shall make arrangements for his care.

COMMENT

Subsection (a) is similar to provisions found in most states and authorizes providing clothing and transporation to

released persons. The section only requires providing these items if the person is unable to provide them for himself. The development of employment opportunities within the facilities will make this provision applicable to only a small number of persons.

The language "can reasonably be expected to reside" in subsection (a)(2) was inserted when the subsection was broadened to require payment for transporation beyond a state's border when necessary. It is impractical to drop off a confined person at the border of a state. In many instances, confined persons do not have an established place of residence, and some protection must be afforded against unreasonable requests for transportation money.

The section only applies to indigent persons.

Subsection (b) requires that the director make arrangements for ill or feeble persons upon their release. This subsection would be satisfied, in most cases, by insuring that relatives or friends are notified of the impending release and are available to care for the person. In some instances the subsection may require the director to contact public assistance agencies. The section is purposefully silent as to the authority of the director to allow a person to remain in a facility after his term has expired. Although it is conceivable that this may be required in the unusual case, the existence of a flat sentencing system provides ample notice of impending release providing the director with a long lead time to make alternative arrangements.

SECTION 3-509. [Released Offender Loan Fund.]

(a) The director may establish and shall administer a released-offender loan fund to provide loans to offenders released from continuous confinement in order to facilitate their adjustment to the free community if their own financial resources are inadequate for that purpose. The loan fund may be composed of appropriated state money, money resulting from the repayment of loans, interest earned on loans and other investments made

by the fund, and money contributed to the fund. Loans made by the fund may be at interest, but the director may establish an interest rate below the prevailing market rate if he believes it to be in the public interest.

(b) If the director establishes the fund, he shall adopt rules for its administration.

(c) The director with the approval of the Governor may contract with a private lending institution to administer the fund.

COMMENT

The section authorizes but does not require the establishment of a released offender loan fund. Experience with such funds in many institutions has been disappointing. The provision is included to insure the availability of the authority to operate such a fund if the director of corrections believes it can be done successfully.

PART 6
RESTITUTION

SECTION 3-601. [Sentence of Restitution.]

(a) A sentencing court may sentence an offender to make restitution to the victim of the offense.

(b) Whenever the court believes that restitution may be a proper sentence or the victim of the offense or the prosecuting attorney requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss.

(c) The court shall specify the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of community supervision that could have been imposed for the offense.

(d) In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the offender to pay or perform. The court may provide for payment to the victim up to but not in excess of the pecuniary loss caused by the offense. The defendant is entitled to assert any defense that he could raise in a civil action for the

loss sought to be compensated by the restitution order.

(e) For purposes of this section "pecuniary loss" means:

(1) all special damages, but not general damages, substantiated by evidence in the record, which a person could recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities, including without limitation the money equivalent of loss resulting from property taken, destroyed, broken, or otherwise harmed and out-of-pocket losses, such as medical expenses;

(2) reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense[.] [; and]

[(3) interest on the amount of pecuniary loss from the time of loss until payment is made.]

(f) An insurer or surety that has paid any part of the victim's pecuniary loss is not a victim for purposes of obtaining restitution.

(g) The court may order a community-service officer to supervise the making of restitution and to report to the court a default in payment.

COMMENT

This section outlines the elements of a sentence to pay restitution to the victim of the offense. It reflects a growing recognition that the criminal justice system has tended to ignore the victim of the offense and the loss he has suffered. Indeed, other sanctions traditionally employed by the criminal law including fines and imprisonment deprive the victim of any realistic opportunity to recoup his loss from the offender. The interest of the victim is increasingly being recognized and the use of restitution is being expanded. See Drapkin & Viano, Victimology: A New Focus (1973); Hudson & Galaway, Restitution in Criminal Justice 167 (1977) (cataloguing 19 active restitution projects in the United States). These programs tend to provide an active supervised form of restitution which includes employment counseling for the offender. In addition, many sentencing judges have imposed payment of restitution as a condition of probation. This Act lifts restitution to the status of a sentencing alternative in order to emphasize its importance and to encourage more careful consideration of its potential impact.

Most other national proposals have recommended that restitution be an authorized condition of probation. ABA, Probation, § 3.2 (1970); Model Penal Code, § 301.1; Proposed New Federal Criminal Code, § 3103. Several states have enacted detailed restitution provisions: Iowa Code Ann., § 789A.8 (1977) ("it is the policy of this state that restitution be made by each violator of the criminal laws to the victims of his criminal activities")' Pa. Const. Stat. Ann. tit. 18, § 1103 (1977).

Subsection (b) requires information relating to restitution to be included in the presentence report. This provides some advance notice to the defendant of the amount requested and allows time for him to contest the information in the sentencing hearing. Subsection (c) by authorizing installments over a limited time places a maximum on the amount of restitution that can be ordered. Subsection (d) makes clear that the ability of the offender to pay is a relevant consideration and in addition the amount to be paid is limited by the loss sustained by the victim. A limitation based on ability to pay may be constitutionally required. People v. Kay, 36 Cal. App. 759, Ill. Cal. Rptr. 894 (1973); State v. Harris, 70 N.J. 586, 362 A.2d 32 (1976). The limitation is also included in the Maine and Iowa code provisions, supra.

One of the potential legal obstacles to a more extensive use of restitution is the conflict with the civil law system. The last sentence in subsection (d) authorizes the defendant to assert any defense he would be entitled to assert in a civil action

brought by the victim for compensation. This seeks to limit the potential variance between civil liability and a restitution order.

Subsection (e) defines the type of loss that can be considered in awarding a restitution order. General damages, such as pain and suffering and disfigurement, are excluded. See Me. Rev. Stat. Ann. tit. 17-A, § 1204 (1975); Iowa Code Ann., § 789A.8 (1)(b)(1977) (all damages recoverable in civil action "except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium."). Paragraph (2) also authorizes reimbursement for reasonable out-of-pocket expenses resulting from the investigation. These expenses would include transportation, loss wages, etc., incurred in order to attend hearings, line-ups, or other investigatory proceedings. Paragraph (3) which authorizes interest on pecuniary loss is bracketed because of the variance among the states on the awarding of prejudgment interest in tort cases. The rule regarding interest should be the same both in tort and for purposes of restitution.

Subsection (f) precludes a surety or insurer from obtaining restitution through the criminal process. The section does not prevent such a party from asserting its contractual subrogation rights in a civil action against the defendant.

Subsection (g) authorizes the use of community-service officers to supervise the payment of restitution.

SECTION 3-602. [Modification or Waiver.]

An offender at any time may petition the sentencing court to adjust or otherwise waive payment or performance of any ordered restitution or any unpaid or unperformed portion thereof. The court shall schedule a hearing and give the victim notice of the hearing, date, place, and time and inform the victim that he will have an opportunity to be heard. If the court finds that the circumstances upon which it based the imposition or amount and method of

payment or other restitution ordered no longer exist or that it otherwise would be unjust to require payment or other restitution as imposed, the court may adjust or waive payment of the unpaid portion thereof or other restitution or modify the time or method of making restitution. The court may extend the restitution schedule, but not beyond the statutory maximum term of community supervision that could have been imposed for the offense.

COMMENT

The section gives the court power to modify or waive payment of restitution if the economic condition of the defendant changes during the payment period. The provision is similar to Section 3-403 for fines, but with regard to restitution the section requires the victim be notified and be given an opportunity to be heard on the requested modification. This additional procedure reflects the victim's interest in the restitution order.

SECTION 3-603. [Default.]

(a) If an offender sentenced to make restitution defaults for 60 days, the court upon the motion of the prosecuting attorney, the victim, or its own motion may issue an order requiring the offender to show cause why he should not be confined for failure to obey the sentence of the court. The court may order the offender to appear at a time, date, and place for a hearing or issue a warrant for his arrest. The order or warrant shall be accompanied by written notice of his right to a hearing and the

rights and procedures applicable thereto. The procedures and rights of the offender at the hearing shall be the same as those applicable to a hearing to revoke community supervision.

(b) Unless the offender shows that his default was not attributable to an intentional refusal to obey the sentence of the court or to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the offender to serve a term of periodic or continuous confinement not to exceed [years] if imposed for conviction of a felony or [year] if imposed for conviction of a misdemeanor. The term runs consecutively with any other term of confinement being served by the offender. The court may provide in its order that payment or satisfaction of the restitution order at any time will entitle the offender to his release from confinement or, after entering the order, at any time for good cause shown may reduce the term of confinement, including payment or satisfaction of the restitution order.

(c) The court shall comply with applicable guidelines of the sentencing commission and the provisions of Section 3-207 in imposing confinement for nonpayment of a restitution order.

(d) If restitution is imposed on an organization, it is the duty of any person authorized to order the disbursement of assets of the organization, and his superiors, to pay the restitution from assets of the organization under

his control. Failure to do so renders a person subject to an order to show cause why he should not be confined.

(e) An order to pay restitution constitutes a judgment rendered in favor of the State and following a default in the payment of restitution or any installment thereof, the sentencing court may order the restitution to be collected by any method authorized for the enforcement of other judgments for money rendered in favor of the State.

COMMENT

The provision establishes provisions for nonpayment of a restitution order. They are identical to those enacted for nonpayment of fines except that the victim is given a greater role in the process. As in cases of nonpayment of fines, once the fact of nonpayment is proved, the defendant has the burden to show that nonpayment is a result of his inability to pay or obtain funds to do so.

Subsection (e) makes applicable to a restitution order, the procedures available to collect money judgments rendered in favor of the State. These procedures usually give the State higher priority to a debtor's funds than would normally be given to a private party. This seems appropriate because the restitution order includes not only a compensatory element but is also part of the sentence imposed for the criminal offense.

SECTION 3-604. [Victim's Compensation.]

(a) Whenever a victim is paid by a crime victim's reparation fund for loss arising out of a criminal act, the fund is subrogated to the rights of the victim to any restitution ordered by the court and to any funds paid into a trust in lieu of a fine to satisfy civil judgments.

(b) The rights of the crime victim's reparation fund are subordinate to the claims of victims who have suffered loss arising out of the offenses or any transaction which is part of the same continuous scheme of criminal activity.

COMMENT

This section coordinates payments to victims under a restitution order with payments by any public victim's compensation act. States without a victim's compensation fund may wish to remove this provision unless there are local funds that provide victims with compensation. Subsection (a) gives the fund a right of subrogation against any order of restitution to the extent the fund has paid the victim. Because of the length of many criminal proceedings, it may be appropriate for a fund to compensate the victim immediately. This subsection provides the fund with an incentive to do so rather than to wait to see if any money is paid under a restitution order.

Subsection (b) speaks to the problem of multiple victims and their relationship to restitution and a victim's compensation fund. The section gives victims priority over the fund in collecting funds from the defendant. Thus the subrogation right granted in subsection (a) is subordinate to the claims of other victims seeking restitution from the offender.

SECTION 3-605. [Civil Actions.]

(a) This Act does not limit or impair the right of a victim to sue and recover damages from the offender in a civil action.

(b) The findings in the sentencing hearing and the fact that restitution was required or paid is not admissible as evidence in a civil action and has no legal effect on the merits of a civil action.

(c) Any restitution paid by the offender to the victim shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution. The court trying the civil action shall hold a separate hearing to determine the validity and amount of any set-off asserted by the defendant.

COMMENT

This section coordinates payments to victims under a restitution order with potential civil suits based on the same event. Although receiving restitution does not prevent the victim from bringing a civil action, amounts paid to the victim are set off against any award. This prevents the victim from receiving double recovery and the defendant from paying for the same loss twice.

Subsection (b) insures that the judgment in the criminal proceeding that restitution is appropriate and the findings based thereon are not admissible in any civil litigation. The burden of proof at the sentencing hearing and the procedures applicable thereto including the type of evidence that can be considered is more flexible and less restricted than in civil litigation.

The last sentence in subsection (c) requires a separate hearing to determine the validity of any set off. This is to prevent the fact that restitution has been ordered from influencing the determination of liability or damages in the civil case.

ARTICLE 4

TREATMENT OF CONVICTED AND CONFINED PERSONS

PREFATORY NOTE

Article 4 is the legislative embodiment of a prescriptive code of treatment of offenders. It reflects an express assumption of the philosophy that "a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law." Coffee v. Reichard, 143 F.2d 413 (6th Cir. 1944). Accord, e.g., Morales v. Schmidt, 340 F. Supp. 544, 553-54 (W.D. Wis. 1972); United States ex rel. Wolfish v. United States, 428 F. Supp. 333 (S.D.N.Y. 1977) (opinion on motion for summary judgment). Cf. Procunier v. Martinez, 416 U.S. 396 (1974); Bounds v. Smith, 45 U.S.L.W. 4411 (1977). It is a philosophy supported by many authorities, and it is gaining increasing recognition by the courts. See e.g., ABA Joint Comm. on the Legal Status of Prisoners, Standards Relating to the Legal Status of Prisoners, § 1.1 and Commentary (Tent. Dr. 1977) reprinted in 14 Am. Crim. L. Rev. 377 (1977) [hereinafter cited as ABA Joint Comm.]; S. Kranz, R. Bell, & M. Magruder, Model Rules and Regulations on Prisoners' Rights and Responsibilities 1-4 (1977) [hereinafter cited as Kranz]; Nat'l Advisory Comm'n on Criminal Justice Standards & Goals, Corrections 17-21 (1973) [hereinafter cited as Nat'l Advisory Comm'n]. It has, moreover, been enacted into law in at least one state. Cal. Penal Code, § 2601 (West 1976) (a confined offender is "deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public").

The legislative recognition that a confined person generally retains the rights of a free citizen is by no means meant to deprecate the legitimate interests of institutional security and public safety. There is throughout Article 4 an affirmation that these security and safety interests are and must be of paramount importance. Article 4 represents the view that security and safety can be maintained consistent with the treatment of confined persons that is mandated or encouraged in the various sections. Thus, the Article describes a just--and safe--correctional system in which attention is paid to the societal interest in humane treatment of confined persons as well as to the personal interests of confined persons themselves in the treatment provided them. By so describing the system, it is believed that society will more nearly achieve the goal of every correctional system--to return to society confined persons who will adjust to the outside world and not recidivate. As was stated by the ABA Joint Committee:

> Virtually all prisoners will someday be released to a society in which . . . they will daily be required to make choices and exercise self-restraint. If our institutions of confinement do not replace self-restraint for compelled restraint, and encourage choice rather than rote obedience, released prisoners will continue to be unable to deal with the "real" world.

ABA Joint Comm. at 418-19.

Provision of rehabilitative programs and services is mandated throughout the Act. See e.g., Section 2-105 supra. It is intended that confined persons will be encouraged to avail themselves of opportunities presented by these programs and services. And many of the provisons are clearly drafted to provide incentives to confined persons to foster their participation. See e.g., Sections 4-801 to 4-816 infra. Forced rehabilitation of offenders is, however, rejected as both denigrating to the individuals involved and not productive of long-term results. See e.g., ABA Joint Comm., §§ 3.4 and 5.7 and Commentary; Nat'l Advisory Comm'n Correc. Std. 2.9 and Commentary.

Part 1 contains a delineation of the most important of the protected interests that are retained by confined persons. Some of these interests, such as, for example, medical treatment and physical exercise, address basic needs. Other protected interests, such as access to the courts, law libraries, and legal assistance, reflect, to a large degree, what has already been mandated by the courts. The protected interests in Part 1, however, extend beyond basic needs and court mandates and include free-citizen rights whose extension to confined persons is consistent with safety and security. Part 2, by creating the office of correctional mediator, provides one method to relieve tensions and mediate disputes within facilities. Part 3 requires the adoption of grievance procedures, another method to relieve tensions and permit a dialogue for change--when change is necessary-- within facilities. Part 4 deals with the assignment, classification, and transfer of persons in the custody of the department. These decisions have a substantial impact on the lives of confined persons; this Part describes procedures by which these decisions must be made. Part 5 deals with discipline within facilities. It prescribes a code of punishment proportionate to the seriousness of the offense and affords some degree of due process protection to the confined person charged with a disciplinary infraction. Part 6 deals with programs putting confined persons at risk. It reflects the belief that informed confined-persons consent is possible in a correctional setting that eliminates parole, earned good time, and coerced rehabilitation,

and that provides real earning capacity to confined persons so that they have sources alternative to experimentation by which to obtain funds. Part 7 provides for implementation, on a limited basis at least at first, of a voucher program. The program is intended to increase the number and effectiveness of programs offered confined persons and to encourage confined persons to take full advantage of such programs by permitting them to choose those programs in which they will participate. Part 8 provides for the employment of confined persons at "real" wages and in a realistic work environment. It encourages provision of a full panoply of employment and vocational training opportunities and, in moving towards a goal of full employment for confined persons, permits employment of confined persons by private enterprise and payment of competitive wages. Part 9 deals with compensation for work-related offender injuries. Part 10 deals with the collateral consequences of a conviction. It acts to restore to ex-offenders those rights abridged by conviction or confinement and to protect him from employment discrimination when the employment he seeks is not directly related to the offense for which he was convicted.

ARTICLE 4
TREATMENT OF CONVICTED AND CONFINED PERSONS

PART 1
PROTECTED INTERESTS AND TREATMENT OF CONFINED PERSONS

SECTION 4-101. [Definitions.] As used in this Part, unless the context otherwise requires:

(1) "clergyman" means a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization;

(2) "contraband" means a weapon, controlled substance, escape plan, or material which may not be lawfully possessed by the general public;

(3) "intercept" means to intentionally read a written communication or to intentionally hear an oral or recorded communication;

(4) "medical care" means the diagnosis and treatment of physical, dental, or mental health problems;

(5) "prohibited material" means material that the director classifies as prohibited material pursuant to this Act;

(6) "reading material" means a book, a single copy or subscription to a periodical, magazine, newspaper, newsletter, or pamphlet, whether or not reproduced by a printing press, or material that qualifies for second-class

mailing privileges.

(7) "written communication" means a communition which is fixed in a tangible medium of expression; and

(8) "scanner" means a metal detector, X-ray machine, fluoroscope, or other non-intrusive method used to detect the presence of particular substances.

COMMENT

The definition of "clergyman" is taken from Uniform Rules of Evidence, Rule 505 (1974).

The definition of "scanner" is intended to include animals trained to detect the presence of controlled substances.

SECTION 4-102. [Protected Interests; General Provisons.]

(a) Whenever this Act specifically provides a confined person with a "protected interest," the director shall take appropriate measures to preserve and facilitate the full realization of that interest.

(b) The director may suspend or limit the realization of a protected interest otherwise provided by this Act during an emergency in a facility or part of a facility if the director finds that unusual conditions exist in a facility that imminently jeopardize the safety of the public or the security or safety within a facility

and that extreme measures are necessary. The director shall rescind the suspension as soon as the emergency is over and, within 30 days after the emergency is over, submit to the Governor a written report describing the nature of the emergency and the measures taken.

(c) Consistent with the provisions of this Part that specifically require or prohibit the performance of an act by the director, the director may adopt measures that:

(1) limit the full realization of a protected interest if the measures are designed to protect the safety of the public or the security or safety within a facility; and

(2) regulate the time, place, and manner of the realization of a protected interest if the measures are designed to assure the orderly administration of a facility.

(d) Whenever the director adopts measures pursuant to subsection (c), they must be:

(1) designed to create no greater restriction on the protected interest than reasonably necessary to accomplish the purpose for which they were adopted; and

(2) adopted in accordance with the procedures established for the adoption of rules.

COMMENT

This section generally obligates the director to facilitate the realization of protected interests by confined persons and

describes those circumstances in which the director may suspend, limit, or regulate the enjoyment of protected interests.

Subsection (b) permits the director to suspend realization of protected interests during an emergency in a facility if necessary for safety or security and that he file a written report with the governor within 30 days after the emergency. The requirement of a written report to the governor allows an independent evaluation of whether, in fact, an emergency situation existed, the events leading to the emergency, and the measures taken to bring the situation under control. The ACA Comm'n on Accreditation, Standards for Adult Correctional Institutions 4180-81 (1977) [hereinafter cited as ACA Std.] requires the adoption of written policy and procedures governing emergencies in facilities and review of these policies and procedures at least annually. Although not required by the section, it is contemplated that the director will require the compiling of such a written plan in each facility as well as assure periodical review of the plan.

Subsection (c) allows the director to limit the realization of a protected interest when necessary for safety or security and clarifies that a confined person's exercise of a protected interest may not override the director's obligation to orderly administer facilities.

Subsection (d) establishes a least restrictive means standard for evaluating the director's actions under subsection (c). Subsection (d) also requires that limitation or regulation of protected interests under subsection (c) must be accomplished through rulemaking procedures so that an independent evaluation may be made of whether limitation or regulation is warranted under subsection (c) and whether the particular action contemplated is the least restrictive means toward achieving the necessary end.

SECTION 4-103. [Prohibited Material.]

(a) The director may adopt rules:

(1) classifying material as prohibited material;

(2) preventing the introduction of prohibited material into a facility; and

(3) making the possession of prohibited material by a confined person a disciplinary infraction.

(b) The director may classify as prohibited material material other than contraband which:

(1) if possessed by confined persons, may jeopardize the safety of the public or the security or safety within a facility or unreasonably interfere with the realization of protected interests of other confined persons;

(2) is determined by the [department of health] to constitute an unreasonable health hazard; or

(3) is owned by another and possessed by a confined person without permission of the owner.

(c) Material may not be classified as prohibited material solely on the basis of its source or because other confined persons do not possess similar material.

COMMENT

The description of "prohibited material" in this section encompasses that class of goods which may lawfully be possessed by the general public but which constitutes a health or safety hazard in a facility. The description is intended to allow a wide range of material to be possessed by confined persons. See ABA Joint Comm., § 6.1 (d) and Commentary. It does not relate classification of "prohibited material" to whether, for example, it was purchased within a facility or whether other confined persons can afford to purchase similar material. It is recognized that once the number and kind of possessions vary among confined persons the potential for theft and intra-facility disturbances increase. It is believed, however, that this potential will be reduced to controllable levels under this Act both because the director may choose to store confined-person property elsewhere in a facility and because the employment provisions of the Act (Article 4 Part 8) should decrease the differentials in purchasing power that presently exist among confined persons. Further, if possession of particular material substantially increases the potential for theft and violence that material may be excluded under subsection (b)(1) as jeopardizing safety or security.

SECTION 4-104. [Physical Security.]

(a) A confined person has a protected interest in his own physical security.

(b) The director shall:

(1) take adequate measures designed to protect a confined person from assaults;

(2) adopt rules limiting the use of physical force by employees to those situations in which physical force is believed to be reasonably necessary to protect the safety of the public or security or safety within a facility;

(3) discipline a confined person or employee who commits an assault;

(4) request prosecuting authorities to prosecute felonies involving physical violence occurring within a facility or involving a confined person and cooperate with prosecuting authorities in the course of those prosecutions; and

(5) keep records and report annually to the Governor on the extent of injuries or deaths incurred by confined persons and employees within facilities.

SECTION 4-105. [Medical Care.]

(a) A confined person has a protected interest in receiving needed routine and emergency medical care.

(b) The director shall assure that:

(1) a newly admitted confined person receives an examination by a person trained to ascertain visible or common symptoms of communicable disease and conditions requiring immediate medical attention by a physician;

(2) except as provided in Section 4-126, a confined person receives a thorough physical and dental examination in accordance with accepted medical practice and standards,

(i) within 2 weeks after his initial admission to a facility unless earlier released; and

(ii) thereafter, not less than every 2 years and, if the most recent examination was given more than one year earlier, upon final release from the facility;

(3) appropriately trained persons are,

(i) present at each facility or otherwise reasonably available on a daily basis to evaluate requests for medical care from confined persons, and

(ii) reasonably available to provide emergency medical care;

(4) a confined person has access to needed routine and emergency medical care in a timely manner consistent with accepted medical practice and standards;

(5) a confined person found to have a communicable disease is isolated from the general population of a

facility to the extent required by accepted medical practice and standards;

(6) a confined person requiring medical care not available in the facility is transferred to a hospital or other appropriate place providing the care; and

(7) medical records of confined persons are:

(i) maintained in a confidential and secure manner;

(ii) compiled and maintained in accordance with accepted medical practice and standards; and

(iii) retained for at least 5 years after the person is released from the facility.

(c) The director shall permit confined persons to utilize their own resources to obtain medical care from any licensed health profession. He may require that the medical care be provided in a way that is consistent with the person's classification and facility assignment and that least interferes with the established administrative procedures of the facility.

(d) Whenever the department provides medical care to a confined person it is entitled to recover insurance

or other benefits available to the confined person to pay for medical care.

(e) An employee of the department may not impede or unreasonably delay the access of a confined person to medical care.

COMMENT

This section establishes a protected interest in the receipt of medical care. Medical services are to be provided to offenders by the division of correctional medical services created in Part 5 of Article 2. See the comments to those sections for further references relating to medical care for confined persons. See generally ACA Stds. 4253-79.

The need for thorough medical examination upon intake is universally recognized. See ABA Joint Committee, § 5.4; ACA Manual at 441; Ass'n of State Correctional Administrators, Uniform Correctional Policies (1972); Nat'l Advisory Comm'n Correc. Std. 2.6 (1973); Nat'l Sheriffs' Ass'n, Standards for Inmates' Legal Rights ch. 20, § 1. Nevertheless, the American Medical Ass'n survey of Medical Care in U.S. Jails (1972) found that of 1,108 responses to a questionnaire, only 1.7% of all city jails automatically provided such intake examinations; 47.5% gave no such examinations; and the rest only if the prisoner complained (some required "obvious" illness even then). Yet the need for such an examination reaches several levels: (1) to protect other inmates against possible contagious diseases; (2) to determine quickly whether emergency medical care is necessary. There are numerous reported cases concerning persons arrested who, for lack of medical attention at the time of their initial incarceration, suffered serious harm or death. In light of these difficulties, numerous decisions have ordered jail and prison officials to initiate such intake examinations. See e.g., Smith v. Hongisto, 2 Pris. L. Rptr. 284 (N.E. Cal. 1973); Dean v. Young, 1 Pris. L. Rptr. 19 (Cal. Super. Ct. 1971) (sheriff ordered to screen incoming inmates for infectious diseases); Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs, 1 Pris. L. Rptr. 186 (Wayne Co. Cir. Ct. Mich. 1972). See also Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972) aff'd, 501 F.2d 1291 (1974); Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971).

Parts of this section are taken directly from the Illinois County Jail Standards, ch. XIV A (4).

The provision requires only that an appropriately trained person conducts the initial intake examinations. This envisions that, with proper training, even a night guard or sheriff's deputy could conduct such examinations. See e.g., Goldsby v. Carnes, 365 F. Supp. 395 (W.D. Mo. 1973), modified, 425 F. Supp. 370 (1977) (medical training for guards ordered). Cf. Isele, The Use of Allied Health Personnel in Jails: Legal Considerations (1977). In sharp contrast, the Nat'l Advisory Comm'n 37 declares that "regardless of the hour, trained practitioners should be available." The ABA Joint Committee, § 5.4 is ambiguous on this issue. The American Correctional Association would require the initial examination to be performed by a member of the "health care staff" which would include medical assistants under the supervision of a licensed physician. ACA Std. 4260.

Subsection (b)(2) requires periodic medical examinations. Such a requirement has been imposed by some court orders. Thus, the court in Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), aff'd and remanded, 503 F.2d 565 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975) ordered that physicians provide such examinations at least once every two years. See also Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), aff'd, 456 F.2d 854 (1972). "Thorough medical examination in accordance with accepted medical practice and standards" is somewhat vague but, with the gradual elimination of the "locality rule" in malpractice cases, see e.g., Brune v. Belinkoff, 354 Mass. 102, 235 N.E. 2d 793 (1968), it would seem apparent that the test is national, rather than local or even statewide.

The American Correctional Association calls for a "comprehensive health evaluation" within 10 days of admission and thereafter every 2 years with annual examinations for persons over 50 years of age. ACA Std. 4261, 4263.

Subsection (b)(3) requires appropriately trained persons to be available to each facility to evaluate medical complaints. The words "evaluate requests for medical care" in subparagraph

(i) would not require the presence of a physician. It would require someone with "appropriate training" to be determined by reference to reasonable medical practice. In many physicians' offices nurses make initial evaluations and this would comply with this section. Although it is likely that in a facility of any size the person making evaluations should be actually present in the facility, in many smaller institutions this would be impractical. The statute requires that such a person be "reasonably available." Access by phone with the ability to be present in the facility on an as needed basis would be sufficient. A similar approach to the provision of emergency medical care is required. This paragraph must be read in conjunction with paragraph (4) which defines the extent of the services that are required for confined persons. See ACA Std. 4262 (". . . daily sick call is an inmate right and not a privilege").

Subsection (b)(4) insures that confined persons receive medical care in accordance with accepted medical practice. Except in emergencies, medical judgments regarding the care required by a confined person would take priority over institutional judgments. The provision effectively encompasses the statement of the American Correctional Association that "to achieve quality medical care any incompatibility between medical and prison rules must be resolved in the former's favor." ACA Manual at 437. The obvious need for giving priority to medical judgments has been acknowledged by the courts as well. Sawyer v. Sigler, 320 F. Supp. 690 (D. Neb. 1970), aff'd, 445 F.2d 818 (8th Cir. 1971). Cases holding invalid a prison warden's command that a prisoner work, where the doctor has proscribed work, are in accord as well. See e.g., Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970) cert denied, 401 U.S. 983 (1971); Black v. Ciccone, 324 F. Supp. 129 (W.D. Mo. 1970). See also Scharfenberger v. Wingo, 542 F.2d 328 (6th Cir. 1976) (warden's delay, on grounds of expense, in sending prisoner to outside hospital, resulting in amputation of prisoner's arm, justifies award of damages).

Although the making and retention of medical records is an integral part of sound medical practice, virtually all studies have demonstrated that recordkeeping in prisons and jails is either non-existent or, at the best, marginal. See e.g., American Medical Ass'n, Medical Care in U.S. Jails (1972); ABA & AMA Compilation, passim. One study, for example, found that "medical records are fragmented and almost useless for purposes of reviewing cases and determining comprehensive medical histories. They document little but the inadequate

recordkeeping practices that currently prevail." Health Law Project, Health Care and Conditions in Pennsylvania's State Prisons (1972). The ACA Manual at 441-42 provides for a medical records library, and the ABA Joint Committee, § 5.5 provides for such records. Some cases have ordered establishment of a system of medical records, e.g., Goldsby v. Carnes, 365 F. Supp. 395 (W.D. Mo. 1973), modified, 425 F.Supp. 370 (1977).

The right of prisoner access to medical records, particularly psychiatric records, is still equivocal under the case law. See e.g., Gotkin v. Miller, 514 F.2d 125 (2nd Cir. 1975). Nevertheless, in accord with other provisions of the Act, this section assures prisoner access to his entire medical file. Under this Act medical records are treated similarly to other records relating to the confined person. General access is provided subject to specified exceptions. See Section 4-122.

Most prisons today prohibit, as a matter of policy, outside physicians from treating their patients who happen to be prisoners. Except for a singular case involving a pretrial detainee who was on methadone while incarcerated, Cudnik v. Kreiger, 392 F. Supp. 305 (N.E. Ohio 1974), there is almost no case law on the question of a prisoner's right of access to treatment by outside physicians.

The balances are indeed delicate. On the one hand, there seems to be no obvious reason why a prisoner, under the treatment of a specific physician prior to his incarceration, should suddenly lose the benefit of that physicians's knowledge of his personal health, at least so long as the prisoner is willing to pay for the services. Dissatisfaction with the level of competence of prison doctors, see e.g.,New York State Special Commission on Attica, Attica, 63-66 (1972), is also a factor. Cf. S. Krantz, The Law of Corrections and Prisoners' Rights in a Nutshell 180 (1976). On the other hand, prison officials suggest that the simple interference with prison routine, and with the authoritative voice of the prison doctor, is undesirable. They also point to the possible conflicts with prison policy (e.g., the outside physician says that the prisoner is unable to work in his assigned duties, or to live in his assigned quarters) and to the difficulties involved in controlling drugs and other substances which are part of the physician's trade.

This provision seeks to strike a balance. The section allows examination and treatment by the outside physician. It further allows the associate director to protect both security and order by

placing reasonable limits on the method and time of treatment by outside medical personnel.

Finally, the term "licensed health professional" is used so as to avoid the need for revision in accord with applicable state standards and terminology.

SECTION 4-106. [Right to Healthful Environment.]

(a) A confined person has a protected interest in a healthful, safe, and sanitary living environment. The [director] of the [department of health], after consultation with the director of corrections, shall designate the appropriate health, safety, and sanitation requirements applicable to facilities and describe what would be substantial compliance with those requirements.

(b) The [director] of the [department of health] shall order closed any facility or part of a facility that he finds is not fit for human habitation.

(c) The [director] of the [department of health] and persons from other relevant departments [and two members of the advisory committee] shall inspect each facility semiannually. The [director] of the [department of health] shall forward to the director of corrections a written report after each inspection. The report shall contain a description of the conditions of the facility, and either:

(1) a certification that the facility is in substantial compliance with health, safety and sanitation requirements; or

(2) a statement that the facility is not in substantial compliance with health, safety, and sanitation requirements, together with a list of the particular violations and a specification of which violations prevent the [director] of the [department of health] from certifying the facility as being in substantial compliance. The [director] of the [department of health] also shall specify the date for reinspection of the facility if reinspection is necessary to determine whether the facility has been brought into substantial compliance.

(d) If at the time of reinspection the facility or part of the facility is still not in substantial compliance, the [director] of the [department of health] shall order closed the facility or the substandard part of the facility or issue any other order necessary to assure that the facility is brought into compliance within a reasonable time.

(e) Immediately after the [director] of the [department of health] orders a facility or part of a facility to be closed, the director of corrections shall transfer persons confined therein to another suitable facility or to the division of community-based services for supervision in the community.

(f) Reports issued pursuant to subsection (c) must be available for public inspection.

[(g) Whenever the [director] of the [department of health] finds that a facility or part of a facility unreasonably endangers the health of the persons confined therein he shall notify the director of corrections. The director shall credit against the sentences of all persons confined therein one additional day for every 3 days spent in the facility or part of the facility from the date the director receives the notice from the [director] of the [department of health] until the [director] of the [department of health] certifies that the facility or part of the facility no longer unreasonably endangers health.]

COMMENT

The physical health of confined persons is directly related to the safety and sanitation of facilities. Most existing correctional facilities are subject to periodic inspection for health and safety related matters. The American Correctional Association accreditation standards require that such an inspection by federal and state or local health officials be conducted annually. ACA Std. 4238. See generally ACA Stds. 4237-5252. See also Nat'l Advisory Comm'n Correc. Std. 2.5. The American Bar Association also recommends compliance with general health, sanitation, fire and safety regulations. ABA Joint Comm., § 6.12. In a number of instances courts have found health and sanitary conditions in facilities falling far below acceptable constitutional standards resulting in cruel and unusual punishment of those confined therein. And courts have become less reluctant to adopt specific standards to improve matters. See Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976).

The section provides for periodic inspections of each facility by the director of the department of health or other comparable official. This official is also authorized to establish standards for facilities and to certify as to whether the facilities meet the standards.

Three separate standards of compliance are established with appropriate remedies tailored to each. Subsections (c) and (d) provide a standard of lack of "substantial compliance" with the standards established by the health official. The failure to be in substantial compliance would result in a report and a requirement of reinspection within a time set by the inspecting official. If the facility is not brought up to compliance within the time established the inspecting official may order the facility closed. The expectation is that the health officials and correctional officials will cooperate to bring facilities into compliance.

If the health official finds that the facility or a part of a facility is "not fit for human habitation" he may close the facility or part of the facility immediately. If conditions reach this unacceptable level, persons should not be continued to be confined therein while conditions are improved. In some instances a part of a facility may not be fit for human habitation as a result of some temporary event such as a gas leak or other health endangering emergency. Confined persons should be removed from this part of the facility immediately.

The third standard established is one in which the health official determines the facility "unreasonably endangers the health of persons confined therein." Subsection (g) is an optional section which would provide a different remedy should a health official make the above finding. Persons confined in such a facility or part of a facility would receive additional credit for time served under such conditions. The section represents a middle ground. The facility or part of the facility can continue to house confined persons, but it is recognized that service under such conditions is far different and more onerous. The subsection provides an additional incentive for correctional officials to improve substandard conditions and reduces the burden on confined persons of delay in altering conditions.

SECTION 4-107. [Physical Exercise.] A confined person has a protected interest in reasonable opportunities for physical exercise.

SECTION 4-108. [Legal Assistance.]

(a) A confined person has a protected interest in access to assistance in legal matters.

(b) The office of correctional legal services shall provide to each indigent person in the custody of the department and not otherwise represented assistance at state expense in any of the following:

(1) post-conviction proceedings testing the legality of conviction or confinement;

(2) court proceedings challenging conditions of confinement or other correctional supervision;

(3) revocation of conditional liberty or supervision;

(4) proceedings before discipline or classification committees to the extent authorized by this Act or the director; and

(5) civil proceedings in which a confined person is a defendant or may be bound by a proceeding he did not initiate.

(c) Assistance pursuant to subsection (b) must:

(1) include consultation regarding legal matters and, unless an attorney provided by the office believes the claim is clearly frivolous, representation in legal proceedings; and

(2) be provided by a licensed attorney or other person authorized to practice law or to give legal

assistance. The office shall provide a sufficient number of persons other than licensed attorneys to consult with confined persons on other matters affecting their status in the department.

(d) Persons providing legal assistance to confined persons may have access to facilities and confined persons at any reasonable time unless the director determines that a state of emergency exists. An employee of the department may not impede or unreasonably delay the access of a confined person to legal assistance.

COMMENT

This section describes those proceedings in which legal services must be provided to confined persons and allows flexibility in determining how legal services will be delivered. There is no requirement that the office handle all legal services in-house. See Sections 2-601 and 2-602, supra. Nor does the section alter a state's determination as to when legal assistance must be provided by a licensed attorney. It is contemplated, however, that the office will take advantage of, and expand, current programs delivering legal assistance to confined persons whenever the programs are of sufficient quality. Many law schools, for example, operate prison "clinics" which provide invaluable training for students and effective and zealous advocacy for confined persons; these programs should be retained wherever possible. See ABA Resource Center on Correctional Law & Legal Services, Providing Legal Services to Prisoners reprinted in 8 Ga. L. Rev. 363 (1974) [hereinafter cited as ABA Resource Center] (slightly outdated list of projects).

On the other hand, the presence of students or other paraprofessionals should not lead to the abandonment of providing actual counsel whenever permitted under this Act and requested by the confined person. The cost is not excessive; the American Bar Association's Correctional Economics Center has estimated that the annual additional cost, per prisoner, of filling needs roughly equivalent to those suggested here would be $75, just barely more than one percent of

the current $7,500+ per year that confinement costs for each inmate. ABA, Correctional Economics Center, Cost Analysis of Correctional Standards: Institutional-Based Program and Parole 12 (Dec. 1975). Given both the presence of a legal mandate, and the high support of correctional administrators for lawyer-operated programs, the cost is insignificant.

In many aspects, these provisions go beyond what is required by current law. Thus, for example the Supreme Court had held that counsel need not be provided in disciplinary hearings. Wolff v. McDonnell, 418 U.S. 539 (1974). This is a holding it reaffirmed only recently. Baxter v. Palmigiano, 425 U.S. 308 (1976). Further, while defendants are entitled to the assistance of counsel on any first appeal, current law does not require, as this section would, that such assistance be given on later appeals. Similarly, current federal law allows, but does not compel, the appointment of counsel for prisoners filing petitions for writs of habeas corpus. 18 U.S.C., § 3006A (g) (1976). There is no similar provision for attorneys who assist in civil rights cases. However, Congress has authorized the recovery of attorneys' fees by a prevailing plaintiff in civil rights cases.

On the other hand, the California Supreme Court has recently held that indigent prisoners are entitled to appointed counsel to represent them in civil cases in which they are defendants unless the government can find some other method of assuring full access to the court process. Payne v. Superior Court, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976).

The Supreme Court has recently stated that the constitutional right of access to the courts may be satisfied by providing confined persons with either legal assistance or law libraries. Bounds v. Smith, 430 U.S. 817 (1977). For information relating to the provision of legal materials, including law libraries, see Section 4-110 infra. The American Correctional Association standard for legal assistance requires either assistance from law-trained persons or provision of law libraries. ACA Std. 4283.

The problems that face prisoners without counsel, see e.g., Flannery & Robbins, The Misunderstood Pro Se Litigant: More Than a Pawn in the Game, 41 Brooklyn L. Rev. 769 (1975), and the frustration that such problems may cause, as well as the nearly unanimous consensus of national study groups that provision of legal counsel is both feasible and desirable, however, are the ultimate persuaders in a tautly balanced situation.

Subsection (d) assures that access to legal assistance at any reasonable time will be impeded only in emergencies. See ACA Std. 4281 (access to attorneys and counsel substitutes to be "facilitated").

The American Correctional Association has long recognized the right of a confined person to have access to legal assistance. See ACA Stds. 4280-84. (requiring access to courts, counsel or designated counsel substitutes, law libraries, and other supplies and services related to legal matters).

SECTION 4-109. [Participating in the Legal Process.]

(a) A confined person has a protected interest in participating in the legal process.

(b) The director shall permit a confined person to offer testimony by deposition and provide space for him to do so.

(c) The director shall comply with a court order directing a confined person to attend in this state a legal proceeding directly involving that person's interest.

(d) If a third person requests a confined person to attend a legal proceeding that does not directly involve the confined person's interest, the director may require, as a condition of assuring the confined person's attendance, that the third person make arrangements to pay all or part of the expense of attendance including the expense of any necessary escort.

(e) If a confined person requests permission to attend a legal proceeding involving his interests, the director may require, as a condition of his attendance,

that the confined person pay all or part of the expense of attendance, including the expense of any necessary escort. In determining whether to assess the expense against a confined person the director shall consider the confined person's available funds as well as whether he initiated the proceedings.

COMMENT

This section protects the participation by confined persons in the legal process, a fundamental right of citizenship. See ACA Std. 4280 (access to the courts). Subsection (b) permits the taking of depositions at a facility. It is not intended to imply that a confined person would not normally be permitted to leave the facility to appear in court. Subsection (c) leaves to the court the determination of the necessity of a confined person's appearance in court. See Nat'l Advisory Comm'n, Correc. Std. 2.1 and Commentary. Subsections (c), (d), and (e) attempt to balance the needs of the judicial process and interests of the confined persons against the costs and administrative inconvenience of confined persons appearing in court. It is contemplated that a confined person would routinely be permitted to attend proceedings relating to family matters.

The authorization to impose costs relates generally to the degree of confined-person voluntariness attendant upon the decision to appear in court. For example, it is not contemplated that a confined person would be assessed costs of attendance when he is needed as a witness.

Finally, the section contemplates that, where security problems would make it inadvisable for a confined person to leave the facility, even if escorted, a court might decide to transfer the proceedings to the facility. The director should be prepared to provide space for such an eventuality.

SECTION 4-110. [Access to Legal Materials.]

(a) A confined person has a protected interest in access to legal materials.

(b) The director shall facilitate reasonable access to legal materials and, to the extent necessary, provide support services and maintain a collection of basic legal

materials in each facility housing persons sentenced to continuous confinement.

COMMENT

In Bounds v. Smith, 430 U.S. 817 (1977), the United States Supreme Court held that "the fundamental right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Id. at 828; See also Younger v. Gilmore 404 U.S. 15 (1971) (per curiam). Although this Act requires that legal services be provided to confined persons, see supra Section 4-108, this section nevertheless requires provision of legal materials. See e.g., ABA Joint Comm., § 2.3(a) and Commentary (requiring provision of both legal services and legal materials). But see ACA Std. 4283 (requiring either legal services or law libraries). The right to represent oneself without the aid of counsel was recently upheld as "basic to our adversary system of criminal justice." Faretta v. California, 95 Sup. Ct. 2525, 2532 (1975). Most state constitutions recognize such a right. E.g., Ala. Const., art. 1, § 6; Ariz. Const., art. 2, § 24; Conn. Const., art. 1, § 8; Del. Const., art. 1, § 7; Fla. Const., art. 1, § 16; Ky. Const., Bill of Rights § 11; Me. Const., art. 1, § 6; Miss. Const., art. 3, § 26; S.C. Const., art. 1, § 18; Tex. Const., art. 1, § 10. Although there is no absolute right to represent oneself on appeal, Price v. Johnston, 334 U.S. 266 (1948), it would seem that several of the policy reasons supporting a right to represent oneself at trial would be equally applicable on appeal or in a habeas proceeding. Potuto, The Right of Prisoner Access: Does Bounds Have Bounds?, 53 Ind. L.J. 207, 233-40 (1978). First, distrust of counsel fosters mistrust of the system. E.g., Faretta v. California, 422 U.S. 806 834 (1975) ("To force a lawyer on a defendant can only lead him to believe that the law contrives against him.") Second, it is possible that a confined person can indeed present his case more forcefully than an overburdened legal-services attorney. See id. Finally, there may be "therapeutic value to prisoners in gaining a better understanding of their legal rights . . . . [A] majority of state prison officials, responding to an informal inquiry, indicated that access to legal materials did not adversely affect prisoners' morale, discipline, or rehabilitation and that positive effects in the prisoners were most frequently noted." Werner, Law Library Service to Prisoners--The Responsibility of Nonprison Libraries, 63 L. Lib. J. 231 (1970). Accord, e.g. Cohen, Reading Law in Prison, 48 Prison J. 21, 23 (1968); Wainwright, Legal Information and Resources for Inmates, in American Correctional Association Proceedings 236 (1966);

A. Lewis, Gideon's Trumpet 98 (1964). It should be noted that the section, in not restricting the legal materials provided to those pertaining to conviction and confinement, may well be broader than the mandate of Bounds. The breadth of the section, however, reflects the breadth of legal problems facing confined persons.

In at least fourteen states, as well as the District of Columbia and the federal system, both legal services and law libraries are already provided. See Brief for Respondent, Exhibit B, Bounds v. Smith, 430 U.S. 817 (1977). At least forty states presently maintain law libraries for confined persons. E.g., Ill. Ann. Stat. ch. 38, § 1003-7-2 (Smith-Hurd 1973). In fifteen of these the libraries provided are well beyond minimal requirements. See Brief for Respondent, Exhibit B, Bounds v. Smith, 430 U.S. 817 (1977). In several other states substantial access is provided; for example, law libraries are maintained in 13 of 16 Texas facilities, 4 of 6 Washington facilities, 5 of 8 Pennsylvania facilities, 8 of 9 Illinois facilities. See id. Other states provide a complete collection in one facility, and, in the other facilities, basic materials with the availability of inter-correctional library loans. See id.

The reference to facilities "housing persons sentenced to continuous confinement" is intended to exclude small local jails from the obligation to maintain a collection of basic legal materials. It is contemplated that a confined person preparing legal documents would be afforded use of a typewriter for his own use or the use of anyone assisting him. See ACA Std. 4284 (typewriters, typing services, and other supplies). Finally, the term "basic legal materials" is intended to include citators and other indexing materials necessary to locate relevant statutes and cases.

The American Association of Law Libraries provides checklists for minimum and expanded prison law library collections. In 1977, the minimum collection required an initial investment of approximately $3,650 and annual upkeep of approximately $525. The minimum collection consists of the following:

I. Federal and State Prisons
   A. Federal Materials
      1. United States Code Annotated. Constitution; Titles, 18, 28 (Sec. 2241-2255), Federal Rules of Appellate Procedure, Rules of Supreme Court); 42 (Sec. 1981-1985).

or

*Federal Code Annotated. Constitution; Court Rules-Criminal Proceedings: Titles 18;28 (Sec. 2241-2255); 42 (Sec. 1981-1985).

2. United States Reports. Vol. 361-, 1960-.

or

Supreme Court Reporter. Vol. 80-, 1960-.

or

United States Supreme Court Reports. Vol. 4-, 1960-.

3. Federal Reporter. (2d Series).

4. Federal Supplement. Vol. 180-, 1960-.

5. Shepard's United States Citations. 5 vols.

6. Shepard's Federal Citations. Federal Supplement; Federal Report, 2d Series. 201-390 vol. (6th ed.).

7. Rules of local federal district courts. Free from court clerks.

B. General Materials

1. Bailey F. Lee and Henry B. Rothblatt. Complete Manual of Criminal Forms. Federal and State.

2. Ballentine, James A., Ballentine's Law Dictionary (3d ed. by James A. Anderson).

or

Black, Henry C., Black's Law Dictionary (rev. 4th ed.)

3. Cohen, Morris L., Legal Research in a Nutshell

4. Criminal Law Reporter. 2 vol. (looseleaf)

5. Fox, Sanford J., Juvenile Courts in a Nutshell. (1971)

6. Israel, Jerold H. and Wayne R. LaFave. Criminal Procedure in a Nutshell. (1971)

7. Prison Law Reporter. 1971-.

8. Sokol, Ronald P., Federal Habeas Corpus (2d ed.).

II. Additional materials for State Prisons

1. Reports of highest and intermediate appellate courts of state. 1960-.

2. State statutes compilation.

3. State digest of court decisions.

4. Shepards Citations for state.

5. Treatise covering state criminal practice and procedure.

6. Volume containing rules of state courts, if available, otherwise, rules obtainable free from clerks of some state courts.

Note: All materials should be kept up to date by supplementation. All prices are subject to change and do change from time to time. Checklists of materials for each state are available on request from A.A.L.L. Special Committee on Law Library Services to Prisoners.

The following legal materials are presently provided in each federal facility:

(1) United States Code Annotated

a. Title 5 - Sections 1-5100 (Freedom of Information and Privacy Acts)

b. Title 18 - All (Criminal Code and Criminal Procedures)

c. Title 21 - All (Food and Drugs)

d. Title 26 - Sections 4001 to end (Narcotic offenses)

e. Title 28 - Volumes containing Supreme Court Rules, Federal Rules of Appellate Procedure, and U.S. Court of Appeals Rules

f. Title 28 - Sections 2241 to end (Habeas Corpus and motion to vacate sentences)

g. Title 42 - Sections 1891-2010 (Public Health and Welfare)

h. U.S. Constitution and Amendments - All

(2) Blacks Law Dictionary
(3) Criminal Law Reporter (Bureau of National Affairs) Volume 16 - Current
(4) Modern Federal Practice Digest - Volume 16-18A, 26, 26A, 39 and 42
(5) Shepard's Federal Citations
(6) Federal Rules of Civil Procedure (Pamphlet form)
(7) Modern Criminal Procedure, Hall and Kamisar
(8) Constitutional Rights for Prisoners, Palmer
(9) Federal Habeas Corpus, Sokol
(10) You and the Law, Reader's Digest
(11) Legal Research in a Nutshell, Cohen
(12) Criminal Procedure in a Nutshell, Israel and LaFave
(13) Emerging Rights of the Confined and 1975 Supplement, Recent Developments in Correctional Law, South Carolina Department of Corrections
(14) Legal Research, Writing, and Analysis, West Publishing Company
(15) Corrections and Prisoners' Rights, Krantz
(16) District of Columbia Code Annotated
(17) Supreme Court Decisions, Lawyers Cooperative Publishing Company - All (Summaries of decisions)
(18) Bureau of Prisons' Policy Statements of Interest to Inmates
(19) United States Supreme Court Reporter - Volumes 91-94A
(20) United States Supreme Court Reports (Lawyers Edition 2d) - Volumes 37 - Current
(21) Federal Reporter Second - Volumes 452 - Current
(22) Federal Supplement - Volumes 336 - Current
(23) Manual for Prison Law Libraries, Werner

SECTION 4-111. [Discrimination Based on Race, Religion, National Origin, or Sex.]

(a) A confined person has a protected interest in freedom from discrimination on the basis of race, religion, national origin, or sex.

(b) The director shall prevent any discrimination on the basis of race, religion, national origin, or sex. Confined persons of either sex may be assigned to the same facility, or they may be assigned to separate facilities if there is essential equality in living conditions, decision-making processes affecting the status and activities of confined persons, and the availability of community and institutional programs, including educational, employment, and vocational training opportunities.

COMMENT

For recommendations embodying similar provisions see e.g., ACA Std. 4294; ABA Joint Comm., § 6.13 and Commentary; Nat'l Advisory Comm'n Std. 2.8 and Commentary.

Racial discrimination in correctional facilities is prohibited by the Fourteenth Amendment absent compelling and particularized needs of institutional security. Cruz v. Beto, 405 U.S. 319 (1972) (per curiam); Lee v. Washington, 390 U.S. 333 (1968) (per curiam). When asserted, these security needs have most frequently been found wanting. See e.g., ABA Joint Comm., § 6.13 and Commentary.

This section prohibits discrimination based on religion. It precludes consideration of a confined person's particular religious beliefs--or lack of them--in making decisions affecting his status or the conditions of his confinement unless that consideration is necessary to facilitate a protected interest under Section 4-113.

The standard of "essential equality" with respect to sex discrimination reflects an awareness of existing differences in location, size, and other features of male and female facilities, see Ill. Correc. Ad. Reg., Adult Div'n, § 807 (1973); essential equality, however, is the minimum due. This provision permits establishment of a "co-ed" facility as one method to assure essential equality of programs and living conditions. "Co-ed" facilities are becoming increasingly familiar; at least half a dozen states have opened such facilities since 1975. See Co-ed Prisons Have Come A Long Way, Crim. Justice Newsletter Feb. 17, 1975 at 7. See also Ruback, The Sexually Integrated Prison: A Legal and Policy Evaluation, 3 Am. J. Crim. L. 301 (1975). ACA Std. 4308, 4309. Any state which has enacted its own equivalent of the proposed Equal Rights Amendment should consider this section in light of its state equivalent.

SECTION 4-112. [Absentee Voting.]

A confined person otherwise eligible to vote has a protected interest in voting in elections. The director shall assure that confined persons otherwise eligible to vote are informed of the right to vote by absentee ballot and, if requested, assure that confined persons are assisted in any procedural steps required to cast the ballot.

COMMENT

Voting is a fundamental right of citizenship whose curtailment or restriction is neither essential nor necessary to assure continued confinement or to protect the safety and security of others. Thus, although the disenfranchisement of confined offenders is not constitutionally prohibited, Richardson v. Ramirez, 418 U.S. 24 (1974), this section encourages voting by confined persons. See e.g., ABA Joint Comm., § 10.2. See also Note, The Need for Reform of Ex-felon Disenfranchisement Laws, 83 Yale L.J. 580 (1974). The provisions, in fact, may be constitutionally mandated for misdemeanants (O'Brien v. Skinner, 414 U.S. 524 (1974) (dicta)) and confined persons other than offenders (Goosby v. Osser, 409 U.S. 512 (1973) (dicta)).

The section authorizes voting by absentee ballot to assuage the fear that confined persons in large facilities in underpopulated geographical areas will unduly affect the outcome of local elections. See infra comment to Section 4-1003.

This section embodies a position contrary to that taken in Section 2(a)(1) of the Uniform Act on Status of Convicted Persons (1964); that Act would not allow voting by confined offenders convicted of felonies.

SECTION 4-113. [Religious Freedom.] A confined person has a protected interest in participating in the religious services of his faith and otherwise enjoying the free exercise of his religion. To facilitate the free exercise of religion the director shall:

(1) assure that each chief executive officer fairly allocates available funds among all religions represented at the facility and provides each confined person with nutritious meals that do not violate the dietary laws of his religion;

(2) permit a confined person to comply with the dress or appearance requirements of his religion and observe the religious holidays of his faith unless to do so would jeopardize the safety of the public or security or safety within the facility; and

(3) permit a confined person access to a clergyman acting in his professional capacity unless the clergyman has been excluded from the facility pursuant to

this Act. A confidential communication by a confined person to a clergyman of a different faith is privileged to the same extent as a confidential communication by a person to a clergyman of his own faith.

COMMENT

It hardly needs stating that the free exercise of religious beliefs is a fundamental right. Murdock v. Pennsylvania, 319 U.S. 105 (1943). It is a right, moreover, that is protected in the prison setting. See Pell v. Procunier, 417 U.S. 817, 826 (1974); Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam). Providing opportunities for confined persons to exercise that right is considered an affirmative duty in virtually every state. E.g., Mass. Gen. Laws Ann. ch. 127, § 88 (West 1974). See ACA Std. 4304. It is expressly mandated by this section which requires that free exercise be facilitated. Such free exercise includes the opportunity for congregate worship in accordance with the tenets of the confined person's faith as well as the opportunity to comply with diet, dress, and other requirements of his faith.

Paragraph (1) requires a fair allocation of available funds. Proportionality is the standard most often recommended. See e.g., ABA Joint Comm., § 6.3; Krantz, R. 1B-6. It is contemplated that a fair allocation of funds will, to a large extent, require allocation of funds proportionate to the number of confined persons of each religion. The section, however, does not require proportionality because it is possible that a particular religious group will be so small that its proportionate share would be meaningless to it. The director would thus be free to withhold funds or to provide the religious group with more than its proportionate share of funds so as to allow it to function effectively.

Paragraph (1) also requires the director to provide nutritious meals not violative of a confined person's dietary laws. The courts are not agreed on the question of a correctional facility's obligation to comply with religious dietary requirements. Compare Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975) with Knuckles v. Prasse, 435 F.2d 1255 (3d Cir. 1970), cert denied, 403 U.S. 939 (1971). The section reflects the view that the appropriate policy result, even if not constitutionally mandated, is to comply with dietary requirements. See e.g., ABA Joint Comm., § 6.3; Krantz, R. 1B-11 to 1b-12; Nat'l Advisory Comm'n Correc. Std. 2.16.

Paragraph (2) permits a confined person, subject to the requirements of security and safety, to comply with any dress or appearance requirements of his religion, observe religious holidays, and otherwise participate in religious services. See, ABA Joint Comm., § 6.3; Krantz, R. 1B-7 and 1b-10; Nat'l Advisory Comm'n Correc. Std. 2.16. Both the ABA Joint Committee and the National Advisory Commission would permit, subject to security and safety, confined persons to dress as they wish whether or not required by a particular religious belief.

Paragraph (3) protects a confined person's right to privacy in conversing with a chaplain. ABA Joint Comm., § 6.3; Krantz, 1B-2. The confidentiality of such a communication would not be affected by the fact that the confined person and clergyman are of different faiths. Although this provision is broader than the privilege provided in some states, but see Uniform Rule Evidence R. 505(b), the broader provision is thought necessary since a confined person has limited opportunity at best to choose the clergyman with whom he communicates.

The intent of the section is that a confined person may not be coerced to practice any or a particular religious belief. Nor may his participation, or lack of participation be made a factor in decisions concerning him. See e.g., ABA Joint Comm., § 6.3.

No attempt is made in this section to define religion. Sham religious groups are not unknown in the correctional setting. E.g., ABA Joint Comm., § 6.3. With the provisions concerning the ability of confined persons generally to join organizations, see section 4-124 infra, it is expected that the incidence of sham religious groups will decrease. If, however, the religious group to which the confined person claims allegiance is, indeed, a sham, his "belief" is not a protected interest under this section. Nevertheless, there is no attempt to define "religion" for purposes of this section. It was thought best to leave the development of what is or is not a religion to a court decision which can be based on the particular facts brought before it. For one attempt to separate sham from "true" religious groups, see Nat'l Advisory Comm'n Correc. Std. 2.16:

> Each correctional agency should give equal status and protection to all religions whether traditional or unorthodox. In determining whether practices are religiously motivated the following factors among others should be considered as supporting a religious foundation for the practice in question:
>
> 1. Whether there is substantial literature supporting

the practice as related to religious principle.

2. Whether there is a formal, organized worship of shared belief by a recognizable and cohesive group supporting the practice.

3. Whether there is a loose and informal association of persons who share common ethical, moral or intellectual views supporting the practice.

4. Whether the belief is deeply and sincerely held by the offender.

The following factors should not be considered as indicating a lack of religious support for the practice in question:

1. The belief is held by a small number of individuals.

2. The belief is of recent origin.

3. The belief is not based on the concept of a Supreme Being or its equivalent.

4. The belief is unpopular or controversial.

In determining whether practices are religiously motivated, the correctional agency should allow the offender to present evidence of religious foundations to the official making the determination.

SECTION 4-114. [Communications.]

(a) A confined person has a protected interest in communicating privately with other persons by means of oral and written communication.

(b) The director shall:

(1) provide, at the department's expense, to each confined person a reasonable amount of stationery and writing implements;

(2) promptly transmit, at the department's expense,

(i) all written communications from a confined person to his attorney, the director, the correctional mediator, or any federal or state court having jurisdiction over a legal matter in which he is involved;

(ii) a reasonable number of written communications from a confined person to the Governor and members of the [Legislature];

(iii) up to 5 additional one-ounce written communications per week from the confined person to other persons; and

(iv) all written communications delivered to the facility and addressed to the confined person; and

(3) provide confined persons with access to telephones and permit a confined person to place and receive emergency telephone calls and those to or from his attorney.

(c) The director may not:

(1) limit the number of written communications that may be sent by a confined person at his own expense or received by him;

(2) limit the persons with whom a confined person exchanges written communications except pursuant to Section 4-118; or

(3) limit to less than 2 the number of 3-minute

nonemergency telephone calls a confined person may place weekly at his own expense.

(d) Notwithstanding subsection (c), if a confined person sends more than 10 written communications per week beyond those sent at the department's expense or a confined person receives more than 10 written communications per week in response to any act of the confined person designed to result in a large amount of written correspondence, the director may require the confined person to pay the costs of processing the additional correspondence.

COMMENT

One of the most important aspects of a confined person's life is his ability to keep in touch with the outside world. Such communication is important to the confined person's adjustment to life inside the facility as well as to his ability to readjust to life outside. Association of State Correctional Administrators, Policy Guidelines (1972); G. Sykes, The Society of Captives, 122-29 (1958); Fox, The First Amendment Rights of Prisoners, 63 J. Crim. L. C. & P.S., 167, 173-74 (1972). In fact, communication with the outside world is an important factor in non-recidivism. See e.g., D. Glaser, The Effectiveness of a Prison and Parole System 378-80 (1964); N. Morris, The Future of Imprisonment 35 (1975); Holt & Miller, Explorations in Inmate-Family Relationships (1972). Communication is thus important both to maintain a stable institutional environment and to structure the correctional system so as to discourage recidivism. Absent compelling reasons to the contrary, then, a confined person should be encouraged to maintain ties to the outside world. See Procunier v. Martinez, 416 U.S. 396 (1974) (Prison mail rules will be upheld only if necessary or essential to legitimate prison interests). See also Fox, The First Amendment Rights of Prisoners, 63 J. Crim. L.C. & P. S., 162, 166 (1972); Note, Prison Mail Censorship and the First Amendment, 81 Yale L.J. 87 (1971).

SECTION 4-114

Affording confined persons the right to send and receive an unlimited number of letters from or to any person has been urged by several sources. E.g., ACA Std. 4305, 4341; ABA Joint Comm., § 6.1; Krantz, R. 1C-1 and 2; Nat'l Advisory Comm'n Correc. Std. 2.17. It represents a growing trend in the operation of correctional facilities. See e.g., ABA Joint Comm. § 6.1(a) and Commentary. Illinois (Ill. Ann. Stat., ch. 38, § 1003-7-2 (Smith-Hurd 1973) and Ill. Correc. Ad. Reg., Adult Div'n), § 823 (1975)) and Massachusetts (see Krantz at 5, 50-51) for example, are states that have adopted this policy. At least one court has found the use of "approved correspondents lists" unconstitutional. Finney v. Arkansas Bd. of Correc., 505 F. 2d 194, 211 (8th Cir. 1974). Although this section prohibits use of such approved lists, there is recognition that circumstances might require the exclusion of a particular correspondent. See Section 4-118 infra.

The importance of helping a confined person keep in touch is also reflected by the fact that several correctional systems already provide free mailing to confined persons. E.g., Manual for Alas. St. Adult Correc. Inst., § 705 (1972) (5 letters weekly); Cal. Dept. of Correc. DP-2404 (rev. 1975)(5 letters weekly for indigent inmates; 2 letters may require additional postage); Ill. Correc. Ad. Reg., Adult Div'n, § 823 (1975) (unlimited postage to courts, 3 letters weekly to legislators, 3 additional letters weekly); for a discussion of these Illinois regulations, see Bach v. Coughlin, 508 F.2d 303, 308 (7th Cir. 1974); Ad. Plan Manual, N.J. Div'n of Correc. and Parole Std. 291.277 (1975)(allowance of "reasonable" correspondence to indigent inmates); Pa. Bur. of Correc. Ad. Dir. BC-ADM 803 (1972) (10 letters monthly); Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973)(describing Texas policy of providing 3 letters weekly); U.S. Army Correc. Sys. AR 190-47 (1975) (all letters of inmates in "nonpay status"). See also ACA Std. 4347. Further, at least one court has ordered the provision of free postage. Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) aff'd sub nom, Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977) (5 letters weekly). The necessity to provide free mailing would, of course, be reduced if confined persons were employed and paid a competitive wage. See Sections 4-801 to 816 infra.

Many correctionsl facilities now have telephones available for the use of confined persons. Krantz at 6. See e.g., Cal. Dept. of Correc. DP-4213 (1975); Ill. Correc. Ad. Reg., Adult Div'n, § 830 (1975); N.J. Div'n of Correc. and Parole Stds. 293.210 to .275 (1975); U.S. Army Correc. Sys. AR 190-47 (1975). The use of telephones is encouraged because it provides another opportunity for the confined person to maintain ties with the outside world. See ACA Std. 4349. It is expected that most

correctional administrators will meet the requirements of this section by providing pay telephones at the facility; procedures will be necessary, of course, to govern the times and incidence of telephone use. The section contemplates that confined persons may reverse the charges on telephone calls. Finally, the section does not address the question of payment for attorney and emergency telephone calls. The decision as to whether and under what circumstances to pay for those telephone calls is left to the sound discretion of the director. A confined person's interest in them may be thought sufficiently strong that a director would elect to have all of them placed at department expense. See e.g., ABA Joint Comm., §6.1. But see U.S. Army Correc. Sys. AR 190-47 (1975). It is also possible that the director could approve payment of those telephone calls for indigent confined persons.

Subsection (d) is intended as a check on the confined person whose volume use of the mail system creates an undue burden on correctional system personnel. It permits the director to respond to a particular instance of abuse without restricting the mail rights of confined persons generally.

SECTION 4-115. [Visitation.]

(a) A confined person has a protected interest in receiving visitors from the free community.

(b) The director shall:

(1) establish a visiting schedule for each facility which provides opportunity for confined persons to meet with visitors and includes hours on holidays and weekends and in the evenings;

(2) permit each confined person to have at least [5] hours of visitation weekly and to accumulate unused visiting hours within a [2-month] period for extended visits within the established visiting schedule; and

(3) permit each confined person, other than a person classified as dangerous, to have monthly a private visit for a substantial period of time. Private visits need not be given to a confined person who has been permitted a furlough to visit his family or friends within the preceding 3 months.

(c) The director shall adopt measures to prevent the introduction of contraband or prohibited material into the facility by visitors. The director shall:

(1) assure that each visitor is given reasonable notice of what constitutes contraband and prohibited materials;

(2) utilize procedures, such as subjecting visitors to scanners or requiring thorough searches of confined persons both before and after visits, that minimize the need for more intrusive searches of visitors themselves;

(3) prohibit any search of a visitor unless he consents to be searched; and

(4) permit the exclusion from the facility of any visitor who refuses to consent to a search or causes a scanner to react or there is reliable information that he is carrying contraband or prohibited material.

(d) The director may not restrict the persons a confined person may receive as visitors except pursuant to Section 4-118.

COMMENT

Confinement brings alienation and the longer the confinement the greater the alienation. E.g., Nat'l Advisory Comm'n Correc. at 67-68. There is little, if any, disagreement that the opportunity to be visited by friends and relatives is more beneficial to the confined person than any other form of communication. E.g., ABA Joint Comm., § 6.2; American Correctional Ass'n Manual of Correctional Standards (1966) [hereinafter cited as ACA Manual]; Krantz. R. 1C-6 and Commentary; Nat'l Advisory Comm'n Correc. Std., § 2.17. See also The First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners, Stds. 37-40. Cf. Holt & Miller, Explorations in Inmate-Family Relationships, 42 (1972).

Ample visitation rights are also important for the family and friends of the confined person. See Rhem v. Malcolm, 371 F. Supp. 594 (S.D. N.Y. 1974) modified, 507 F.2d 333 (2d Cir. 1977); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972). Private visits among confined persons and family members aid in preserving the family unit. See Hopper, Sex in Prison (1976); Hayner, Attitudes Toward Conjugal Visits for Prisoners, 36 Fed. Prob., Mar. 1972, at 43. Preservation of the family unit is important to the reintegration of the confined person and decreases the possibility of recidivism upon release. See comment to Section 4-116 infra.. Since visitation has demonstrated positive effects on a confined person's ability to adjust to life while confined as well as his ability to adjust to life upon release, this section is intended to make visitation as expansive as possible.

Subsection (b) directs maintenance of a broad visitation schedule, entitlement to a minimum number of hours of weekly visiting (the right to five hours of weekly visiting strikes a balance between facility limitations and broad visitation) and to private visits, and the ability to accumulate unused visiting hours for more extended visits. It is recognized that these provisions may tax institutional schedules, personnel assignments, and available space, and that, therefore, their implementation may represent a significant expense. It is also recognized, however, that their implementation need not require building or renovation costs. For example, trailers are presently used for private visits in the California correctional system. There may well be other cost-saving ways to implement these provisions. The section ultimately reflects the view that, whatever the expense involved, the strong interests of society and the confined person require the implementation of these provisions.

The ability to accumulate visiting hours and thus have extended visits seems particularly crucial. Facilities are often geographically remote from population centers. See comment to Section 4-802 infra. The long distances to be traveled and the costs of such travel discourage frequency of visits. This is only exacerbated by short visiting time upon arrival. Longer visits should, at least in part, make visits more attractive. See ABA Joint Comm., § 6.2. Further, the section contemplates the possibility that the director would provide transportation to the facility from terminal public transportation points and would choose to pay transporation, and even lodging, costs of indigent visitors. See id.; ACA Std. 4355; Nat'l Advisory Comm'n Correc. Std. 2.17.

The provision for private family visits is intended to strengthen and maintain the family unit. See Hopper, Sex in Prison (1976); Hayner, Attitudes Toward Conjugal Visits for Prisoners, 36 Fed. Prob., Mar. 1972, at 43. Provision for family visits is recommended by, among others, the Nat'l Advisory Commission, Correc. Std. 2.17 and the ABA Joint Commission, § 6.2. Such visits are common in European facilities. See e.g., H. Barnes and N. Teeters, New Horizons in Criminology 511 (3d ed. 1959). California has permitted family visits for several years, see Cal. Correc. R. DR-2705 (rev. 1975), and has now expanded these visits to include all medium and minimum security facilities and is seriously considering introduction of family visits in maximum security facilities. See ABA Joint Comm., § 6.2(b) and Commentary. The American Correctional Association urges the implementation of extended family visits. ACA Std. 4353. Although family vists are strongly urged, they are not required by this section because of a concern that it will not be possible to provide sufficient space in a facility. (It is of course possible that space can be purchased or rented elsewhere. See ABA Joint Comm., § 6.2(b) and Commentary). An option is therefore included to provide home furloughs.

"Approved" visiting lists are employed in most facilities. E.g., Alas. Correc. Reg. 706 (1972); Ill. Correc. Ad. Reg., Adult Div'n 829 (1973); Pa. Bur. Correc. Ad. Dir. BC-ADM 812 (1972). See ABA Joint Comm., § 6.2. This section rejects the necessity for such lists. See id.; Nat'l Advisory Comm'n on Correc. Std. 2.17 (1973). It permits a confined person to visit with any person of his choice subject to an exclusion for articulable cause pursuant to subsection (c) or Section 4-118.

This section is also intended to promote the public's right to information about the operation of its correctional facilities. As was stated by the National Advisory Commission:

> The walls of correctional institutions have served not merely to restrain criminal offenders but to isolate them. They have been isolated from the public in general and from their families and friends. As a result, the public does not know what is happening in prisons .... If corrections is to assure that an offender will readjust to the free society upon release, the adjustment process must begin long before the day of release. To accomplish this, the public must be concerned about what happens in corrections. Information is a prerequisite to concern.

Nat'l Advisory Comm'n Correc. Std. 2.17.

The National Advisory Commission recommended free and uncensored interviews between media representatives and confined persons. Id. See ABA Joint Comm., § 6.2(a) and Commentary.

The Supreme Court has upheld the right of a facility to bar one-to-one interviews between a confined person and a media representative. Pell v. Procunier, 417 U.S. 817 (1974). Nevertheless, most departments of corrections do allow broad media access. Saxbe v. Washington Post Co., 417 U.S. 843, 869 (1974) (Powell, J., dissenting). See e.g., Federal Bureau of Prisons Policy Statement 1220.1B (July 1, 1976) (private and uncensored interviews permitted; confined person to authorize department to respond to comments and to release information relevant to those comments). Ment. Health & Correc. Dept. Policy Statement 30 (June 24, 1974) (denial of access only by the director in writing and only when necessary to preserve security or prevent clear and imminent threat of violence).

The constitutional rights of news media in correctional visitation are no greater than those possessed by the public generally. Pell v. Procunier, 417 U.S. 817 (1974). No greater rights are set forth in the Act because of the broad thrust of visitation granted the public.

Finally, the use of camera and audio equipment is often a necessary adjunct to a media interview. The intent of this section would be to permit their use within facilities if the confined person involved gives his consent. See e.g., Mass. Correc. Dept. Order 1340.1 (1973).

Subsection (c) is a recognition of a fact of prison life: visitors represent one source for the introduction of contraband into a facility. In some correctional systems searches of visitors are nonetheless expressly prohibited. E.g., U.S. Army Correc. Sys. AR 190-47-5-11 (1975). Subsection (c) authorizes a visitor search upon reliable information that the visitor is carrying contraband and when other means of discovering it are unavailable. The search is still subject to the consent of the visitor who may not be searched without his consent but who may be excluded if he refuses.

The expansive visiting rights contemplated by this section will, admittedly, increase the opportunities for the introduction of contraband by visitors. The director is required to establish procedures that prevent its introduction while reducing the need to search visitors. One such procedure is the routine search of a confined person before and after each visit and this authority is provided in the section. See e.g., N.J. Correc. Dept., Adult Div'n Std. 292.279 (1975) (patdown prior to visit; strip search subsequent to visit); Pa. Correc. Ad. Reg. BC-ADM 812 (1972). The subsection provides, in effect, that a visit is standing cause for a search of a confined person and may be so described in a plan developed pursuant to Section 4-119. While the privacy interests of confined persons are important and should be protected, the privacy interest of visitors, who are, after all, free citizens, deserve even greater protection. It is the intent of this section that searches of confined persons be employed in an effort to decrease or eliminate the need to search visitors.

Section 4-117, infra, allows correctional authorities to intercept particular communications upon reliable information and to formulate a plan for the random interception of communications; the section would apply to all but the private family visits in subsection (b)(3). The director might reasonably decide against intercepting any communication between a confined offender and a visitor. See ABA Joint Comm., § 6.2; Nat'l Advisory Comm'n Correc. Std. 2.17. It is contemplated, in any case, that interviews between confined persons and media representatives will not be intercepted.

SECTION 4-116. [Preserving Parental Relationships.]

(a) The director shall:

(1) assist confined persons in (i) communicating with their children and otherwise keeping informed of their affairs, and (ii) participating in decisions relating to the custody, care, and instruction of their children; and

(2) provide any confined person or any person accused of an offense access to relevant information about child-care facilities available in the department, counseling, and other assistance in order to aid the person in making arrangements for his child.

(b) The director may:

(1) establish and maintain facilities or parts of facilities suitable for the care and housing of confined persons with their children;

(2) authorize periodic extended or overnight visits by children with a confined person;

(3) authorize a child, upon the request of the confined person, to reside with the person in a facility while the person is entitled to custody of the child or if the person gives birth to the child during confinement.

(c) In determining whether a child may reside in a facility or visit a facility on an extended or overnight basis pursuant to subsection (b), the following factors, among others, must be considered:

(1) the best interest of the child and the confined person;

(2) the length of sentence imposed on the confined person and the likelihood that the child could remain in the facility throughout the confined person's term;

(3) the nature and extent of suitable facilities within the department;

(4) available alternatives that would protect and strengthen the relationship between the child and the confined person; and

(5) the age of the child.

(d) A child may not reside in a facility or visit a facility on an extended or overnight basis if:

(1) the division of correctional medical services certifies that the confined person is physically or emotionally unable to care for the child;

(2) the [Department of Welfare] certifies that the conditions in the facility will result in a substantial detriment to the physical or emotional well-being of the child; or

(3) the [juvenile, family court] orders that the child not do so.

(e) Whenever a child is authorized to reside in a facility or visit a facility on an extended or overnight basis, the director shall provide for the child's basic

needs including food, clothing, and medical care if the confined person is unable to do so. The department is subrogated to any rights the confined person has against any other person or organization on account of those expenses.

(f) Whenever the director allows a child to reside with a confined person in a facility he shall notify the [Department of Welfare] which may take any action authorized by law to protect the best interest of the child.

(g) This section does not limit or otherwise affect the power of a court to determine the nature and extent of parental rights of confined persons or to determine the custody of children.

COMMENT

One of the serious side effects of confining persons convicted of crimes is the resulting destruction of family relationships. P. Morris, Prisoners and Their Families (1965). It has long been recognized that the existence of a supportive relationship is one of the few factors that can be shown statistically to have an affirmative influence on recidivism. See D. Glaser, The Effectiveness of a Prison and Parole System 378-80 (1964) (relating residence with wife after release to post-release success); Holt & Miller, Explorations in Inmate-Family Relationships (1972) (relating extent of visitation to parole success); N. Morris, The Future of Imprisonment 35 (1974).

The importance of preserving family relationships has been recognized in ABA Joint Comm., § 6.2; ACA Manual at 542 ("As a matter of general policy, the members of the inmate's family should be permitted and encouraged to maintain close contact with the inmate, not only to help his morale while serving a sentence but to sustain family life, insure close ties after release, and assist in the inmate's institutional adjustment, giving him encouragement and helping him keep in touch with the outside world in a practical way."); Nat'l Advisory Comm'n Correc. Std. 2.17.

Various studies indicate a large percentage of women prisoners have children. See Singer, Women and the Correctional Process, 11 Am. Crim. L. Rev. 295, 302 (1973) (reporting the findings of four studies which show the following percentage of women prisoners have children: California (50%), federal system (70%), Pennsylvania (80%), District of Columbia (86%). See also Note, The Prisoner-Mother and Her Child, 1 Cap. U. L. Rev. 127 (1972). A 1971 study disclosed that in that year 239 babies were born to prisoners in state institutions. E. Chandler, Women in Prison 118-19 (1973). Figures indicating children affected by the imprisonment of men are even less available. It is reported that in one year in Oregon, "774 men newly committed for felonies left behind a total of 988 children." Sack, Seidler, & Thomas, The Children of Imprisoned Parents: A Psychosocial Exploration, 46 Am. J. Orthopsychiat. 618 (1976).

There are no specific figures on how many children are being retained in correctional institutions to be with their parents. The 1970 Census lists 53 children under the age of 5 in correctional institutions and another 60 in local jails and workhouses. The census also shows 67 children between the age of 5 and 9 in prison and 76 in local jails. These children are distinguished from those living in training schools for juvenile delinquents and thus it is unlikely that they are in correctional institutions as a result of their own criminal activity. U.S. Dept. of Commerce Bureau of Census, Persons in Institutions and Other Group Quarters, Table 3, at 5 (1973).

The traditional official response to the problem of the children of confined persons is to place them with other individuals or agencies with or without the permission of the confined parent. In many jurisdictions conviction of serious offenses is a ground for termination of parental rights. See generally, Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 1064-1079 (1970) (providing a survey of state provisions).

Many states have no specific provision relating to children of prisoners. Those states that have addressed the problem have taken a variety of courses. Cal. Penal Code, § 3401 (West 1970) (allows child to remain until two years of age when board of corrections arranges for its care elsewhere); Fla. Stat. Ann., § 944.24 (West 1973) (allows child to be retained in institution for 18 months and longer in exceptional cases); Me. Rev. Stat. Ann. tit. 34, § 815 (West Supp. 1976-1977) (custody of child determined "at instance of the department" in accordance with procedure for divesting parents of neglected children of their parental rights); Mass. Gen. Laws Ann. ch. 127, § 149 (West 1974) (authorizes parole of pregnant prisoners);

N.Y. Correc. Law, § 6.11 (McKinney 1968) (gives mother the right to bring child into institution until child is one year old unless the mother is physically unfit to care for child or not in the child's best interest). See also Apgar v. Beauter, 75 Misc. 2d 439, 347 N.Y.S.2d 872 (1973), holding the jailer did not have a right to arbitrarily deny the mother the right to retain her child in the jail:

> It is a general and well-established principle in this state that the welfare of a child is best served by remaining with its natural parent . . . . That incarceration in a jail or correctional institution per se does not constitute such unfitness or exceptional circumstances so as to require that a newborn infant be taken from its mother is attested to by the enactment by the Legislature of subdivision 2 of section 611 of the Correction Law. In fact, it has been New York's policy for over 40 years to permit inmate mothers to keep their newborn infants. . . . So important does the Legislature consider the natural mother-child relationship that even the father does not have the power under this statute to countermand the decision of an inmate mother to keep her child.

Id. at 440-41, 347 N.Y.S.2d at 875.

The problem of children of confined persons involves a delicate balancing of the parent's interest, the child's interest, and the state's interest in administering correctional facilities. The parents interest in preserving the relationship is clear. The state's interest is mixed--in many cases preserving the relationship may reduce recidivism but contemporary prisons are unsuited for raising children. The child's interest may also be mixed; although a prison is not an ideal environment for children, the child does benefit from continuity and stability in his relationship with his parent and some tentative findings suggest that children, particularly those in puberty, who are separated from their parent because of the latter's incarceration, exhibit a higher incidence of anti-social behavior. See Sack, Seidler, & Thomas, supra; Sack, Children's Reactions to the Imprisonment of Their Parents (Paper presented to the 1976 Annual Meeting of the American Academy of Child Psychiatry). The thrust of this section is to facilitate the continuation of the parent-child relationship within a prison context if necessary and appropriate. For additional psychological and legal support for this section, see Note, On Prisoners and Parenting: Preserving the Tie That Binds, 87 Yale L.S. 1408 (1978).

Subsection (a) authorizes the director to assist confined persons in maintaining their parental relationships. He is required to assist confined persons in communicating with their children and, to the extent they are able, to participate in decisions affecting their children. The decisions to which this section is directed include both formal decisions made by a child-care agency or a juvenile court and informal decisions made by temporary guardians. To the extent that confinement permits, the confined parent should be allowed to counsel or otherwise direct the upbringing of his children unless formal legal proceedings have terminated his right to do so.

Subsection (b) authorizes, but does not require, the director to permit extended overnight visits by children or to permit children to reside with their parents in a facility and to make appropriate provision for them. A variety of factors, provided in subsection (c), would influence a decision to allow permanent residence by children in a facility. No statutory restrictions on this authority are provided because of the complex mixture of factors which often exist. In most instances, it is likely that only very young children would be allowed to remain for limited periods of time with their parents in confinement. However, in a half-way house or other community-based facility and with parents with very short terms, it may be appropriate and beneficial to include older children.

Subsection (d) provides for some external review by the division of medical services, the department of welfare, and the juvenile or family court in order to protect the interests of the child.

Subsection (e) authorizes the expenditure of departmental funds to provide for the basic needs of children visiting or residing in a facility. The section is drafted to emphasize that the confined parent must pay for these basic provisions unless he is unable to do so. The last sentence of the subsection is intended to allow the department to seek, by way of subrogation funds available for the care of children. This would authorize the department to seek enforcement of a child support order against a spouse of a confined person where the department provides basic support to the child.

Subsection (f) enhances the external review by the department of welfare or other agency generally concerned with the care and custody of parentless children. The last phrase of the subsection is intended to incorporate any existing state provision for protecting the child's interest such as procedures authorizing the appointment of a guardian ad litem.

Subsection (g) insures that the authority granted by this section is subordinate to the power of any court to determine parental rights or child custody.

SECTION 4-117. [Searches and Interception of Communications.]

(a) The director may authorize the opening and search for contraband or prohibited material of an envelope, package, or container sent to or by a confined person. This subsection does not authorize the interception of written communications.

(b) The director may permit the interception of communications:

(1) upon obtaining reliable information that a particular communication may jeopardize the safety of the public or security or safety within a facility;

(2) in pursuance of a plan formulated by the chief executive officer of each facility for conducting random interception of communications by or to confined persons which plan must be approved by the director as providing the least intrusive invasion of privacy necessary to the safety of the public and security and safety within a facility; or

(3) when otherwise authorized by law.

(c) Notwithstanding subsection (b), a communication may not be intercepted except pursuant to a court order or unless otherwise authorized by law if the communication is one which reasonably should be anticipated to be:

(1) a privileged communication between a confined person and his attorney, clergyman, or physician; or

(2) between a confined person and the Governor, Attorney-General, a member of the [Legislature], a member of the state judiciary, a member of the advisory committee, or a member of the sentencing commission.

(d) Whenever the director is authorized by this Act to prevent a person from communicating with a confined person, the director, in lieu thereof, may authorize communications between the persons to be intercepted if both parties agree to the interception.

(e) The chief executive officer shall designate specifically employees authorized to intercept communications.

(f) If a written communication is intercepted, it thereafter shall be transmitted promptly to its addressee unless to do so would jeopardize the safety of the public or the security or safety within a facility. Only that part of the communication which jeopardizes the safety of the public or the security or safety within the facility may be excised.

(g) The director shall maintain a record of each interception or excision of a communication which includes the date of its occurrence, the content thereof, the person authorizing the interception or excision and the factual basis for his doing so, and the name of the confined person involved.

COMMENT

This section attempts to balance institutional security against the confined person's privacy interest. See Procunier v. Martinez, 416 U.S. 396 (1974) ("the limitation of First Amendment freedoms [while incarcerated] must be no greater than is necessary or essential to the protection of the particular governmental interest involved"). The right of correctional authorities to openand inspect mail for contraband generally has been upheld. E.g., Denson v. United States, 424 F.2d 329 (10th Cir. 1970), cert. denied, 400 U.S. 844 (1970); Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), aff'd, 456 F.2d 854 (1972). The United States Supreme Court has indicated in dicta that censorship of content, under some circumstances, might be upheld, Procunier v. Martinez, 416 U.S. 396 (1974), and that opening attorney mail in the presence of confined persons might be more than is constitutionally required. Wolff v. McDonnell, 418 U.S. 539 (1974) (state conceded it could not read attorney mail).

The balance struck in this section, however, reflects a policy choice to protect communication rights beyond a constitutional minimum. This choice relates in part to the positive effect on a confined person of communication with the outside world. See comment to section 4-114 supra. It also relates, perhaps more fundamentally, to the high value placed on the exercise of first amendment rights in our society. See e.g., Kovacs v. Cooper, 336 U.S. 77 (1949); DeJonge v. Oregon, 299 U.S. 353, 365 (1937). See also Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 879 (1963).

Several authorities would grant a broader right to the confined person than that granted in this section. E.g., ACA Std. 4343 (no reading or censorship unless clear and convincing evidence). ABA Joint Comm., § 6.1 (letters opened only pursuant to a search warrant; packages brought or sent opened in presence of confined person); Krantz, R. 1C-1 to 1C-2 (outgoing letters opened only pursuant to a search warrant; incoming letters read only pursuant to a search warrant, and either opened only with

probably cause, or opened only in presence of the confined person); Note, Prison Mail Censorship and the First Amendment, 81 Yale L.J. 87 (1971). Although states have various policies with respect to opening communications, most have standards similar to--or more protective of confined person privacy rights--than the standard reflected in this section. E.g., Alas. St. Adult Correc. Inst., § 705 (1972) (letters checked for contraband; censored only if "clear and present danger"); Cal. Dept. of Correc. DP-2404, 2411 (rev. 1975) (letters read on "intermittent basis" and regularly if "immediate and present danger"" censored if clear and present danger); Ill. Correc. Ad. Reg., Adult Div'n, § 823 (1975) (incoming letters examined for contraband but not read, censored, or reproduced; outgoing letters "spot checked"). In New Jersey incoming letters are not read and outgoing letters are not opened. The latter would be more protective of privacy rights than this section except that the standard for reading incoming and opening and reading outgoing is a reasonable belief of "disapproved content" which includes a violation of institutional rules. Plan Manual, N.J. Div'n of Correc & Parole Stds. 291.271, .273 and .275 (1975).

Subsection (b) refers to both incoming and outgoing communications. It is contemplated, however, that the occasions for intercepting outgoing communications will be limited. Subsection (b) is specifically limited by the provisions of subsection (c). The requirement of prior judicial authorization before intercepting a privileged communication, see Wolff v. McDonnell 418 U.S. 539 (1974), is a recognition of the stronger privacy--and societal--interests in the unencumbered flow of such mail as well as the decreased potential of substantial harm. See ACA Std. 4282 (confidential contact with attorneys). Courts and correctional facilities, while not necessarily imposing a warrant requirement, have generally required separate, and more protective treatment of this type of mail. For a sampling of court decisions, see Bach v. Coughlin, 508 F.2d 303 (7th Cir. 1974); Wilkinson v. Skinner, 462 F.2d 670 (2d Cir. 1972); Lamar v. Kern, 349 F. Supp. 222 (S.D. Tex. 1972); Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), aff'd, 456 F.2d 854 (1972); Peoples v. Wainwright, 325 F. Supp. 402 (M.D. Fla. 1971). For a sampling of correctional department treatment, see Cal. Dept. of Correc. DP-2405 (rev. 1975); Ill. Correc. Ad. Reg., Adult Div'n Std. 823 (d) (1975); Ad. Plan Manual, N.J. Div'n of Correc. & Parole Std. 291.277 (1975); Pa. Correc. Admin. Dir. BC-ADM-803 (1972).

The requirement in subsection (e) of a special designation of employees who may conduct interceptions is intended to protect the privacy of a confined person by limiting the number of employees who may conduct interceptions; affording this authorization to

specifically designated employees allows the opportunity to select employees who are particularly sensitive to the privacy interests of those confined. See e.g., N.J. Stat. Ann., §§ 2A:156A-9(b) and 10(e) (1971) (wiretap statute); Note, New Jersey Electronic Surveillance Act, 26 Rutgers L. Rev. 617, 632 n.118 (1973). The requirement of a special designation may also assure technical competence. See State v. Dye, 60 N.J. 518, 527, 291 A.2d 825, 829, cert. denied, 93 S. Ct. 699 (1972).

It is expected that the director will require for his own purposes in the sound operation of the department as well as for possible inclusion in his annual report to the Governor, see section 2-104 supra, a periodic summary that would include the number of letters opened and of interceptions conducted, the amount of personnel hours used for that work, and the results achieved. The director thus will be able to evaluate the search procedures developed.

SECTION 4-118. [Limiting Visitors and Correspondents.]

(a) The director may issue an order that:

(1) prevents a specific person from communicating with a confined person if,

(i) the person seeking to communicate with a confined person knowingly has violated the rules relating to communication with confined persons, and

(ii) less restrictive measures, such as intercepting communications between the person and confined persons, are not feasible.

(2) prevents a specific person from entering facilities or visiting confined persons if,

(i) the person has in the past knowingly violated the rules of a facility relating to visitation; or

(ii) the director has reliable information that if admitted to the facility, the person is likely to advocate unlawful acts or rule violations that jeopardize the safety of the public or security or safety within a facility.

(b) A person against whom an order is issued is entitled to a written statement of the basis for the order, an opportunity to contest the order at a hearing before the director or his delegate, and judicial review.

(c) A confined person affected by an order issued pursuant to this section must be informed in writing of the order, the person against whom it is issued, and the specific reason for the order.

(d) An order pursuant to this section may not continue for more than 180 days without further evaluation.

COMMENT

The thrust of this Part is to encourage visitation and communication with persons in the free community. Precluded by this Part are limitations as a general matter on the number of letters that may be sent or received (Section 4-114(c)), the persons with whom letters are exchanged (id.), and the persons with whom a confined person may visit (Section 4-115(d)). It is nonetheless recognized that a particular person may have violated visiting or communication rules or otherwise jeopardizes security and safety. This section provides a mechanism and a standard for excluding such persons.

The judicial review authorized in subsection (b) refers to the review provided in Section 2-104. Visitors as well as confined persons are entitled to a written statement of the reasons for the exclusion and a hearing and review under

this Act because of the dual nature of the visiting provisions: they protect the public's right to be informed as well as the confined person's interest in visitation. See e.g., Cal. Correc. R. D.P. 2704 (1975) (notice of exclusion, including reasons, duration of, and circumstances for reconsideration, to be afforded confined person and visitor. "Such notice will include instructions for appealing the action if the ... visitor desires to do so"). The requirement under subsection (d) for review every 180 days is a recognition that communication and visitation rights reflect substantial interests of the confined person and the public and that, therefore, an order restricting such rights should not continue indefinitely without review.

SECTION 4-119. [Searches.]

(a) A confined person has a protected interest in freedom from unreasonable searches.

(b) Searches within facilities are subject to the following limitations:

(1) Searches must be conducted solely to detect contraband, prohibited material, or evidence of a crime;

(2) The frequency and scope of random or general searches of facilities or confined persons must conform to a plan approved in advance by the director as providing the least intrusive invasion of privacy necessary to the safety of the public and security and safety within the facility. The plan may include provisions for search of confined persons upon admittance to a facility, upon leaving and returning to a facility, and upon entering or leaving designated areas. The plan need not be published or adopted in compliance with the procedures governing the adoption of rules or other measures.

(c) Searches other than those authorized by the plan and directed at living quarters or a particular confined person must be conducted only upon obtaining reliable information that a search is necessary to detect contraband, prohibited material, or evidence of a crime. Except in an emergency, prior authorization to conduct such a search must be obtained from the chief executive officer or supervisory-level correctional employees to whom the chief executive officer has delegated the responsibility to authorize searches.

(d) A search requiring a confined person to remove his clothes must be conducted with due regard to the privacy and dignity of the confined person.

(e) A search requiring the examination of a body cavity other than visual observation of the mouth, nose, or ear must be conducted by medically trained personnel of the Division of Correctional Medical Services in the medical quarters of the facility, or, in the absence of medical quarters, in other quarters appropriate for conducting a private examination.

COMMENT

The Fourth Amendment protection against unreasonable search and seizure has been applied by the Supreme Court in various contexts. E.g., United States v. Van Leeuwen, 397 U.S. 249 (1970) (mail searches); Terry v. Ohio, 392 U.S. 1 (1968) (street detentions); Katz v. United States, 389 U.S. 347 (1967) (electronic surveillance); Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative searches); Schmerber v. California, 384 U.S. 757 (1966) (bodily intrusions). The court, however, has not applied it to prisons:

> [T]o say that a public jail is the equivalent of a man's "house" or that it is a place where [a confined person] can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. . . . [I]t is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day.

Lanza v. New York, 370 U.S. 139, 143 (1962) (footnotes omitted). Most decisions since Lanza continue to reject applying the fourth amendment to the prison setting. E.g., United States v. Kelley, 393 F. Supp. 755, 756-57 (W.D. Okla. 1975); Hoitt v. Vitek, 361 F. Supp. 1238 (D.N.H. 1973), aff'd sub nom. Laaman v. Vitek, 502 F.2d 1158 (1st Cir. 1973); People v. Chandler, 262 Cal. App. 2d 350, 356, 68 Cal. Rptr. 645, 648 (1968), cert. denied 393 U.S. 1043 (1969); State v. Brotherton, 2 Ore. App. 157, 160, 465 P.2d 749, 750 (1970). Several cases that involve prison searches do not even refer to the fourth amendment. E.g., Jackson v. Werner, 394 F. Supp. 805 (W.D. Pa. 1975); People v. Ranes, 58 Mich. App. 268, 227 N.W. 2d 312 (1975). The precedential weight of the Lanza opinion is, nevertheless, open to question. See e.g., Bonner v. Coughlin, 517 F.2d 1311, 1316-17 (7th Cir. 1975) (opinion by Stevens, J.); Daughtery v. Harris, 476 F.2d 292 (10th Cir.), cert. denied, 414 U.S. 872 (1973); Burns v. Wilkinson, 333 F. Supp. 94, 96 (W.D. Mo. 1971); A. Amsterdam, B. Segal & M. Miller, Trial Manual 3 for the Defense of Criminal Cases 1-218 (3d ed. 1974); Gianelli & Gilligan, Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities, 62 Va. L. Rev. 1045 (1976). In the past few years the self-imposed "hands off" policy has been increasingly rejected by courts dealing with the institutional setting. E.g., Bounds v. Smith, 430 U.S. 817 (1977) (law libraries); Wolff v. McDonnel, 418 U.S. 539 (1974) (disciplinary proceedings); Procunier v. Martinez, 416 U.S. 396 (1974) (access to court; communication); Cruz v. Beto, 405 U.S. 319 (1972) (religion); Younger v. Gilmore, 404 U.S. 15 (1971)(access to court); Lee v. Washington, 390 U.S. 333 (1968) (equal protection): Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) (experimental psychosurgery); Sostre v. McGinnis, 442 F.2d 178, 202-03 (2d Cir. 1971) cert. denied, 404 U.S. 1049 (1972) (free speech); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971) (conditions of confinement). Moreover, the "constitutionally protected place" rationale of Lanza has given way to a standard affording protection when there are "reasonable expectations of privacy." E.g., Katz v. United States, 389 U.S. 347 (1967). The crucial question becomes, then, what are a confined person's reasonable expectations of privacy?

Although most cases have held differently there have been several cases in which the Fourth Amendment was applied to the prison setting. E.g., Bonner v. Coughlin, 517 F.2d 1311, 1316-17 (7th Cir. 1975); Daughtery v. Harris, 476 F.2d 292 (10th Cir.), cert. denied, 414 U.S. 872 (1973); Burns v. Wilkinson, 333 F. Supp. 94, 96 (W.D. Mo. 1971). It is nevertheless clear that the provisions in this section go beyond what is presently constitutionally required. But the fact that these provisions are not required by the Constitution does not mean that the provisions are either unsound or not workable. Cf. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 137 (1977) (Burger, C.J., concurring). Several authorities have recommended standards with respect to prison searches which resemble or are even more protective of a confined person's privacy interest than what is reflected in this section. E.g., ABA Joint Comm., § 6.6 (hierarchy of cause needed ranges from (1) none for institutional searches other than living quarters to (2) reasonable belief and, unless a reasonable fear that contraband will be destroyed, prior written permission for searches directed particularly at living quarters and (3) probable cause for a body cavity search); Krantz, R. ID (hierarchy of cause needed plus requirement of prior authorization by shift supervisor for living quarter searches and, except in an emergency, for personal searches); Nat'l Advisory Comm'n Correc. Std. 2.7 (plan for regular administrative searches to be published and approved by court or legal authority; searches to be conducted only as "reasonably necessary" to control contraband or recover property); Gianelli & Gilligan, Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities, 62 Va. 1045, 1078-98 (1976) (administrative searches under articulated rules; searches directed at particular confined persons to be preceded by authorization of chief executive officer or designate unless an emergency).

The section reflects an intent to protect the privacy interests of a confined person to the fullest extent possible consistent with safety and security. See Singer, Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons, 21 Buffalo L. Rev. 669 (1972). It is, of course, true that a confined person loses some ability to protect his privacy. Thus, for example, while visual observations should be kept to the minimum consistent with security and safety, it is not intended that a visual observation without more is a "search" for purposes of the requirements of this section. By including institutional searches other than visual observations within the purview of a fourth amendment standard it is intended, however, to assure application of a test of reasonableness:

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> The question of what constitutes a covered "search" or "seizure" would and should be viewed with an appreciation that to exclude any particular police activity from coverage is essentially to exclude it from judicial control and from the command of reasonableness, whereas to include it is to do no more than say that it must be conducted in a reasonable manner.

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 363-64 (1974). The section allows general random searches pursuant to a plan to decrease the incidence of controlled substances and weapons. This section thus permits frequent and wide ranging searches. The requirement of the filing of a plan with the director, however, does assure some review of the plan and a directorial decision that it is the least intrusive possible. The section requires "reliable information" once the search is to be directed at a particular confined person. This is, of course, less than what is normally required in similar contexts in the free world. But even in the free world the balancing of privacy against societal interests has not uncommonly resulted in a standard requiring less than probable cause. E.g., Terry v. Ohio, 392 U.S. 1 (1968); See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); Alexander v. United States, 362 F.2d 379 (9th Cir.), cert. denied, 385 U.S. 977 (1966).

The requirement in subsection (c) that at least supervisory level correctional employees give prior authorization to conduct a search is intended to focus responsibility at fewer employees and at a level of employees somewhat removed from daily, on-line duties.

The special requirements for the body cavity search provided for in (e) are not intended to apply generally to eye, ear, nose, and mouth examinations. These special requirements, as well as those provided in subsection (d) for strip searches, seem warranted by the additional intrusive nature of these searches. E.g., Ill. Correc. Ad. Reg., Adult Div'n, § 401 (1972); ABA Joint Comm., § 6.6(d) and Commentary; Krantz, R. ID. The courts have required no higher showing of cause for body cavity searches than for other searches within a facility. E.g., Daughtery v. Harris, 476 F.2d 292 (10th Cir.), cert. denied, 414 U.S. 872 (1973). Cf. Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967) (body cavity search at border). Several authorities, however, have required a higher standard. ABA Joint Comm., § 6.6(d) and Commentary; Krantz, R. ID-3 and Comment. This section does not specifically require a higher standard of proof.

However, it does require the director to adopt rules that preserve the dignity of confined persons. It is intended that the rules will reflect the greater intrusion on privacy represented by a body cavity search.

SECTION 4-120. [Searches and Interceptions; Notice and Disclosure.]

(a) Within a reasonable time after contraband or prohibited material is seized or the substance of a communication is excised, the chief executive officer shall give the confined person affected a receipt identifying the sender, if any, the person conducting the search or interception, and the nature of the material confiscated or the reason for excising the communication.

(b) Except for interceptions conducted pursuant to a plan authorizing random interceptions, whenever a communication is intercepted the chief executive officer shall give the confined person a statement identifying the communication intercepted and the reason for its interception.

(c) A correctional employee who intercepts a communication may divulge the substance of the communication only when necessary to the performance of his official duties.

(d) Notwithstanding subsections (a) and (b), the chief executive officer may delay disclosing to a confined

person information concerning the excising or interception of his communications until the disclosure no longer interfere with the purpose for which the excising or interception was conducted.

COMMENT

This section affords a confined person the right to notice whenever a communication to or from him is intercepted or its substance excised or whenever property is confiscated after a search. See Cal. Dept. of Correc. DP 2404 (1975); N.J. Correc. Reg., Adult Div'n, §§ 291.273 and .275 (1975); ABA Joint Comm., § 6.6 and Commentary. Cf., 18 U.S.C., § 2510 to 2520 (1976) (federal wiretap statute). It is contemplated, in appropriate circumstances, that additional information would be provided in the statement or receipt. For example, it is expected that searches will be conducted so as not to damage property or injure persons and that living quarters would be left in the same condition as they were in when entered. E.g., Alas. Correc. Reg., § 205; Ill. Correc. Ad. Reg., § 401 (1975). If, however, property were to be damaged, that information should be included in the receipt.

The Act does not require that searches and interceptions be conducted in the presence of the confined persons. Other authorities, in an attempt to assure the proper conduct of a search as well as to reduce the distrust of confined persons, do so require. E.g., ABA Joint Comm., § 6.6 and Commentary. Because a confined person may be absent when a search is conducted, the receipt or statement required in this section is particularly necessary if there is to be assurance that a confined person will learn of the search, interception, or excision.

Institutional searches, at times, have been employed to harass confined persons. Nat'l Advisory Comm'n Correc. Std. 2.7 and Commentary. Harassment is clearly impermissible as an operative cause for a search. The receipt or statement required by this section would provide a confined person with the means to challenge the necessity of the search in a grievance procedure. Thus, there is a review mechanism in which to test the reasonableness of the search, interception, or excision.

Subsection (a) requires a receipt only if property is confiscated. No notice need be given for searches in which nothing is taken. The term "excising the communication" is intended to cover both excising a part of the communication or, where necessary, withholding the entire communication.

Subsection (c) is intended to assure that correctional employees who intercept communications will act in a manner to protect the privacy interests of confined persons.

Subsection (d) permits a delay in providing a confined person with a statement or receipt. If, for example, an intercepted communication furnished evidence of a planned escape, a delay might be warranted in order to obtain all details or learn of all those participating. The delay should be as short as possible; it is not intended that subsection (d) may be employed to avoid the requirements in subsections (a) and (b).

Although the Act requires only that a receipt or statement be furnished to the affected confined person, it is, of course, contemplated that the chief executive officer also will receive a copy. It could form the basis, should the director require it, of an annual summary of the number, type, results, and approximate costs of searches and interceptions. See Krantz, R. 1D-7. The information will aid in determining whether an appropriate balance has been reached between confined-person privacy and institutional security.

SECTION 4-121. [Privacy and Accuracy of Records.]

(a) A confined person has a protected interest in the privacy and accuracy of records maintained about him by the department.

(b) The department may not disclose information about a person who is or has been in its custody except pursuant to the written consent of the person, unless disclosure would be:

(1) to employees of the department or other persons providing services to persons in the custody of

the department who need the information in the performance of their duties;

(2) pursuant to an order of a court of competent jurisdiction;

(3) to the correctional mediator;

(4) to a recipient who has provided the department in advance with adequate written assurance that the record will be used solely as a statistical research or reporting record and the record is to be transferred in a form that is not individually identifiable;

(5) to any governmental agency for a civil or criminal law enforcement or correctional activity if the activity is authorized by law and the head of the agency has made a written request to the director specifying the particular information desired and the law enforcement activity for which the information is sought; or

(6) in an emergency, to any appropriate person if the information is necessary to protect the health or safety of any person.

(c) Notwithstanding subsection (b), the director may authorize the disclosure of information about a person who is or has been in the custody of the department in an individually identifiable form whenever there is no practical way to obtain the consent of the person to whom the information pertains and the recipient has provided the

department with advance adequate written assurance that:

(1) the information will be used solely for research purposes and will not be disseminated in an identifiable form;

(2) the recipient is affiliated with an agency that assumes responsibility for maintaining the confidentiality of the information;

(3) the recipient has implemented physical, technical, and administrative safeguards necessary to protect the confidentiality of the information; and

(4) disclosure of the information in identifiable form is necessary to accomplish the purpose of research and the value of the research outweighs the risk of disclosure.

(d) Persons in the custody of the department may not have access to the files of other persons in the custody of the department.

(e) Nothing in this section precludes the director from disclosing the name, former address, date and place of birth, sex, race, or national origin, length of sentence, crime committed, place of confinement, or residence of a person in the custody of the department to any person who the director believes has a valid interest in obtaining the information.

COMMENT

This section is modeled after the Federal Privacy Act of 1974, 5 U.S.C., § 552a (1974). That act governs records of persons in the federal correctional system. The exceptions to the rule of non-disclosure are those that seem appropriate in a state system. The section allows additional disclosure with the consent of the person affected.

One of the more difficult issues upon which to strike the balance between public interest and personal privacy is with regard to research. The correctional system is a particularly important focal point for research, but, at the same time, the claim for privacy on behalf of those in custody is also compelling. Subsection (b)(4) authorizes the transfer of information to a qualified researcher as long as the information is not in personally identifiable form. In systems that have computerized personal records, this requirement will not impose substantial costs. On the other hand, the section could, in some circumstances, require sufficient costs to prevent legitimate research projects from going forward, particularly long-term follow-up studies where personal identification is required. Subsection (c) allows the transfer of information in a personally identifiable form in those circumstances where other substantial safeguards to preserve privacy are maintained.

The section does not speak to the retention or destruction of records. The Act leaves this difficult and complex subject to the existing laws of the states.

SECTION 4-122. [Access to Files.]

(a) The director, upon the request of a person who is or has been in the custody of the department, shall authorize him to:

(1) gain access to his central file and other information about him maintained by the department

and copy all or any portion thereof in a form comprehensible to him;

(2) designate an employee of the office of correctional legal services, legal counsel, or, with the approval of the director, any other person to review and copy or accompany him in reviewing his file;

(3) request amendment or deletion of information contained in his file on the basis that the information is,

(i) erroneous;

(ii) deceptive; or

(iii) irrelevant or unnecessary; and

(4) add information to his file not clearly irrelevant to the functions of the department.

(b) Whenever a person requests an amendment or deletion of information in his file, the director shall review the file, determine whether the amendment or deletion is justified, order any change in the file he considers appropriate, and notify the person involved of his action. If the person is not satisfied with the action of the director, he may supplement the disputed information with his own version or explanation which must accompany any disclosure of the information it supplements.

(c) Notwithstanding subsection (a), the director may deny a person access to those portions of his file which a court has indicated in writing or the director determines consist of:

(1) diagnostic opinion relating to physical or mental health problems the disclosure of which might affect adversely a course of on-going treatment;

(2) information obtained upon a promise of confidentiality if the promise was made before the effective date of this Act;

(3) information about a pending investigation of alleged disciplinary or criminal activity; or

(4) other information that, if disclosed, would create a substantial risk of physical harm to any person.

(d) If any material or document in a person's file includes information on more than one person, the person may inspect only the information relating to him.

(e) Whenever the director denies access to portions of a person's file, he shall summarize the factual basis for the information. Upon the person's request, the director shall fully disclose the file to the correctional mediator who, without disclosing the information to the person, shall make a full investigation to determine the

accuracy of the information and report his findings to the director and the person involved.

(f) Except for employees of the department authorized by the director to examine files in the course of their duties, the director shall maintain a written record of those individuals who have examined the file of a confined person or to whom information in a confined person's file has been disclosed.

COMMENT

It is increasingly recognized that the governmental power to collect and maintain information files on citizens is subject to abuse and should be regulated by state. A citizen's right of privacy requires that such information necessarily collected by governmental agencies to perform their function should not be used for other purposes. Similarly it is recognized that a citizen should be entitled to examine his own file to insure the accuracy of the information contained therein. These interests are equally compelling in the context of a correctional system where the type of information collected is intensely personal and the effect of erroneous information can be immediate and severe.

The section is modeled primarily after the Federal Privacy Act of 1974, 5 U.S.C., § 552 (1974). Subsection (d) is derived from the federal rule governing access to educational records. 20 U.S.C., § 12329.

To date, the extent to which constitutional or statutory requirements of disclosure are appropriate have focused on either presentence reports or prison files used for parole hearings. This section is basically consistent with the present federal rule governing disclosure of presentence reports. Fed. R. Crim. Pro. 32. See also, Calif. Penal Code, § 1203(a), Colo. R. Crim. P. 32(a)(2), and Idaho Crim. R. 32(c)(1). The section is consistent with a variety of proposals for sentencing reform: ABA, Standards, Sentencing Alternatives and Procedures 4.4; Nat'l. Advisory Comm'n., Correc. 5.16; Administrative Conference Recommendation #72-3 pertaining to parole.

A few courts have held that disclosure of the prison file prior to a parole hearing may be constitutionally required. See, e.g., Childs v. United States Board of Parole, 371 F.Supp. 1246 (D.D.C. 1973), modified, 511 F.2d 1270 (D.C.Cir. 1974). Contra: Wiley v. United States Board of Parole, 380 F.Supp. 1194 (M.D.Pa. 1974); Barradale v. United States Board of Parole, 362 F.Supp. 338 (M.D.Pa. 1973).

SECTION 4-123. [Lending Library; Reading Material; Radio and Television.]

(a) A confined person has a protected interest in access to a lending library, in the possession and use of reading material, and in the receipt of regularly scheduled radio and television transmissions. The director shall permit each confined person to:

(1) acquire reading material by purchase, loan, or gift from any source, but the chief executive officer may withhold from the intended recipient material jeopardizing the safety of the public or security of safety within a facility; and

(2) acquire, if not otherwise reasonably available within the facility, and use, subject to the rights of other confined persons, a receiving radio and television set.

(b) The chief executive officer shall inform a confined person in writing whenever reading material is withheld from him.

COMMENT

The provisions of this section again implicate First Amendment considerations. They afford confined persons access to the free world by means of reading material, libraries, and regularly scheduled radio and television broadcasts.

The requirement of "regularly scheduled broadcasts" is intended to exclude transmissions from short-wave radios; it is not intended to exclude "specials" or other similar programs transmitted by cable, radio, or television that pre-empt regular program broadcasts. Access to radio and television broadcasts has been recommended by the Nat'l Advisory Comm'n Correc. Std. 2.17. Most correctional systems now provide access. E.g., Me. Ment. Health & Correc. Dept. Policy 31 (July 8, 1974). Access to such broadcasts is considered sufficiently important that the section allows confined persons to possess television and radio sets if those provided by the facility are too few to meet the needs of confined persons.

Several correctional systems, in an effort to control the flow of contraband in a facility, have restricted the source, usually to the publisher only, from which reading material can be obtained. See e.g., Cal. Dept. Correc. DP-2404 (rev. 1975) (publishers and approved vendors); U.S. Army Correc. Sys. AR 190-47-5-9 (1975); United States ex rel. Wolfish v. United States, 428 F. Supp. 333, (S.D.N.Y. 1971) (opinion on motion for summary judgment) (describing Federal Bureau of Prison's "publisher-only source" rule). The Wolfish court found the publisher-only-source rule overbroad. Id. Accord, Seale v. Manson, 326 F. Supp. 1375, 1381-82 (D. Conn. 1971). Cf., e.g., Cruz v. Hauck, 515 F.2d 322, 333 (5th Cir. 1975) cert. denied sub nom. Andraude v. Hauck, 424 U.S. 917 (1976); Inmates of Milwaukee County Jail v. Peterson, 353 F. Supp. 1157, 1168-69

(E.D. Wis. 1973); Collins v. Schoonfield, 344 F. Supp. 257, 281 (D. Md. 1972). But see Woods v. Daggett, 541 F.2d 237 (10th Cir. 1976). This provision rejects policies such as the publisher-only rule as overbroad and unduly costly to confined persons. See, e.g., United States ex rel. Wolfish v. United States, 428 F. Supp. 333, 340 (S.D.N.Y. 1977) (opinion on motion for summary judgment) ("The rule raises obvious question of moment under the First Amendment and, in distinguishing between affluent and other inmates, under the due process clause of the Fifth.") See also Me. Dept. Ment. Health & Correc. Dept. Policy 31 (July 8, 1974) (confined persons permitted to receive reading material from "publishers and authorized correspondents," emphasis added); Krantz, R. 1C-4.

The intent of the section is that reading material advocating the repeal of legislation would not be prohibited. Nor does it include within its prohibition works of a political nature or works by, for example, Mao Tse Tung or Eldridge Cleaver. See, e.g., Aikens v. Jenkins 534 F.2d 751 (7th Cir. 1976). See also Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971); Long v. Parker, 390 F.2d 817 (3rd Cir. 1968); Hopkins v. Collins, 411 F. Supp. 831 (D. Md. 1976) modified 548 F.2d 503 (4th Cir. 1977); McCleary v. Kelly, 376 F. Supp. 1186 (M.D. Pa. 1974).

The requirement of notice upon the withholding of reading material is intended to allow confined persons to challenge whether the withholding was in compliance with the standard set forth in this section. E.g., Me. Dept. Ment. Health & Correc. Dept. Policy 31 (1974); Krantz, R. 1C-4. Cf. U.S. Army Correc. Sys. AR 190-47-5-9 (1975).

Finally, the clear intent of the section is that reading material published in a language other than English may not be withheld on that basis. See, e.g., U.S. Army Correc. Sys. AR 190-47-5-9 (1975); Krantz, R. 1C-4.

SECTION 4-124. [Facility News Medium.] The director may provide a newspaper, radio, or other news medium through which confined persons may share information and opinions with other confined persons. If the director provides a news medium, each confined person has

a protected interest in freedom from discrimination in access to the medium for the presentation of his views.

COMMENT

This section provides confined persons with the opportunity to share opinions and information with other confined persons and is predicated upon the belief that "preparation of a prisoner for return to civilian life is [not] advanced by deadening his initiative and concern for events within the prison itself." Carothers v. Follette, 314 F. Supp. 1014, 1025-26 (S.D.N.Y. 1970). Paragraphs (1) and (2) are intended to assure that the facility news medium will be a genuine forum for confined-person expression; otherwise the interests of the confined person, the correctional system, and the public will not be served. See ACA Manual 552 n.7.

The intent of the section is that an article will not be rejected merely because it is critical of officials or official action. See, e.g., Fortune Society v. McGinnis, 319 F. Supp. 901, 902 (S.D.N.Y. 1970). The section does permit, however, rejection of an article for reasons of economics or editorial judgment. There is no explicit right of reply afforded. But see ABA Joint Comm., § 6.5 and Commentary; Krantz, R. 1A-2. The right of reply, of course, is not applicable to the free world print media. Tornillo v. Miami Herald Pub. Co., 418 U.S. 241 (1974). But a facility news medium, whether print or broadcast, is probably comparable to the free world regulated broadcast media. There a right of reply is constitutional. Red Lion Broadcasting v. Federal Communications Comm'n, 395 U.S. 367 (1969). Hence, the right of reply is omitted, not because it would be unconstitutional if applied to facility news media, but because it is thought unnecessary to require it in this section. The underpinning of the right, after all, is to assure dissemination of a wide variety of viewpoints and the intent of the section is to assure that. It is contemplated, moreover, that the requirements of this section will frequently result in a right of reply dictated by policy considerations.

SECTION 4-125. [Organizations.]

(a) A confined person has a protected interest in forming, joining, or belonging to an organization whose purposes are lawful.

(b) The director shall assure that rules regulating meetings and other activities of an organization do not unfairly discriminate among organizations within the facility

(c) The director shall permit reasonable participation in the meetings or other activities of an organization by invited persons from the free community unless to do so would jeopardize the safety of the public or the security or safety within a facility.

COMMENT

The First Amendment protects the right to form groups and associate with others; where a restriction of that right is necessary to further a legitimate state interest the Supreme Court has required a solution which least restricts the exercise of the right. E.g., Kusper v. Pontikes, 414 U.S. 51 (1973). The right of association, although in curtailed form, applies to confined persons. E.g., Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125-26 (1977); ("Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution. Equally as obvious, the inmate's 'status as a prisoner' and the operational realities of a prison dictate restrictions on the associational rights among inmates.") An associational right of confined persons, reflected in this section, is that membership by a confined person in a lawful organization may not be prohibited. Id. at 128-29 (Rehnquist, J.); id. at 138 (Stevens, J., concurring).

Subsection (b), permitting meetings and other organizational activity on a nondiscriminatory basis, subject to the requirements of security and safety and as applied through a least-restrictive means test, is supported by several authorities. See, e.g., ABA Joint Comm., § 6.4 and Commentary; Krantz, R. 1A-5; Nat'l Advisory Comm'n Correc. Std. 2.15 and Commentary. It is the standard used in Maine correctional facilities. Me. Dept. Mental Health & Correc. Policy 32 (July 29, 1974). But see

Knuckles v. Prasse, 302 F. Supp. 1036, 1057 (E.D. Pa. 1969), aff'd, 435 F.2d 1255 (3d Cir. 1971) (It should not be necessary to "go through a catastrophic riot to create a factual record to justify their finding that there was in fact a clear and present danger.") Subsection (c) permits outside persons and groups who are otherwise eligible to visit confined persons under Section 4-115 to enter facilities to meet with existing groups within facilities. This provision authorizes, for example, members of Alcoholics Anonymous in the confined and free communities to meet together.

This section does not speak directly to the question of labor organizations and, among other things, rights of collective bargaining. The Supreme Court recently upheld the authority of a state to prohibit collective bargaining and other union activities. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125-26 (1977). The court, then, sees no Constitutional barrier to treating labor unions differently than other confined-person organizations.

A fear of strikes and work stoppages is certainly a prime motivation for treating unions differently. See Note, Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for the Organization of Inmate Labor, 21 Buffalo L. Rev. 963, 973 (1972). But such strikes, even without union activity, are a not uncommon occurrence in correctional facilities. See M. Sobell, On Doing Time (1973). Organizational activity, moreover, is not unique in its potential for fomenting disturbances. "There may be fist fighting--or killings even--from group therapy sessions, decisions of the baseball coach, selections for prison dramas, political discussion groups, literary disputations in English classes, etc." Butler v. Preiser, 380 F. Supp. 612, 621 (S.D.N.Y. 1974). The potential for disturbance, then, must be balanced against the potential benefit to be derived from the activity and the First Amendment values at stake.

The states are beginning to be more receptive to confined-person unions as well as the participation by confined persons in decision-making processes at a facility. See, e.g., ABA Joint Comm., § 6.4 and Commentary. Minnesota is particularly interested, indeed encouraging, labor union participation by confined persons in an effort to bring private enterprise, and thus competitive wages, to its correctional facilities. See, e.g., Letter from Kenneth F. Schoen, Comm'r, Minn. Dept. of Correc., to J. R. Potuto (Dec. 15, 1976) (on file in Uniform Corrections Act Project Office, Un. Neb. Law College, Lincoln, Neb.); Letter from Howard G. Fortier, Sec'y-Treas., Minn. Teamsters Jt. Council No. 32 to Stan Wood, Dir. of Private Industry, Minn. Dept. of Correc. (April 21, 1976) (on file in Uniform Corrections Act Project Office, Un. Neb. Law College, Lincoln, Neb.). It is estimated that several thousand persons confined in Georgia facilities are members of labor unions. Letter from Frances Furlow, Project Dir., Ga. State Bar Comm. on Correc. Facilities and Services, to J. R. Potuto (Nov. 3, 1976) (on file in Uniform Corrections Act Office, Un. Neb. Law College, Lincoln, Neb.). The interest in confined-person employment, moreover, is certainly one that is reflected in this Act. See Sections 4.801 to 4.816 infra. Ultimately, the question of whether to permit full union activity is one of policy.

Chief Justice Burger, in discussing the implication of the Court's decision that states may prohibit union activity, Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977), attempted to clarify that the soundness of a particular policy decision is a separate question from what is required by the Constitution:

> This is but another in a long line of cases in the federal courts raising questions concerning the authority of the States to regulate and administer matters peculiarly local in nature. Too often there is confusion as to what the Court decides in this type of case. The issue here, of course, is not whether prisoner "unions" are "good" or "bad," but rather, whether the Federal Constitution prohibits state prison officials from deciding to exclude such organizations of inmates from prison society in their efforts to carry out one of the most vexing of all state responsibilities--that of operating a penalogical institution. In determining that it does not, we do not suggest that prison officials could not or should not permit such inmate organizations, but only that the Constitution does not require them to do so. . . .
>
> . . . The federal courts, as we have often noted, are not equipped by experience or otherwise to "second guess" the decisions of state legislatures and administrators in this sensitive area. . . .

Id. at 136-37 (Burger, C.J. concurring).

Encouraging organizational activity in this section is a recognition that such activity (1) promotes constructive decision-making and, opportunities to shoulder responsibility, see, e.g., Me. Dept. Ment. Health & Correc. Policy 32 (July 29, 1974), and (2) may also work to relieve tension and bring constructive change. See, e.g., Goodwin v. Oswald, 462 F.2d 1237, 1246-48 (2d Cir. 1972) (Oakes, J., concurring); ABA Joint Comm., § 6.4 and Commentary.

Of course, a confined person may not be coerced into joining an organization. ABA Joint Comm., § 6.4; Krantz, R. 1A-5. And, certainly activities of an organization which causes a disturbance may be prohibited under this section. See, e.g., Me. Dept. Ment. Health & Correc. Policy 32 (July 29, 1974). In weighing the potential for disturbance against both the benefits derived from organizational activity and first amendment interests, it is believed that a standard of safety and security strikes the appropriate balance.

SECTION 4-126. [Refusing Participation in Treatment Programs.]

(a) A confined person has a protected interest to choose whether to participate in educational, rehabilitative, recreational, or other treatment programs.

(b) Subject to subsection (d), a confined person other than a confined offender may choose whether to undergo a medical examination or treatment.

(c) A confined offender may be required to undergo an examination or a course of treatment reasonably believed to be necessary for preservation of his physical or mental health or a course of counselling directed at the alleviation of chemical dependency.

(d) A confined person may be required to undergo medical examination or course of medical treatment if the examination or treatment is:

(1) required by order of a court;

(2) reasonably believed to be necessary to detect or treat communicable disease or otherwise to protect the health of other persons; or

(3) reasonably believed to be necessary in an emergency to save the life of the person.

COMMENT

This section protects the right of a confined person generally to choose whether to participate in programs that

benefit him. E.g., ABA Joint Comm., § 3.4 and Commentary; Nat'l Advisory Comm'n Std. 2.9 and Commentary. The section embodies the view that forced rehabilitation is rarely productive of long-term results. More fundamentally, the section represents another expression of a dominant theme in the Act: the correctional environment should approximate as closely as possible life outside the facility. Permitting a confined person to choose to participate affords him the same exercise of will as that of a free citizen. This is not, it should be emphasized, a denigration of the rehabilitation principle. The Act, in fact, provides ample opportunities and incentives to motivate confined persons to better themselves.

Subsections (b) through (d) address specifically the special problems created when the treatment program is medical in nature. In this type of program, when the life or health of the confined person or others is involved, a confined person may be required to undergo medical treatment under the conditions set forth in subsection (d) and a confined offender may be required to undergo treatment as described in subsection (c). The language "alleviation of chemical dependency" relates to drug or alcohol addiction. It was believed that the nature of chemical addiction may interfere with an offender's ability to voluntarily choose a treatment program and the state's interest is sufficiently important to authorize compulsory participation in these treatment programs.

The term "preservation" in subsection (c) is employed to distinguish between courses of treatment designed to maintain a person's health from those that more closely resemble "rehabilitation" programs directed at self-improvement. Particularly with mental health programs, the line between treatment to preserve and treatment to rehabilitate is not unwavering. Where a substantial element of rehabilitation is involved, the person's consent should be obtained before treatment commences. Nothing in this Act would prevent the application of procedures applicable to all citizens regarding compulsory mental health programs as an element of involuntary commitment.

This section does not address the circumstances in which a confined person or confined offender may be required to work. These issues are addressed in Section 4-808, infra.

SECTION 4-127. [Personal Property.]

(a) A confined person has a protected interest in the ownership, possession, and use in his living quarters or elsewhere of personal property other than contraband or prohibited material. The director may limit the amount of property a confined person may possess in a facility at any one time to an amount that can be reasonably accommodated in the space available. The director may provide storage space in the facility for material that would constitute a health or safety hazard if stored in a confined person's living quarters.

(b) The director shall assure that upon final release, each confined person receives his own personal property, except contraband, that is under the control of the department including his accumulated earnings and accrued interest thereon. Earnings and interest must be paid either in a lump sum or otherwise as determined by the chief executive officer to be in the best interest of the confined person. At least one-third of his accumulated earnings must be paid upon release and the entirety must be paid within 90 days after release.

COMMENT

Courts addressing the question of confined-person property rights have generally accepted correctional restrictions on the possession of property. E.g., United States ex rel. Lee v.

Illinois, 343 F.2d 120 (7th Cir. 1965); Gittlemacher v. Prasse, 428 F.2d 1 (3d Cir. 1970); In re Hal Harrell, 2 Cal. 3d 675, 470 P.2d 640 (1970). These restrictions have been imposed in the interest of health, safety, space limitations, and to discourage theft and jealousy among confined persons. While permitting restrictions based on health, safety, and available space, this section encourages the possession of personal property.

The possibilities of theft is ever present in the prison setting. And, of course, the more property a confined person is allowed to possess, the more property is subject to be stolen. The intent of the section, however, is that more than a general fear of theft would be necessary to prevent a confined person from possessing personal property. Potential friction among the "haves" and "have-nots," moreover, should be lessened as the employment and compensation provisions, see Sections 4-801 to 4-815, infra, become a reality.

The decision to maximize possession of personal property, reflected in subsection (a), derives from a belief that such possession will assist a confined person in maintaining a positive self-image. See, e.g., E. Goffman, Asylums (1961); Krantz, R. 1D-11 and Commentary ("learning to live on the outside world involves learning to respect other people's property and to maturely handle one's own"). This section encourages the possession and use of property consistent with health and safety requirements; authority is given to the director to store elsewhere in the facility items which, for example, would be a health hazard if stored in a confined person's living quarters.

Subsection (b) allows the director to return the earnings of the confined person over a 90-day period. Since the 90 days immediately subsequent to release is generally the most difficult period of adjustment, the graduated payment schedule may prevent imprudent purchases and may ensure some financial base for the full period. To the extent that employment opportunities are increased under the Act, the amounts of money may be considerably larger than those currently available to persons released from confinement. See D. Glaser, The Effectiveness of a Prison and Parole System 403 (1964).

PART 2
CORRECTIONAL MEDIATION

SECTION 4-201. [Office of Correctional Mediation; Correctional Mediator; Appointment.] The office of correctional mediation is created [as an independent state agency] [in the state ombudsman's office] [in the Governor's office]. It consists of the correctional mediator and other employees. The Governor shall appoint the correctional mediator after consultation with the director and representative offenders and [with the advice and consent of the Legislature, Senate]. The correctional mediator must have appropriate training and experience to analyze questions of law, administration, and public policy. He shall serve a term of [6;4] years and until his successor is appointed and has qualified. The Governor may remove the correctional mediator only for disability, neglect of duty, incompetence, or malfeasance in office. Before removal, the mediator is entitled to a hearing.

COMMENT

Part 2 of Article 4 is designed to provide an independent mediator to mediate disputes between correctional administrators and persons in their custody. The correctional mediator is modeled after the concept of the Swedish ombudsman. He has no authority to dictate policy or to formally review administrative action. His sole powers are to investigate, mediate, and where necessary report to the public.

There is growing recognition that a mediator is a valuable asset in the correctional context. One survey found that sixty-four major state correctional institutions had some form of mediator. McArthur, Inmate Grievance Mechanisms: A Survey of 209 American Prisons, Fed. Prob., Dec. 1974 at 41. Counts of statewide correctional mediators or ombudsmen range from 8 to 14. See Center for Correctional Justice, Toward a Measure of Justice 12-15 (1975); May, Prison Ombudsmen in America . . . They Listen to Both Sides, Corrections, Jan.-Feb. 1975 at 45. Correctional ombudsmen have been established by administrative action in Oregon, South Carolina, Ohio, Connecticut, and Michigan. Id. In Minnesota and Kansas the correctional ombudsmen are established by legislation. Kan. Stat., § 75-5231 (Supp. 1976); Minn. Stat. Ann., §§ 241.41-.45 (West 1977). In three other states, Hawaii, Iowa, and Nebraska, statewide ombudsmen established by legislation have jurisdiction over complaints involving correctional agencies. Haw. Rev. Stat., § 96-1d-5 (1968 & Supp. 1975); Iowa Code Ann., §§ 6016.6 &.9 (West 1975) ("citizens' aide"); Neb. Rev. Stat., § 81-8,241 to 8.254 (Reissue 1976) ("Public Counsel").

In at least three cases, courts have directed the appointment of an ombudsman as one device to cure unconstitutional conditions in correctional facilities. Alberti v. Sheriff of Harris Co., 406 F. Supp. 649 (S.D. Tex. 1975); Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975); Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972).

The provisions of this Act are in large part modeled after existing state statutes but modified to take into account specific correctional concerns. Hawaii, Nebraska, and Iowa, which give their ombudsmen broad jurisdiction over all state agencies, provide forlegislative appointment. Haw. Rev. Stat., § 96.2 (Supp. 1975); Iowa Code Ann., § 601G.3 (West 1975); Neb. Rev. Stat., § 81-8,241 (Reissue 1976). The Minnesota Correctional Ombudsman is appointed by the Governor and serves at his pleasure. Minn. Stat. Ann., § 241.41 (West Supp. 1977). In Kansas, the "ombudsman of correctional institutions" is appointed by a "Citizen's Advisory Board" whose membership is appointed by a variety of state officials including the Governor, Chief Justice, and legislative leaders. Kan. Stat., § 75-5231 (Supp. 1976). No detailed provisions for his office are provided. A major requirement for effectiveness is to insure the mediator's independence from the correctional agency. The section suggests at least three alternative locations for the correctional mediator in the organization of state government. In those states with an existing statewide ombudsman, the correctional mediator should be located in that office. In other states, the office could

appropriately reside in the Governor's office or as an independent state agency. It should not be subject to the authority or dependent in any way on the department of corrections. It is essential not only that its independence be preserved but that the appearance of objectivity be retained.

The statutory qualifications provided for the mediator are also found in the Nebraska, Iowa, and Minnesota provisions.

See generally S. Anderson, ed., Ombudsmen for American Government? (1968); T. Fitzharris, The Desirability of a Correctional Ombudsman (1973); W. Gellhorn, When Americans Complain, (1966); G. Hawkins, The Prison 150-57 (1976); Tibbles, Ombudsmen for American Prisons, 48 N. Dak. L. Rev. 383 (1972). See also ABA Section of Administrative Law, Model Ombudsman Statute for State Governments (1974); LEAA, Prescriptive Package: Grievance Mechanisms in Correctional Institutions 15-19 (1975).

SECTION 4-202. [Duties of Correctional Mediator.]

The correctional mediator shall:

(1) administer the office;

(2) adopt rules for the office;

(3) appoint, and he may remove in accordance with law, employees of the office and may delegate to them appropriate powers and duties;

(4) assure that a member of his staff is available on a daily basis, except holidays and weekends, to confined persons in each facility and periodically visits all facilities;

(5) assure that a member of his staff is available on a daily basis for contact by persons in the custody of the department;

(6) receive and respond to a petition filed by a person in the custody of the department:

(i) requesting information regarding his status or the conditions of his confinement or supervision;

(ii) suggesting changes in the policies or practices of the department or its employees; or

(iii) stating a grievance arising out of an act or practice of the department, its employees, or other persons;

(7) meet periodically with correctional officials, employees, and persons in the custody of the department to discuss the conduct and improvement of his office; and

(8) report annually on the administration of his office to the director, the Governor, and the [Legislature] and make copies available to the press and persons in the custody of the department.

COMMENT

This section sets out the duties of the mediator. To be effective in relieving tensions and mediating disputes the mediator must be available to persons in the custody of the department. This is particularly important with regard to confined persons whose own freedom to seek out the mediator is circumscribed. It is also important for the mediator or his staff to be personally present in correctional facilities to see first hand the conditions that exist and to insure that confined persons understand and appreciate the functions of the office.

The section provides that a staff member should be available to confined persons on a daily basis. The statute does not require him to be physically present on a daily basis but does require him at some point to be physically present in the facility. For larger institutions, a full-time staff member may be required. For smaller facilities a regular visitation schedule should be established. In addition, the provision requires that some mechanism be established to insure that a person subject to the actions of the department be able to contact a staff member within 24 hours. Such mechanisms may include the telephone, complaint boxes, or other devices that would allow confidential communication. These would satisfy, if properly regulated, the "available on a daily basis" requirement.

The likely caseload of the mediator will depend on a number of factors, including the nature of the facilities, the nature of its residents, and the nature of the correctional administration. Also the mediator's own reputation for objectivity and independence will determine the extent to which persons in the department use him to mediate problems. Information on existing correctional ombudsmen is to a large degree anecdotal. In its first year of operation the Minnesota Correctional Ombudsmen (at that time established by executive order) processed 1,070 complaints or one complaint for every five inmates. Annual Report of the Ombudsman for Corrections, State of Minnesota (1973-74). With 6,000 prisoners, the Minnesota program began with 2 full-time staff members but was increased to 7 in the second year. It was also reported that the Ohio prison population was 13,500. ABA Comm'n on Correctional Facilities & Services, The Minnesota Correctional Ombudsman (Ombudsman/Grievance Mechanism Profiles No. 1).

SECTION 4-203. [Powers of Correctional Mediator.]

The correctional mediator may:

(1) investigate, on a petition or on his own motion, any administrative act or practice of the department or its employees without regard to whether it is the final action of the department;

(2) process any request for information directly or by referring it to the relevant agency or individual;

(3) forward, with or without his own evaluation, any suggestion from any person for change in the policies or practices of the department or its employees;

(4) follow up on any request for information or suggestion for change that has been forwarded or referred and request, and he is entitled to receive, a progress report on the position of the agency regarding a request for information or suggestion for change;

(5) refer a grievance to the appropriate grievance committee;

(6) prescribe:

(i) the method by which petitions are to be written, received, and acted upon;

(ii) the scope and manner of investigation; and

(iii) the form, frequency, and manner of distribution of his findings, conclusions, and recommendations;

(7) request, and is entitled to receive from the department, cooperation, assistance, and information he considers necessary in discharging his responsibilities;

(8) request and is entitled to receive office space and equipment in any facility necessary in discharging his responsibilities;

(9) inspect the records and documents of the department;

(10) inspect premises within the department's control;

(11) visit and confer in private with any person in the custody of the department;

(12) administer oaths and receive sworn testimony, and

(13) issue a subpoena, enforceable by action in [an appropriate] court, to compel any person to appear, give sworn testimony, or produce documentary or other evidence relevant to a matter under investigation. A person required to provide information is entitled to receive the same fees and travel allowances and to be accorded the same privileges and immunities as are extended to witnesses in the courts of this State and he is entitled to have counsel present while being questioned.

COMMENT

This section outlines the powers of the correctional mediator. It gives him broad investigative powers necessary to carry out his functions. The provision is substantially similar to Haw. Rev. Stat., §§ 96-4 to -10 (1968 & Supp. 1975); Iowa Code Ann., § 601G.9 (West 1975); Minn. Stat. Ann., § 241.44 (West Supp. 1977); Neb. Rev. Stat., § 81-8,245 (Reissue 1976). Each of these states provides subpoena power as well as the power to inspect files and documents and visit premises under the control of the agency. See also ABA Model Ombudsman Act, § 11 (1974). Since the mediator's effectiveness will be evaluated on his ability to informally resolve or avoid disputes, it is unlikely that the subpoena power will be used on an extensive basis.

The provision relating to witness fees and travel allowances in paragraph (13) would not apply to departmental employees appearing as part of their official duties. Their duty to cooperate with the mediator is independently created in paragraph (7).

SECTION 4-204. [Confidentiality of Files.]

(a) Unless otherwise privileged, the fact that sources of information requested by the correctional mediator from the department are regarded by it as confidential or that the information is restricted does not authorize withholding the information or its source from the mediator. Whenever the correctional mediator obtains information that is confidential or otherwise restricted, he shall maintain the confidentiality of the information. Reports or recommendations made on the basis of that information must preserve confidentiality.

(b) The department shall indicate to the correctional mediator which information obtained from the department is regarded by it as confidential or is restricted and the reason for or source of the confidentiality or restriction.

(c) If a person filing a petition with the correctional mediator so requests, the correctional mediator must not disclose to any person or agency outside his office the name, identity, or status of the person filing the petition.

(d) A person outside the office of correctional mediation may not have access to the files of the office.

COMMENT

The correctional mediator can best perform his mediation function if he has access to all information and information he collects can be kept confidential. Subsection (a) authorizes the mediator to see any unprivileged information held by the department, even though the information itself, or the source of the information, could not be disclosed to the complainant or to any other person. This allows the mediator to investigate the accuracy of information. However, he is obliged to retain the confidentiality, or source, of the information and his reports should be so written. The phrase "unless otherwise privileged" exempts from disclosure to the mediator material such as medical records if the state grants a privilege generally to such information. The phrase is not intended to allow the department to claim a privilege based on exemptions in public records statutes which provide for public access to governmental information.

Subsection (c) allows the fact of filing or the identity of the person who files a complaint with the mediator to remain confidential. This is to insure there will not be subtle pressures not to use the mediator. The "status" of the individual includes whether he is an employee or prisoner, or what program he is in, or other similar information which might indirectly identify the person filing the complaint.

Confidentiality provisions vary among those states with statutorily established ombudsmen. All except Minnesota have some provision providing that the ombudsmen's files are confidential. Haw. Rev. Stat., § 96-9(b) (1968) places an obligation on the ombudsman to keep his files secret unless disclosure is necessary to carry out his duties. Iowa Code Ann., § 601G.8 (West 1975) makes the files confidential except from the Legislature and the Governor. Nebraska, Hawaii, and Iowa have provisions comparable to the following: "No proceeding, opinion, or expression of the [ombudsman] shall be reviewable in any court. Neither the [ombudsman] nor any member of his staff shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters within his official cognizance, except in a proceeding brought to enforce [this chapter]." Haw. Rev. Stat., § 96-17 (1968); Iowa Code Ann., § 601G.20 (West 1975); Neb. Rev. Stat., § 81-8, 253 (Reissue 1976).

SECTION 4-205. [Handling of Petitions.]

(a) The correctional mediator may receive and respond to a petition from any person who requests information, makes recommendations, or states a grievance regarding acts or practices of the department, its employees, or other persons. He shall conduct an investigation unless he concludes that:

(1) the petitioner has available to him a more appropriate administrative remedy he could reasonably be expected to use and, if the petitioner is a person in the custody of the department, the mediator shall assist him in initiating the other remedy;

(2) the petition relates to a matter outside his power;

(3) the petitioner's interest is insufficiently related to the subject matter;

(4) the petition is frivolous or not made in good faith; or

(5) other petitions are more worthy of attention.

(b) The correctional mediator's refusal to investigate a petition does not bar him from proceeding on his own motion to inquire into related matters.

(c) Whenever a petition is filed by a person in the custody of the department, the correctional mediator

shall acknowledge receipt thereof in writing and thereafter periodically inform him of its status until it is resolved.

COMMENT

Subsections (a) and (b) are substantially similar to Neb. Rev. Stat., § 81-8,247 (Reissue 1976) and Iowa Code Ann., § 601G.12 (West 1975). They give the mediator some control over his own workload. Subsection (a)(1) does not require that he force persons to exhaust their other remedies if he thinks it advisable to become involved. The subsection does authorize the mediator to assist the person in taking whatever steps are necessary to initiate another procedure, but it does not authorize the mediator to "represent" the person in that proceeding.

Subsection (c) redresses one of the most numerous complaints of prisoners and that is that they get no response when they file a complaint involving conditions of confinement. The immediacy and continuing nature of a prisoner's complaint require that he be kept informed of what steps are being taken on his behalf.

SECTION 4-206. [Recommendations of Correctional Mediator.]

(a) After considering a petition or conducting an investigation, the correctional mediator may recommend that the department:

(1) consider a matter further;

(2) modify or cancel a practice or policy;

(3) explain more fully a practice or policy; or

(4) take any other action.

(b) If the correctional mediator so requests, the department, within a reasonable time, shall inform him of the action taken on his recommendations or the reasons for not complying with them.

(c) If the correctional mediator believes that legislative action is desirable, he shall inform the [Legislature] of his views and may recommend statutory change.

(d) The correctional mediator may publish his conclusions and recommendations by transmitting them to the Governor, the [state Legislature] or any of its committees, the press, and others who may be concerned. Before publishing a conclusion or recommendation that expressly or impliedly criticizes an agency or individual, the correctional mediator shall consult with that agency or individual and include with his conclusions and recommendations any statement the agency or individual may desire concerning or explaining the matter involved.

COMMENT

This section details the action that can be taken by the mediator on a complaint. He has no authority to alter a practice or action of the department directly; he can only recommend change or modification of existing policy and report to the public, the Legislature, or the Governor. The section is substantially similar to the following: Haw. Rev. Stat., §§ 96-12 to -13 (1968); Iowa Code Ann., §§ 601G.16-17 (West 1975); Minn. Stat. Ann., §§ 241.44-.45 (West Supp. 1977); Neb. Rev. Stat., §§ 81-8,249, 8,250 (Reissue 1976).

Subsection (d) requires that any publication by the mediator critical of the department or an individual must contain the response of the department or individual. This does not prevent the mediator from giving press interviews in emergency situations or from stating his conclusions in a temporary way without the response.

SECTION 4-207. [Access to Correctional Mediator.] A person or agency may not:

(1) adopt any rule or undertake any act or practice that would adversely affect a person for, or otherwise discourage or restrict him from filing a petition with the correctional mediator;

(2) open, read, refuse to forward, or delay the forwarding of any letter or other correspondence between a person and the office of correctional mediation; or

(3) impede, intercept, or interfere with the personal access to or other communication with representatives of the office of correctional mediation by a person in the custody of the department.

COMMENT

The extent to which the department has control over persons in its custody requires that specific provisions be directed at insuring free access to the mediator. This has been recognized in those states which have general ombudsmen provisions by specific provisions dealing with communications from persons in custody. Iowa Code Ann., § 601G.14 (West 1975) requires immediate delivery of mail from prisoners to the "citizens' aide" and prohibits opening of this mail by correctional authorities. Haw. Rev. Stat., § 96-18 (1968) and Minn. Stat. Ann., § 241.44(3) (West Supp. 1977) are similar to the Iowa provision. Nebraska, Iowa, and Hawaii also establish penalties for willfully hindering or obstructing the ombudsman. Haw. Rev. Stat., § 96-19 (1968); Iowa Code Ann., § 601G.22 (West 1975); Neb. Rev. Stat., § 81-8, 254 (Reissue 1976).

The language "impede, intercept, or interfere" in paragraph (3) must be read in the context of a prison environment and would not require officials to allow prisoners to see the mediator on demand at any hour. The language is designed to prevent conduct designed to burden or discourage the filing of complaints or to intrude into the relationship between the mediator and persons in custody.

PART 3
GRIEVANCE PROCEDURES

SECTION 4-301. [Grievance Procedure; Rules.]

(a) The director shall adopt rules to facilitate communication between employees of the department and persons in their custody and to encourage the informal resolution of grievances. The rules must provide at least the following:

(1) a method for persons in the custody of the department to communicate in a confidential manner with the director;

(2) authority for employees informally to resolve grievances;

(3) a requirement that employees who are in direct contact with persons in the custody of the department receive training in resolving grievances; and

(4) a method for the periodic explanation of the policies of the department to persons in its custody.

(b) The director shall meet periodically with representative persons in the custody of the department to develop procedures for resolving grievances. The director may adopt any procedure for resolving grievances. Those procedures are in addition to, but do not restrict, a person's right to avail himself of the procedures required by this Act.

COMMENT

The pervasive nature of the regulation of the lives of persons in correctional custody inevitably results in misunderstandings and complaints. Particularly in correctional facilities, the prisoner's feeling of lack of control over his own existence and his inability to seek relief from perceived grievances increases tensions and hostility toward correctional staff. Landman v. Peyton, 370 F.2d 135, 141 (4th Cir. 1966), cert. denied, 385 U.S. 881 (1967) ("Experience teaches that nothing so provokes trouble for the management of a penal institution as a hopeless feeling among inmates that they are without opportunity to voice grievances or to obtain redress for abusive or oppressive treatment.")

Correctional administrators have come to recognize that informal and formal grievance procedures should be adopted to provide resolution of grievances before they result in violence or disruption. In 1973, a survey of over 200 major prison facilities found that 77 percent had some form of formal grievance mechanism. McArthur, Inmate Grievance Mechanisms: A Survey of 209 American Prisons, Fed. Prob., Dec. 1974 at 41.

This section requires the director to establish informal methods of resolving disputes. If line personnel are authorized and trained to resolve conflict at its initial stages, the expense of either formal procedures or disruption can be avoided. Some correctional officials have estimated that 85-90 percent of prisoner complaints can be resolved informally. Fitzharris, The Desirability of a Correctional Ombudsman 27-28 (1973).

Subsection (b) allows the director to establish formal grievance procedures in addition to those required by the Act. The credibility of any procedure will in large measure determine its effectiveness. And there are a variety of different mechanisms that can be employed.

Two states, Maryland and North Carolina, have established by legislation "inmate grievance commissions" that utilize persons outside the department to resolve grievances. In Maryland the five-member commission is appointed by the Governor with the advice of the Secretary of Public Safety and Correctional Services. Md. Ann. Code art. 41, § 204F (Supp. 1976). In North Carolina the Governor selects the five members from a list of 10 provided by the state bar association. N.C. Gen. Stat., § 148-101 (Supp. 1975). Under this Act, the correctional mediator is designed to provide the independent "external" review of correctional practices; the grievance procedure provides an

internal participatory system. Section 4-301(b) allows the director to adopt any other procedure in addition to those provided by this Act.

See generally Center for Correctional Justice, Toward a Greater Measure of Justice (1975); R. Goldfarb & L. Singer, After Conviction (1973); Nat'l Advisory Comm'n Correc. Std. 2.14; Lesnick, Grievance Procedures in Federal Prisons: Practices and Proposals, 123 U. Pa. L. Rev. 1 (1974).

SECTION 4-302. [Grievance Committees; Creation.]

(a) The director shall adopt rules establishing a procedure for creating grievance committees for each facility or program of supervision and governing their operation. Consistent with the provisions of this Act, the rules creating and governing grievance committees may vary within or between facilities and programs.

(b) Each grievance committee must consist of an equal number of employees of the department and persons in the custody of the department. The director shall adopt rules for the selection of the members of grievance committees and for resolving an impasse if a grievance committee cannot reach a decision.

COMMENT

This section requires the director to establish a participatory grievance procedure as one alternative mechanism for resolving disputes. The grievance committee is composed of equal numbers of correctional staff and persons in the custody of the department. One of the critical factors relevant to the success of conflict resolution is the extent to which the process

appears to be independent and objective. Grievance committees comprised solely of correctional personnel bear a heavy burden in retaining credibility. The system here enacted insures that all persons in the correctional environment have a stake in peacefully resolving disputes. The director is authorized to appoint a nonvoting chairman for each committee to facilitate its operation.

New York has established a similar system by legislative enactment. N.Y. Correc. Law, § 139 (McKinney Supp. 1976-1977). This part of the Act also parallels a procedure used by the California Youth Authority. Keating & Kolze, An Inmate Grievance Mechanism: From Design to Practice, Fed. Prob., Sept. 1975 at 42. Wisconsin also has an inmate participatory procedure under which a warden at his option may refer grievances to an advisory board of two inmates and two staff members. LEAA, Grievance Mechanisms in Correctional Institutions (Sept. 1975).

The participatory model required by this and subsequent sections may appear to be an unduly burdensome procedure for every grievance that might arise in a facility. This procedure however is enacted as a last resort mechanism to be iniated only when other, more efficient procedures, are unable to resolve the grievance. Section 4-301(b) allows the director to establish any other procedure and Section 4-304(3) allows him to require its exhaustion before the procedure established in this part may be employed. To the extent the director can develop a procedure that retains the credibility of both staff and persons in custody, resort to the statutory mechanism will not be required.

The section allows the director some flexibility in establishing committees. In some facilities, each cell block may need its own committee; in others, one committee for the entire facility may be appropriate.

The provision is silent on the method of selecting committee members. In some facilities it may be appropriate to allow confined persons to elect their own representatives; in others, the director may find it more advisable to appoint members after consultation with inmate groups.

Equal representation on a committee may lead to an impasse. One of the advantages to a participatory model with equal representation is it requires the participants to fully examine an issue rather than rely on power voting. The process of discussion may result in a compromise satisfying all interests. The director is authorized to provide methods for resolving an impasse. A California program of a similar nature

used outside arbitrators trained in conflict resolution who would join the committee to assist in working out a compromise. The correctional mediator may be an appropriate official to perform this function. See Keating & Kolze, An Inmate Grievance Mechanism: From Design to Practice, Fed. Pro., Sept. 1975 at 45 (out of 166 hearings, the committee evenly divided in less than 8 percent of the cases).

SECTION 4-303. [Jurisdiction of Grievance Committees.]

(a) A grievance committee has jurisdiction over any grievance relating to a policy or practice of the department, an act or practice of an employee of the department, or a condition of a facility or program if the grievance is:

(1) filed by a person or group of persons in the custody of the department;

(2) referred to the committee by the correctional mediator; or

(3) referred to the committee by a chief executive officer.

(b) A grievance committee has jurisdiction over any grievance relating to an act or practice of a confined person if the grievance is filed by an employee of the department or a confined person.

(c) Unless authorized by the director, a grievance committee may not review the findings and actions arising out of an adjudicatory hearing conducted by a disciplinary hearing officer or a classification committee and resulting in a decision affecting a specific individual or group

of individuals. The grievance committee may review grievances directed at the policies, practices, or procedures of hearing officers or classification committees.

COMMENT

Subsection (a) establishes the jurisdiction of the grievance committees. They may consider grievances from all members of the correctional community. In some instances, persons outside the department may have a complaint concerning a departmental policy, e.g., a relative of a prisoner adversely affected by a visiting regulation. In these cases, the committee would not have jurisdiction unless the complaint was referred by the chief executive officer or by the prisoner himself. Some complaints received from free citizens, e.g., complaints about work-release policies, may not be appropriately considered by the committees, because the relevant interests are not fairly represented.

Subsection (b) is drafted to insure that grievance procedures are not used to resolve labor management grievances between state employees and the department. However, with a grievance committee consisting of both staff and confined persons, it would be useful to allow a guard or other staff person to file a grievance against a confined person. By authorizing use of the mechanism to handle complaints of both staff and confined person as they relate to each other, both groups may develop more support for the procedure.

Subsection (c) prevents the grievance committee, unless authorized by the director, from becoming an appellate board for other committees making decisions about individuals. Disciplinary and classification procedures established by this Act have their own appellate process. Although the grievance committee may not consider the merits of an individual case, it may consider complaints about the general policies or procedures of other committees. Thus although the grievance committee could not review a particular prisoner's classification, it could review general classification policies. The director is authorized for a particular case or class of cases to use the grievance committee as part of the appeal mechanism for discipline or classificatjon.

SECTION 4-304. [Procedures of Grievance Committees.]

The director shall adopt rules establishing procedures for the resolution of grievances by grievance committees. The procedures must be consistent with the following:

(1) Each person in the custody of the department has a right to file a grievance with a committee.

(2) The grievance committee shall conduct a hearing on each complaint not patently frivolous. Each party to the dispute may present at the hearing information relating to the merits of the grievance and counter information offered against him.

(3) The director may require a person to utilize any other grievance procedure established by the director pursuant to Section 4-301 as a condition of filing a grievance with a grievance committee established pursuant to Section 4-302. If the grievance is not resolved within 15 days, the person may file a grievance pursuant to Section 4-302.

(4) The grievance committee in all cases shall make written findings of fact and recommendations within a reasonable time and forward them to the parties and the chief executive officer of the facility or program involved.

(5) The chief executive officer of the facility or program shall review the findings of fact and

recommendations and resolve the matter on the basis of the committee's findings of fact unless clearly erroneous. If the chief executive officer does not accept the committee's recommendations he shall state in writing to the committee and the parties involved his reasons for not doing so.

COMMENT

The section authorizes the director to adopt rules establishing procedures for the grievance committees. The committees would be obliged to hold hearings for the taking of evidence. The hearing is informal in nature, and the statute does not require all of the trappings of an adversarial process. Cross-examination of witnesses is not required although committees may authorize it if it is thought useful. The participatory nature of the committee itself would seem to reduce the need for formal procedures. The director could authorize the use of staff or other persons to provide assistance to those filing grievances with the committee and could also authorize legal assistance although it is not required by the Act.

The committee need not hold hearings on complaints that are patently frivolous. In all cases, even where it refuses to hold a hearing, the committee must make findings of facts and recommendations which are forwarded to the chief executive officer for his decision. Whenever the committee determines that a complaint is patently frivolous, it should indicate the facts upon which that finding is based.

Paragraph (3) authorizes the director to require exhaustion of other established grievance procedures as a prerequisite to initiation of the statutory procedure. However, the other procedure must be capable of resolving the grievance within 15 days. The 15-day period would begin upon initiation of the alternate procedure. The Nat'l Advisory Comm'n Correc. Std. 2.1 (1973) recommended a 30-day limitation on exhaustion requirements prior to seeking judicial relief. See also ABA Joint Comm., § 8.6 (same). The Federal Bureau of Prisons procedure requires an initial staff response within 15 days (exclusive of weekends) and resolution of the appeal in another 30 days. Federal Prison Service, Policy Statements, § 2001.6 (Feb. 14, 1974). Because the limitation here relates

only to the initiation of another administrative remedy and not judicial relief the 15-day limit seems appropriate. If the procedure retains credibility, exceeding the 15-day limit will not necessarily result in use of the statutory mechanism.

The purpose of the grievance mechanism is to resolve disputes, not to administer the department of corrections. Paragraph (5) allows the chief executive officer to ignore the recommendations of a grievance committee. The paragraph does require that the chief executive officer accept the findings of fact of the committee unless clearly erroneous and that he indicate to the committee and the parties the reasons for his actions if he rejects the committee's advice.

SECTION 4-305. [Appeal from Grievance Committee Decision.] A person aggrieved by a decision arising out of grievance procedures may appeal the decision to the director. The director, on the basis of the entire record of the matter, shall:

(1) submit the matter to the correctional mediator for his findings and recommendations; or

(2) affirm or modify the decision of the chief executive officer.

COMMENT

This section establishes an appeal process for the grievance procedure. The grievance committee has no power other than to recommend action to the chief executive officer. This section provides an appeal to the director. This approach allows the director to remain informed of grievances filtering up through the system, provides a somewhat detached review of the particular complaint, and retains the final decision-making choice within the department which ultimately must bear the responsibility for it.

SECTION 4-305
SECTION 4-306
SECTION 4-307

Paragraph (1) authorizes the director to refer an appeal to the correctional mediator if he thinks it might be better resolved in that fashion.

SECTION 4-306. [Access to Grievance Procedures.] The department and its employees may not adopt any rule or undertake any act or practice that would adversely affect a person for, or otherwise discourage or restrict him from, utilizing a grievance procedure.

COMMENT

This section prevents interference by correctional officials with the grievance procedures. The section applies both to the statutory mechanism and any additional procedure established by the director. The language preventing officials from "limiting" the use of a grievance procedure is not intended to prevent the director from establishing grievance procedures to tailor those procedures to particular types of cases. The section applies only to prevent conduct limiting use of an established procedure, not to prevent fashioning a limited procedure in the first instance.

SECTION 4-307. [Arbitration.] The director may adopt rules for the arbitration of disputes between the department and persons in its custody by one or more persons outside the department.

COMMENT

This section authorizes but does not require voluntary arbitration of some disputes. Although arbitration has not been extensively applied in the correctional context, the idea of bringing in a totally outside panel to resolve disputes is not completely without precedent. Both Maryland and North Carolina establish by statute external grievance commissions. Md. Ann. Code art. 41, § 204F (Supp. 1976); N.C. Gen. Stat., § 148-101 to -113 (Supp. 1975). Neither, however, makes the recommendations of the commission binding on the correctional agency. See generally Coulson, Justice Behind Bars: Time to Arbitrate, 59 A.B.A.J. 612 (1973). This section makes submission to arbitration discretionary with the director.

PART 4
ASSIGNMENT, CLASSIFICATION, AND TRANSFER

SECTION 4-401. [Immediate Assignment.]

(a) Whenever a person is ordered to confinement in the custody of the department, the court may:

(1) order the person to report at a specific time to the appropriate facility designated by the director for receiving confined persons; or

(2) order the [sheriff, marshall, bailiff] to take the person without unnecessary delay to the appropriate facility designated by the director for receiving confined persons.

(b) Whenever a person is sentenced to confinement, he shall be sentenced to the custody of the department and not to a specific facility.

COMMENT

This section requires immediate delivery of persons ordered to confinement, except where the judge allows the offender some time to adjust matters prior to confinement. The section would operate on both sentenced offenders and persons detained awaiting trial.

SECTION 4-402. [Classification of Facilities.]

(a) The director shall classify each facility or part of a facility as to the level of security it provides for persons confined therein. In making the classification

the director shall consider:

(1) the extent of perimeter security at the facility;

(2) the freedom of movement by confined persons within the facility;

(3) the nature of programs in the facility; and

(4) the extent of regimentation of confined persons in the facility.

COMMENT

Although the terms "maximum," minimum" and "medium" security have become virtually terms of art in the penology profession, they are almost nowhere defined by statute, and are only vague approximations of specific factual settings. Indeed, a survey of representative state statutes resulted in not a single definition of the terms, although several statutes use the terms. More commonly, prisoners are classified according to their security "need", but the method of ascertaining the proper institution is unclear.

Only slightly better definitions can be found in the literature. The ACA Manual, for example, describes "typical" institutions of each rank, but the differences often appear insignificant. Thus, while minimum security institutions "may be composed to a large extent of dormitories . . . supervised without an excessive amount of personnel", and may or may not have a fenced enclosure, a medium security facility "will normally have a double-fenced enclosure . . . topped with barbed wire". The typical maximum security institutions "will in some cases be enclosed by a masonry wall from 18 to 25 feet high, but often a double fence . . . will provide tne needed security . . . . A large percentage of the housing will be composed of interior cell blocks". Id. at 332-33. The not-surprising fact is, as the Nat'l Advisory Comm'n has noted, that "any attempt to describe the 'typical' maximum security prison [or any other for that matter] is hazardous". Id. at 343.

The director should consider establishing fixed percentages of each type of housing he will tolerate. The ACA Manual, for example, estimates that 33 percent of the prison population could live in minimum housing without security problems, 50 percent in medium, with no more than 15 percent actually requiring maximum security. ACA Manual at 332-33. Yet, according to the National Advisory Commission in 1972, precisely the opposite was the case: 15 percent of the prison population was confined in minimum housing, 56 percent was in maximum, and over 30 percent was in medium. Nat'l Advisory Comm'n Correc. at 343. Even assuming that the American Correctional Association figures are somewhat inapposite because based on a "rehabilitationist" philosophy or because of alleged changes in the prison population, the general figures do not seem impossible to achieve.

The department of corrections, in time, will obtain authority over local "jails," virtually all of which are presently, in fact, maximum security institutions. While this control opens opportunities for placing prisoners close to home, it could also skew the proportion of maximum security institutions operated by the department.

SECTION 4-403. [Temporary Initial Facility Assignment.] The director shall adopt rules governing the temporary initial facility assignment of confined persons, to be determined by consideration of the following factors:

(1) the apparent requirements of security and safety;

(2) the availability of space within facilities;

(3) the desirability of keeping a confined person in a facility near the area in which he lived before confinement or to which he is likely to return after confinement; and

(4) the extent to which his presence is required in a particular locality.

COMMENT

This provision governs the initial temporary assignment of confined persons to a facility prior to any serious evaluation of the person's security risk. This initial decision is not governed by procedural rules for it must be made quickly. It is also a critical decision for the safety of the institution, because in many cases little is known about the person when the decision is made. Thus, substantial discretion is warranted.

SECTION 4-404. [Rules for Classification and Assignment.]

The director shall adopt rules governing the classification and assignment of confined persons. The rules governing classification must:

(1) establish one or more classification committees consisting of not less than 3 members whose backgrounds reflect differing functions and services performed in facilities;

(2) establish classification guidelines that indicate on the basis of the following factors the presumptively appropriate security classification for a confined person:

(i) the present offense or, if a pretrial detainee, the charged offense;

(ii) the past criminal record;

(iii) the past history of behavior or escape attempts while confined;

(iv) the results of any psychological or other evaluations;

(v) any recommendation made by the sentencing court; and

(vi) any other factor relevant to security classification;

(3) require that confined persons be classified in the least restrictive security classification consistent with the safety of the public or security and safety within a facility;

(4) presumptively classify persons convicted of misdemeanors in the least restrictive security classification; and

(5) require that the presumptive classification be adopted unless to do so would jeopardize the safety of the public or the security or safety within a facility.

COMMENT

Many writers call the process of "classification", by which confined offenders are given a "security rating" and assigned to both a facility and, often, a job within that facility, the keystone of modern day penology. See ACA Manual at 35152. See also Sirico, Prisoner Classification and Administrative Decision Making, 50 Tex. L. Rev. 1229 (1972). Indeed, the National Advisory Commission considered it so crucial that it devoted an entire chapter solely to classification. Id. at 197-218.

As currently practiced, classification typically involves a determination by a classification committee that should be composed of staff members who most represent the diagnostic, treatment, and security responsibilities of the institution." ACA Manual at 358. Based on the offender's presentence report, as well as a wealth of information gained during extensive psychological and learning testing at the facility, the

committee will decide which type of facility should be used to house the prisoner, which facility of that type should be used, and, usually, which job should be assigned to him, if any.

The announced basis of this entire process, of course, is that the proper treatment for each prisoner must be individualized. See United Nations Standard Minimum Rules for the Treatment of Prisoners, § 67 (1955); Warren, Classification of Offenders as an Aid to Efficient Management and Effective reatment, 62 J. Crim. L.C. & P.S. 239 (1971). As the National Advisory Commission noted, however, "Most correctional classification schemes in use today ... would more properly be called classification systems for management purposes." Id. at 197. Although this Act rejects "individualization" of sentencing decisions, at least to the extent that it has been followed in the past, see Part III, infra, it retains much of the classification process, primarily because of the prison's concomitant duty to other prisoners to protect them from those believed to be truly dangerous.

Yet the classification process is still, after 50 years, in its embryonic stages. The National Advisory Commission declares "The field of corrections does not yet have the knowledge or the techniques to answer the first question [what caused the offender to break the law?] by other than educated guesswork, and deficiencies in correctional resources and initiatives discourage attempts to answer the second question [what kinds of help does the offender need?] adequately." Id. at 211.

This chapter of the Act distinguishes between the "security rating" of the prisoner, and the facility assignment, a distinction sometimes overlooked in the literature and in practice, suggesting that facility assignment should, where possible, achieve other goals as well as effectuate the "security rating" determination. The decision of security rating is the most important, since it drastically affects the conditions in which the prisoner will live, and the relative liberty he will enjoy while still confined. Consistent with the Act's method of controlling discretion in serious, yet subjective, dispositions, this provision requires the establishment of guidelines for classification decisions, with a presumptive classification system to be employed. Additionally, the requirement that the least drastic security classification be imposed consistent with the facts of the individual offender's case will allow some consistency to emerge from these decisions.

Nothing in this chapter, or in this Act, deals directly with the assignment of prisoners to specific jobs, see, e.g., Bryan v. Werner, 516 F.2d 233 (3d Cir. 1975); Gardner v. Johnson, 429 F. Supp. 432 (E.D. Mich. 1977); Diamond v. Thompson, 364 F. Supp. 659 (M.D. Ala. 1973) (on the expectation that the voucher system established in sections 4-701 to 706 may obviate any need for further regulation).

This section is in basic harmony with the American Correctional Association's accreditation standards. The ACA requires written policies and procedures for classification and "maximim involvement of inmates". See ACA Std. 4372 et. seq. The ACA does not provide for a presumptive classification system.

SECTION 4-405. [Classification of Dangerous Persons.]

(a) The director shall adopt rules authorizing a classification committee to classify or reclassify a confined person as requiring a greater level of security than that generally provided in a maximum security facility if the committee, after a hearing, finds a present factual basis that the person presents a substantial risk to the safety of another person within the facility. A person so classified may be assigned to separate more secure housing within a facility.

(b) A classification committee shall review at least once every 30 days the necessity to continue the more secure housing. A person may be continued in more secure housing under this section only as long as necessary to avoid the risk to other persons.

COMMENT

The hope that prisons will become less dangerous in the future cannot be allowed to infringe upon the perceived needs of prison officials for authority to confine certain offenders more severely. Although this provision would not allow placement in "solitary confinement", it authorizes the establishment of a "maxi-maxi" unit within the most secure facility so that truly dangerous offenders may be removed from the general population for long periods of time. The need for continuous, periodic review is stressed by subsection (d).

SECTION 4-406. [Assignment to Facilities.]

(a) Factors to be considered in assigning a person to a facility include:

(1) the person's security classification;

(2) the availability of programs in the facilities;

(3) the location of family or other supportive relationships;

(4) the location in which the person intends to reside after release;

(5) the location of employment opportunities;

(6) the wishes of the person to be assigned;

(7) the relationships with other confined persons;

(8) any written pretrial agreement entered into by the person and the prosecuting attorney concerning the facility to which the person would be assigned;

(9) any recommendation made by the sentencing court; and

(10) any other factor established by the director relevant to the selection of an appropriate facility.

(b) Consistent with his security classification, a pretrial detainee must be assigned to the available facility nearest to the location of his trial unless the detainee and the court in which his trial will take place agree that the assignment should be made under subsection (a).

(c) Consistent with his security classification, an offender sentenced to a term of continuous confinement of 6 months or less must be assigned to an available facility near his place of residence if he has a permanent place of residence in this State unless the offender agrees that the assignment should be made under subsection (a).

COMMENT

This provision enumerates the factors which should govern the decision of the classification committee in determining the facility to which a prisoner, once having received his security rating, should be assigned. Although not specifying the weight to be given any individual factor, the provision generally structures the decision in a way heretofore not done by statute, and only rarely by prison regulation. By so doing, the provision seeks to bring about some uniformity in an area of decision-making now often characterized by disparity and uncertainty.

Subsection (c) requires a person sentenced to continuous confinement for 6 months or less to be assigned to an available facility near his place of residence. The section is designed to attempt to preserve family and other community ties, particularly for short-term offenders. In most states, local jails are

used for persons sentenced to less than 6 months and thus the facility utilized is at the location of the offense. For many persons this would automatically be nearest his residence. Under the Act the department of corrections will eventually control all local facilities as well. The section not only provides affirmative encouragement to assign to facilities in such a way as to be least disruptive of an offender's contacts but also serves to place some limitation on the department's ability to assign and transfer misdemeanants.

Subsection (c) is limited to persons who reside in the state. The problem of short-term offenders confined in a state other than their residence varies greatly on geographic circumstances. In the Northeast, where states are small, assigning a person to a facility near his residence even if in another state is appropriate. In the West, where states are larger, it may have little effect as to where the non-resident is assigned. It is expected that the philosophy of the subsection which recognizes the relationship between assignment and community ties would govern assignment of non-residents. It is also recognized that many states belong to interstate agreements that may allow a person to be transferred to his home state for service of his sentence.

SECTION 4-407. [Separation of Confined Persons.]

(a) Rules for the assignment of confined persons, to the extent feasible, must facilitate the separation of:

(1) offenders from confined persons other than offenders;

(2) violent offenders from confined persons other than violent offenders; and

(3) first offenders from multiple offenders.

(b) Pretrial detainees, to the extent feasible, must be assigned to pretrial detention facilities.

(c) Offenders sentenced to a term of continuous confinement of more than 6 months must be assigned to a

facility in the division of facility-based services, but the director may authorize the offender to be transferred to serve his last 90 days in a facility in the division of jail administration or community-based services if the offender consents and the transfer will assist his return to the free community.

COMMENT

Although there is much anecdotal material that tends to support the notion that mixtures in prison population help to alleviate tensions, increase prisoner acceptance of behavior norms, and decrease violence, separation of offenders by specific class (young-old; first offender-repeater, etc.) is generally seen by prison officials as essential to their task. See ACA Manual at 214-30. Cf. Nat'l Advisory Comm'n Correc. Stds. 6.1 and 11.5. This section permits, but does not require, separation of groups if the director of corrections finds it necessary or desirable.

SECTION 4-408. [Classification and Assignment; Procedure; Review.]

(a) A representative of a classification committee, within 10 days after a confined person arrives at a facility, shall meet with the confined person, explain the guidelines and factors relating to classification and assignment, and seek to develop a mutually agreeable security classification and permanent facility assignment.

(b) If an agreement is reached, it must be submitted to a classification committee for its approval or rejection.

(c) If an agreement is not reached or a classification committee does not approve the agreement, a confined person is entitled to a hearing before a classification committee within 30 days after arrival at a facility for the purpose of determining his security classification and permanent facility assignment.

(d) The classification committee shall review at least annually with each confined person his security classification and facility assignment unless the confined person waives the review in writing. An offender who has served one-sixth of his sentence is entitled presumptively to a reduction in his security classification unless:

(1) the offender is in the least restrictive security classification;

(2) the offender has committed a serious disciplinary infraction within the past year;

(3) the offender has a history of violent behavior or escape attempts while confined; or

(4) there are other exceptional circumstances that would make the reduction unreasonable.

(e) A confined person who contests the decision by the classification committee in its annual review of his security classification and facility assignment is entitled to a hearing before a classification committee within 30 days after the annual review.

COMMENT

Most classification processes today are informal, seeking to stress the "collaborative" prison envisioned by the President's Crime Commission Report of 1967. President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: Corrections 47 (1967). See ACA Manual at 353; Krantz, R. II-5; Nat'l Advisory Comm'n Correc. Std. 2.13; ABA Joint Comm., § 3.5. This section retains that informality, specifically providing for a "pre-hearing" procedure by which the prisoner and the classification committee may reach an accommodation on both the security rating and the facility assignment. Obviously, if such an agreement can be reached, it can both avoid the necessity of a hearing and begin the correctional process on a sound footing. As Krantz declares, "Adjustment to the institutional setting can only occur if the new inmate receives accurate information about the prison community he is entering . . . . Any viable classification process must be based in large measure on the involvement of the inmate concerned in his program." Id. at 8, 97.

The provision for annual review of the security classification is compatible with present prison practice. The provision of presumptive "downgrading" of a security rating is innovative, and suggests that the absence of serious misbehavior in the prison should be the prime criterion by which reclassification should be gauged. See ACA Std. 4376 (annual review). The "downgrading" provision is triggered when an offender has served one-sixth of his sentence, and would apply only to those who have avoided disciplinary offenses. With the good time reduction available, the provision practically begins after the offender has reduced his sentence by one-third.

SECTION 4-409. [Furloughs.]

(a) The director shall adopt rules governing the granting of furloughs of not more than 14 days duration to confined persons for any of the following purposes:

(1) to visit a close relative or friend who is seriously ill or to attend the funeral of a close relative or friend;

(2) to obtain medical, psychiatric, psychological, or other treatment;

(3) to appear in court as a party or a witness;

(4) to make preliminary contacts for employment, admission to an educational institution, or participation in any similar activity;

(5) to secure a residence for release or make any other preparation for release;

(6) to visit family or friends;

(7) to make arrangements for the care and custody of a child;

(8) to appear before any group whose purpose is to obtain a better understanding of crime or corrections, including appearances on television or radio; and

(9) any other purpose the director determines to be in the person's and the public's interest.

(b) The chief executive officer of a facility, consistent with the rules of the department, shall determine whether a confined person is to be accompanied on furlough by an employee of the department.

(c) The chief executive officer shall provide each person with a written explanation of the conditions of his furlough.

SECTION 4-410. [Rules for Granting Furloughs.]

(a) An appropriate classification committee may consider any confined person for a furlough.

(b) The classification committee shall afford the confined person an opportunity to appear before the committee and present pertinent information to assist the committee.

(c) In determining whether to grant a furlough the committee shall consider the wishes of the confined person and whether:

(1) the person has violated a condition of a previous furlough;

(2) the person has a recent history of violation of rules of other conditional release programs;

(3) the person has a recent history of violation of rules of a facility; and

(4) release of the person would be in his interest and the public interest.

(d) The grant or denial of a furlough may not be used as a reward or punishment for participation or failure to participate in educational, training, or other treatment programs within a facility.

(e) If the committee denies a furlough, it shall provide the person with a written explanation of the reasons for its action.

(f) A confined person on request is entitled to be considered for a furlough when he has completed one-third of his sentence and once every 60 days when he has less than 6 months left in confinement.

COMMENT

Most correctional authorities would agree that "[t]he furlough system is far superior to the institutional arrangement [for family visiting]". Nat'l Advisory Comm'n at 68; President's Comm'n on Law Enforcement at 176-177. Indeed, most states now provide power in the director of corrections or some other authority, to "expand" the jurisdiction of the prisoner's confinement to encompass furlough-type arrangements. See, e.g., Ill. Ann. Stat. ch. 38, § 1003-11-1 (Smith-Hurd 1973)(language parelleling that of this provision); N.Y. Correc. Law, § 113 (McKinney Supp. 1976-1977); 18 U.S.C., § 4082(c) (1970 & Supp. III 1973). These provisions do not generally specify, however, as Section 4-410 does, the various factors that may be considered in implementing such a furlough program. By establishing, once again, specific, written criteria by which the furlough decision is to be made, the Act seeks to avoid decisions made according to unknown, and possibly inconsistent, standards. The drafters consider the opportunity to participate in a furlough program as an important one and seek to protect it by requiring some modicum of due process before a furlough is denied.

Many current state statutes, particularly those concerned with work release furlough programs, or pre-release furloughs, limit eligibility to those reasonably near the culmination of their terms. Although the director may wish to consider such a limitation, the statute itself does not prohibit other prisoners from participating in those programs because the benefits are potentially very high and the risks, given a sound basis for the program, are relatively low.

By providing for an "automatic" furlough consideration, the Act seeks to insulate furlough programs from the inevitable public pressure, which arises whenever an individual prisoner, on furlough or some other kind of release, commits a new, often sensational crime, resulting in the entire shut-down of a furlough program for weeks or months. With a strong legislative statement that furlough programs are sufficiently helpful as to deserve legislative protection, that pressure may be overcome. The "one-third of his sentence

requirement in subsection (f) means that with good time reductions, the section applies to those offenders who have one-third of their sentence left to serve.

SECTION 4-411. [Protective Confinement; Conditions.]

(a) Whenever the safety of a confined person is in jeopardy, the chief executive officer shall, if feasible, order reasonable arrangements other than protective confinement to secure safety. Unless other reasonable arrangements are made, a confined person must be placed in more secure confinement for his own protection at his own request, and may be so placed on the order of the chief executive officer. A person in protective confinement may not be denied any protected interests or privileges to which he would have been entitled in less secure confinement unless essential to assure his protection.

(b) A person may not be kept in protective confinement for more than 30 days unless a classification committee, after a hearing, finds that the person prefers to remain in protective confinement or:

(1) the person is in danger of serious bodily harm from other persons;

(2) there is no other facility, within or outside the jurisdiction, to which the person can be transferred in which he would be in less danger; and

(3) the state has a particular interest in the person's safety which overrides his desire to leave protective confinement.

(c) The classification committee shall review the necessity for involuntary protective confinement at least every 30 days.

COMMENT

Prisons are dangerous societies. Informants, and prisoners particularly vulnerable to assault for other reasons, may feel compelled to seek isolation from the prison population for their own protection. Several courts have held that this "service" requires the prisoner to cede all those privileges and rights they are removed from persons who are in administrative segregation because of misbehavior. See, e.g., Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854 (4th Cir. 1975). Contra, Little v. Walker, 552 F.2d 193 (7th Cir. 1977) appeal pending. This is unfair; if the prison cannot assure protection other than by isolated confinement, the onus of that failure should not fall upon the vulnerable prisoner. Preferably, the prisoner should be transferred to another facility in which he will not be threatened in the general population. See Note, A Prisoner's Right to a Protective Transfer from State to Federal Prison, 50 Ind. L.J. 143 (1974). If this is not possible, the prison should establish protective custody without depriving the prisoner of other rights or privileges.

SECTION 4-412. [Classification Committees; Hearing Procedures.]

(a) The director shall adopt rules establishing hearing procedures for classification committees. The rules must be consistent with the following:

(1) A confined person has, but may waive in writing, the right to,

(i) written notice at least 7 days before the hearing of the contemplated action and the facts on which it is based;

(ii) subject to the limitations of Section 4-122(c), examine at least 3 days before the hearing all information in the committee's possession to be considered at the hearing;

(iii) legal assistance in preparing for the hearing and in contesting a material fact upon which classification is likely to be based other than a fact determined by a court at the trial of the offense or necessarily found as part of the conviction;

(iv) present relevant evidence and cross-examine persons giving adverse evidence.

(2) The classification committee must,

(i) preserve, in transcribable form, a record of the hearing, which must be retained until the time for appeal has expired or the appeal has been concluded; and

(ii) inform the confined person in writing of its decision and the reasons therefor.

(b) This section does not require a person to appear or be examined or information to be disclosed if a

classification committee makes a written factual finding that to do so would subject a person to a substantial risk of physical harm.

COMMENT

The courts are currently divided on the question of whether either initial classification or reclassification requires a hearing. This is also true with regard to some transfers, compare, Wakinekona v. Doi, 421 F. Supp. 83 (D. Haw. 1976) (hearing required for interstate transfer) and Jones v. Manson, 393 F. Supp. 1016 (D. Conn. 1975), with McKinnon v. Patterson, 425 F. Supp. 383 (S.D.N.Y. 1976) and Peterson v. Davis, 421 F. Supp. 1220 (E.D. Va. 1976) (no hearing required). Since Meachum v. Fano, 427 U.S. 215 (1976) and Montanye v. Haymes, 427 U.S. 236 (1976) the cases holding that no hearing is required have multiplied, except where state regulations create an expectation of a hearing. See, e.g., Four Unnamed Plaintiffs v. Hall, 424 F. Supp. 357 (D. Mass. 1976) rev'd per curiam, 550 F.2d 1291 (1st Cir. 1977); Lavine v. Wright, 423 F. Supp. 357 (D. Utah 1976). Because such a justifiable expectation cannot arise merely from the practice of prison officials, however, see Curry-Bey v. Jackson, 422 F. Supp. 926 (D.D.C. 1976), this section establishes such an expectation, in light of the severe changes in prison conditions which may attend a classification decision.

Another series of decisions requiring hearings prior to classification as a "special offender" in the federal system may also be apposite. See Holmes v. United States Bd. of Parole, 541 F.2d 1243 (7th Cir. 1976); Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975).

Recognizing the severe impact that such a decision may have upon a prisoner, the provision basically analogizes those hearings to major disciplinary hearings. One conspicuous alteration, however, is that the prisoner is entitled to legal assistance only before and not necessarily during the hearing itself. Moreover, the legal assistance may be provided by a paralegal, rather than by a licensed attorney. See Krantz, R. II-5.

The specifications here, like those in the disciplinary section, go beyond what current law now requires. Nevertheless, the Act's concern with unwarranted and unreviewable

discretion, whether in the hands of sentencing judges or prison officials, suggests the rationale for the expansion of prisoner rights in this area. For further discussion, see Sections 3-101 to -207, infra.

SECTION 4-413. [Classification Decisions; Appeal.]

(a) A confined person may appeal any decision of the committee to the chief executive officer, who shall decide the appeal within 7 days.

(b) The affected person may appeal to the director, who shall decide the appeal within 30 days.

(c) Failure by the appropriate officer to act within the time provided entitles the confined person to treat the failure as an adverse decision.

(d) A confined person is entitled to judical review of a decision to reclassify him to a more restrictive classification, transfer him from his permanent facility assignment, or classify him as requiring a greater level of security than that generally provided in a maximum security facility.

COMMENT

Consistent with the Act's view of classification as a crucial decision in the life of the prisoner, review of that decision, including judicial review of some decisions, is provided in this section. The review is limited in scope as provided in Section 1-104 and does not allow the court to substitute his judgment for that of the classification committee.

SECTION 4-414. [Change in Status.]

(a) A confined person may not be reclassified to a more restrictive classification unless:

(1) he has committed a disciplinary infraction resulting in confinement in his own living quarters, placement in separate housing for more than 10 days, loss of privileges for more than 40 days, or loss of good time;

(2) he is convicted of a new offense;

(3) his status changes from a pretrial detainee to an offender;

(4) new information becomes available that would have affected his initial classification and its relevance to his classification is not outweighed by his conduct in the facility since the initial classification; or

(5) he consents to the classification.

(b) A confined person may not be transferred to another facility unless:

(1) he is subject to reclassification pursuant to subsection (a);

(2) his transfer is necessary to allow him to receive special medical, psychological, psychiatric, or other similar treatment;

(3) his space in the facility would be more constructively utilized by another confined person and his transfer to another facility would not result in a

substantially more onerous assignment;

(4) his transfer is necessary to allow him to return to a general population setting from protective confinement;

(5) the facility or part of a facility to which he is assigned is closed or its population is being reduced; or

(6) he consents to the transfer.

(c) Whenever a confined person is reclassified or transferred without his consent pursuant to this section, he is entitled to a hearing before a classification committee.

(d) Whenever a confined person is reclassified or transferred so as to affect adversely the conditions of his confinement, a classification committee shall review his classification and facility assignment within 6 months.

COMMENT

The Supreme Court has clearly indicated that prisoners are entitled to a due process hearing before being disciplined for specific behavior. Wolff v. McDonnell, 418 U.S. 539 (1974). In note 19 of the Wolff opinion, the court expanded its notions of due process by declaring that whenever there was a "major change in the conditions of confinement," due process was required. The lower courts split on whether classification or reclassification involved such a "change in the conditions of confinement." Some courts, concerned with the lack of process by which initial classifications were made, required due process wherever there was something "unique" or "special" about the classification. See, e.g., Lokey v.

Richardson, 527 F.2d 949 (9th Cir. 1975), vacated, 427 U.S. 902 (1976); Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975). Cf. Daigle v. Hall, 387 F. Supp. 652 (D. Mass. 1975); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970). Other courts disagreed, holding that Wolff was inapplicable, and repeating the pre-Wolff view that classification of inmates and job assignments were matters of internal prison administration which the courts were reluctant to review. See, e.g., Young v. Wainwright, 449 F.2d 338 (5th Cir. 1971); Hanvey v. Pinto, 441 F.2d 1154 (3d Cir. 1971).

Similarly, the courts split on whether re-classification, which clearly involved a potential change in the conditions of confinement, warranted due process protections. Graham v. State Dep't of Correction, 392 F. Supp. 1262 (W.D.N.C. 1975); Jones v. Manson, 393 F. Supp. 1016 (D. Conn. 1975); Davenport v. Howard, 398 F. Supp. 376 (E.D. Va. 1974) aff'd, 520 F.2d 940 (4th Cir. 1975); Jordan v. Keve, 387 F. Supp. 765 (D. Del. 1974). These courts stressed that movement from a minimum or medium security prison to a maximum security institution entailed substantial curtailment of movement and freedoms, often meant disruption of a prisoner's established patterns and programs, and could be based on inaccurate information. The possibility that reclassification was being used as an artifice to avoid the Wolff requirements was also suggested. On the polar side of the ledger were those courts who simply repeated that classification was a singularly unique, subjective, determination into which courts should not wade. Rossen v. Weatherholte, 405 F. Supp. 48 (W.D. Va. 1975).

While the lower courts were still wrestling with this division, the Supreme Court decided a disciplinary case, and two "transfer" cases. Baxter v. Palmigiano, 425 U.S. 308 (1976); Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976). The opinions appeared to retreat from the concept that every major "change in conditions" requires due process, and relied more heavily on the notion that only if the state creates an expectation interest is due process required. Cf. Walker v. Hughes, 558 F.2d 1247, (prison policy statements created liberty interest) (6th Cir. 1977); Lavine v. Wright, 423 F. Supp. 357 (prison rules and regulations created expectation) (D. Utah, 1976).

The reaction to Montanye and Meachum has been mixed. Several courts have held that the two cases make Wolff -- and due process -- totally inapplicable to the classification process. See, e.g., Cooper v. Riddle, 540 F.2d 731 (4th Cir.

1976); Franklin v. Fortner, 541 F.2d 494 (5th Cir. 1976); Peterson v. Davis, 421 F. Supp. 1220 (E.D. Va. 1976). Other courts have applied Wolff to reclassification processes, or initial classification, at least in "exceptional" circumstances. See, e.g., Holmes v. United States Bd. of Parole, 541 F.2d 1243 (7th Cir. 1976); Persico v. United States Dep't of Justice, 426 F. Supp. 1013 (E.D. Ill. 1977). Still others have found liberty interests created by rules. Walker v. Hughes, 558 F.2d 1247, (6th Cir. 1977); Four Unnamed Plaintiffs v. Hall, 424 F. Supp. 357 (D. Mass. 1976) (justifiable expectation of non-transference created by state statute and prison regulations), rev'd per curiam, 550 F.2d 1291 (1st Cir. 1977); Wakinekona v. Doi, 421 F. Supp. 83 (D. Haw. 1976) (State Correction regulation created right to a hearing before impartial board preceding transfer to mainland).

Confronted with this division in authority, the Act provides some protection, specified in Section 4-412, before classification or transfer decisions may be implemented. The reason is simple: the impact upon a prisoner of a downgrading, a transfer to another institution, or both, may be severe. Aside from the inherent need for fairness in those situations, it is simply non-productive to cause the prisoner to feel that he is being unfairly treated. While the hearing provided in Section 4-412 is not elaborate, and does not comport with what the Supreme Court has otherwise called the "minimum" of due process, Goldberg v. Kelly, 397 U.S. 254 (1970), it does establish at least a base of protection for the prisoner and for the prison.

To the extent, however, that a prisoner has already received one hearing, on discipline, prosecution, etc., this provision would allow file review; there is obviously no need for duplication of a hearing at which the same, or greater, rights were afforded the prisoner.

SECTION 4-415. [Mentally Ill Confined Persons; Commitment.]

(a) Whenever the chief executive officer believes that a confined person may be mentally ill or mentally retarded, as defined in [The Mental Health Code], and in need of treatment that cannot be provided by the department,

he shall commence civil commitment proceedings in the [appropriate court] under [the Mental Health Code] to transfer the prisoner to [a facility to be designated by the Department of Mental Health].

(b) The sentence of a person so transferred continues to run, and he remains eligible for credit for good behavior under this Act.

(c) If a person so transferred is released pursuant to [the Mental Health Code] before expiration of his sentence, he shall be returned to the department to complete service of his sentence.

COMMENT

Prisoners who become mentally ill after conviction and incarceration are placed, as a rule, in a separate facility for mentally ill persons, run either by the department of corrections (e.g., New York, California, Indiana) or the department of mental health (e.g., Michigan, Illinois, Alaska). Although the placement, in the former case, is not "civil commitment," and clearly ends at the terminal date of sentence, it still carries with it a sufficient stigma to justify some rudiments of due process. See Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969), cert. denied, 396 U.S. 847 (1969); Matthews v. Hardy, 420 F.2d 607 (D.C. Cir. 1969) cert. denied, 397 U.S. 1010 (1970). In the latter situation, most state statutes make clear that jurisdiction remains in the department of corrections, and confinement in the mental hospital past the terminal sentence date is allowed only upon further proceedings. See, e.g., Cal. Penal Code, § 2685 (West 1970); Colo. Rev. Stat., § 27-23-101(2) (1973); Ind. Code Ann., § 16-14-8-5 (Burns 1971); Mich. Comp. Laws. Ann., § 330.2006(3) (West Supp. 1977-78); Neb. Rev. Stat., § 83-180 (Reissue 1976).

If an offender is to be transferred to the jurisdiction of the department of mental health for the period necessary to treat the illness, the normal processes for civil commitment

should be followed. Although at least two states [Mich. Comp. Laws Ann., § 330.2000 (West Supp. 1977-78); N.Y. Correc. Law, § 408 (McKinney 1968)] provide for administrative procedures prior to the filing of a commitment petition, this provision does not adopt that approach, instead leaving the sole determination in the hands of the appropriate court. See, e.g., Colo. Rev. Stat., § 27-23-101(3) (Supp. 1976); Ill. Ann. Stat. ch. 38, § 1003-8-4 (Smith-Hurd 1973).

Although most states now appear to credit time spent in a mental institution toward completion of the initial criminal sentence, some still preclude the earning of good time. See, e.g., Tex. Code Crim. Proc. Ann. art. 46.01(8) (Vernon Supp. 1976-1977). There is no apparent reason for this distinction and this section adopts the majority view. Moreover, the rights and privileges otherwise present in this Act, for example, access to legal services, should not be lost because of a transfer to a mental institution; indeed, those institutions should have such programs of their own. In the event that this is not the case, however, this section makes clear that the transfer effects no alteration of the offender's protections.

SECTION 4-416. [Persons Subject to Foreign Laws.]

(a) [With the approval of the Governor,] the director, consistent with the terms of any applicable international agreement, may accept custody of a resident of this State convicted of an offense under the laws of a foreign country and may release to the custody of a foreign country a national of that country convicted of an offense under the laws of this State.

(b) Whenever a resident of this State convicted under the laws of a foreign country is received into the custody of the department, he is subject to the provisions

of this Act except to the extent they are inconsistent with an express provision of the international agreement authorizing his transfer or of any agreement entered into pursuant thereto.

PART 5
DISCIPLINE

SECTION 4-501. [Disciplinary Rules.]

(a) The director shall adopt rules governing the conduct of confined persons. Subject to the approval of the director, each chief executive officer may adopt supplementary rules pertaining to his facility. A violation of any of these rules constitutes a disciplinary infraction for which a confined person may be punished pursuant to this Part.

(b) The rules must:

(1) define with particularity the conduct regulated;

(2) establish the maximum punishment for each infraction proportionate to the seriousness of the infraction;

(3) establish, on the basis of the seriousness of the infraction and the past history of similar infractions committed by confined persons, the presumptive punishment to be imposed; and

(4) require that the presumptive punishment be imposed by a hearing officer unless he states in writing the reasons for imposing a different punishment.

COMMENT

The two major methods of control and security within a prison system are (1) disciplinary sanctions and (2) classification and reclassification, each of which may result in transfer to another institution. Unlike the latter decisions, which are theoretically based primarily upon a prisoner's entire record, disciplinary decisions should be predicated exclusively on the basis of a particular incident. Thus, the fact-finding process in discipline decisions is significantly different than that involved in classification hearings. Because of this difference, different procedures and protection are necessary, and limitations upon information which can be utilized are critical. Similarly, since specific factual allegations involving a specific incident are the sine qua non for disciplinary decisions, procedures for such fact-finding may more closely parallel those in the free society.

The area of prison discipline has probably been more litigated than any other; the law, however, is still unclear in many respects. Thus, the provisions in significant part go beyond what current decisional law requires, but in many instances parallel current correctional practice.

A recent commentator on prison practice has declared:

> "Our system of jurisprudence assumes that the criminal law should give fair warning of prohibited conduct, restrict the imposition of arbitrary power, and be fundamentally fair. To achieve these ends, we insist that the criminal law be written in clear and unambiguous terms, with proscribed conduct clearly and unambiguously defined, so that potential wrongdoers are able to determine precisely what conduct is prohibited and what the penalties are for violation; and that in each case the prescribed penalty should bear some relationship to the seriousness of the offense . . . .
>
> ". . . . The traditional modes of response to prison misconduct stand in marked contrast to our approach to the criminal law outside prison. Rather than attempt to carefully delineate proscribed prison behavior, correctional administrators adopt one of two equally ineffective responses. Either they fail to define any proscribed conduct, and hence make institutional sanctions dependent on the whims and prejudices of correctional personnel, or they prohibit all modes of behavior and in effect create the same risks of imposition of arbitrary action."

L. Orland, Prisons: Houses of Darkness 152-53 (1975).

Scrutiny of present prison regulations demonstrates the accuracy of Professor Orland's charges. Thus, many prison regulations proscribe such acts as "insubordination," "engaging in conversation with other prisoners," or, in at least one instance, "vicious eyeballing." See ABA Joint Comm. at 444. Even the United States Bureau of Prison Regulations, which in many respects form the model for the provisions in this part, still prohibit "refusing to obey an order of any staff member," "using abusive or obscene language," "insolence towards a staff member" and "being unsanitary or untidy." U.S. Dept. of Justice, U.S. Bureau of Prisons, Policy Statement No. 7400.5D, § 6(f) (July 7, 1975).

Similarly, the concept of proportionality, even when articulated in the regulations, see id., § 11 (b) (2), is not fully implemented. Thus, for example, United States Bureau of Prisons Policy Statement does not list specific ranges of punishments for specific offenses, providing instead that "The Institution Discipline Committee shall have available a broad range of sanctions and dispositions (for each offense)." Id., § 9 (d). Indeed, a 1974 study of prison disciplinary procedures discovered that only 25 percent of responding prisons provided rules which had specific sanctions for specific offenses. American Bar Association, Resource Center on Correctional Law and Legal Services, Survey of Prison Disciplinary Practices and Procedures With an Analysis of the Impact of Wolff v. McDonnell (1974). Yet all recent studies have recommended, and in some cases promulgated, such schedules of sanctions available for prison infractions. See, e.g., ABA Joint Comm., § 3.1; Krantz, R. IV A-1 to A-9; L. Orland, Prisons: Houses of Darkness, Appendix D (1975). As enunciated by Professor Orland, the concept of proportionality is deeply imbedded in our criminal law. See, e.g., Weems v. United States, 217 U.S. 349 (1910); Wright v. McMann, 460 F.2d 126 (2d Cir. 1972) cert denied, 409 U.S. 885 (1972). While some prison systems have moved in this direction, adopting a "major/minor" rule infraction differentiation, see, e.g., United States Department of Justice, United States Bureau of Prisons, Policy Statement No. 7400.5D supra, the preferred model, envisioned by this provision of the Act, is that offenses should be arranged into discrete "classes" with relatively fixed penalties for the class.

The provision requires, consistent with the approach taken in other parts of the Act, that the schedule indicate the "presumptive" sanction to be imposed for a specific rule violation, and that deviations from that presumptive sanction be allowed only if accompanied by the written reasons of the hearing officer.

This section is in basic harmony with the position of the American Correctional Association Commission on Accreditation ACA Std. 4310-39. Standards 4310-11 require a rulebook that defines offenses and the range of penalties. The ACA does not adopt a "presumptive penalty" system, but such a system would be consistent with the accreditation standards.

SECTION 4-502. [Punishments for Disciplinary Infractions.]

(a) Punishments that may be imposed for a disciplinary infraction are:

(1) confinement in living quarters for not more than 30 days or placement in separate housing for not more than 90 days;

(2) loss of privileges for not more than 120 days;

(3) restrictions on the realization of the protected interest in physical exercise or use of personal property for not more than 120 days;

(4) forfeiture or withholding of good time reductions pursuant to this section;

(5) fines in an amount not exceeding $100; and

(6) restitution to the department or to an injured person in an amount not exceeding $100 for personal

injury or property damage or loss caused by the infraction.

(b) This section does not authorize, either alone or as an incident of another punishment:

(1) restrictions on the realization of protected interests other than physical exercise or use of personal property;

(2) restriction on physical exercise to less than 7 hours per week;

(3) isolation from oral communication with other confined persons for more than 16 hours per day, but a person may be isolated in an emergency for not more than 24 consecutive hours if necessary;

(4) deprivations of cosmetic or hygienic implements, clothing appropriate to the season, or regular diet.

(c) Rules authorizing the forfeiture of accumulated good-time reductions or the withholding of future good-time reductions as a punishment for disciplinary infractions must be consistent with the following:

(1) the forfeiture or withholding of good time reductions may be imposed only if,

(i) the disciplinary infraction involves conduct that is a felony or seriously jeopardizes the safety of the public or security or safety within the facility; or

(ii) less severe measures have been imposed frequently and recently on the confined person for disciplinary infractions.

(2) The director may not authorize hearing officers to impose a forfeiture or withholding of good-time reductions of more than 90 days for a disciplinary infraction. The director may adopt rules specifying particularly aggravated infractions or circumstances for which a hearing officer may recommend, and the director may impose, a forfeiture or withholding in excess of 90 days but not to exceed 2 years or one-fourth of the confined person's sentence, whichever is less. The director may not delegate this authority.

(3) Notwithstanding the provisions of subsection (c)(2), one-fourth of any accumulated good-time reductions vests and is not subject to forfeiture.

(d) Cumulative punishments may not be imposed for 2 or more infractions committed as part of a single course of conduct.

(e) The fact that a punishment is available or imposed pursuant to this section does not prevent the imposition of applicable civil or criminal penalties or remedies authorized by law.

COMMENT

This section enumerates the potential sanctions for violation of prison rules. Most penalties now enforced in most prisons are included; excluded are, principally, corporal punishment and "solitary confinement." While solitary has been the most persistently inflicted punishment in the past, see, e.g., Jacob, Prison Discipline and Inmate Rights, 5 Harv. Civ. Lib. Civ. Rts. L. Rev. 227, 234 (1970), its use seems to have diminished in recent years, even if one adds certain types of "administrative segregation". In light of the ambiguous evidence as to whether such confinement inflicts long-lasting psychological damage, e.g., Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) cert. denied 404 U.S. 1049 (1972), and the evidence that it has at times caused or facilitated mental breakdown, LaReau v. McDougall, 473 F.2d 974 (2d Cir. 1972), the punishment seems unnecessary and excessive. Yet abolishing "soli-

tary confinement" is immensely difficult, since it has often been renamed in prison systems: "adjustment center," "mediatation room," or "private quarters." Subsection (b) (3) is an attempt to generalize the proscribed situation.

The retained rights in subsection (b) (2) are certainly unextraordinary except perhaps for physical recreation. Several courts have found that lack of recreation, both because of its physical debilitation and its mental impositions, violates the Eighth Amendment. See, e.g., Sinclair v. Henderson, 331 F. Supp. 1123 (E.D. La. 1971); Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970) aff'd 439 F.2d 146 (5th Cir. 1971); Glenn v. Wilkinson, 309 F. Supp. 411 (W.D. Mo. 1970).

Subsection (a) (6) allows the Committee to order restitution in minor cases, but would effectively require the prison, or an injured prisoner, to seek normal civil relief where the amount of restitution or compensation sought is not insignificant.

Virtually every state provides for the granting, and the revocation of "good time." See Hand and Singer, Sentencing Computation Laws and Practices, 10 Crim. L. Bull. 318 (1974). Generally, revocation is totally within the hands of prison administrators. Nevertheless, there is a broad diversity of opinion as to whether the threat of revocation is an important control device in the prison, ranging from those who consider the power "essential" to those who believe it a nuisance which makes prison management much more difficult. Arguably, of course, such a loss, which effectively increases the duration of incarceration, should be imposed only by a court; that view, however, has been rejected by the courts, and is not adopted here. Although the Supreme Court has implicitly upheld the right to revoke good time, see Wolff v. McDonnell, 418 U.S. 539 (1974), it has also made clear that it is the harshest sanction possible for prison discipline, circumscribing its imposition with substantial due process safeguards.

The section, therefore, allows revocation of "good time" but, in accord with the Committee's concern that neither of these measures be used indiscriminately to replace the traditional discretion of parole and thereby undermine the determinate sentencing approach adopted in the Act, limitations upon the offenses for which the sanction may be imposed are expressly stated.

The sanction is generally limited to 90 days, in accord with ABA Joint Comm., § 3.2(a) (v), but, in contrast to those standards, allows revocation of up to two years' liberty in exceptional cases. This is consistent with most practice today, although some systems appear to have greater limitations. Thus, for example, the federal prison system permits "forfeiture" only of good time accumulated

"at the time of the offense for which forfeiture action is taken." U.S. Dept. of Justice, U.S. Bureau of Prisons, Policy Statement No. 7400.5D, § 9(d) (5) (July 7, 1975) so that in some instances the amount subject to forfeiture under the Act is greater than that allowed in that system. Because the loss of good time is such a severe sanction, however, and particularly because the loss of large amounts of good time is equivalent to a freshly imposed sentence, the provision requires that the director personally approve any withholding of good time in excess of 90 days.

Subsection (d) is geared to the problem of "over-charging," a difficulty familiar to criminal law generally. See Blockburger v. United States, 284 U.S. 299 (1931); Gore v. United States, 357 U.S. 386 (1958). Cf. Model Penal Code Sentencing Standards, §§ 3.4, 3.5, 5.2; Model Sentencing Act, §§ 19-2; Nati'l Advisory Comm. Correc. Std. 5.6.

SECTION 4-503. [Dissemination of Disciplinary Rules.]

(a) The director shall publish annually a written rulebook containing the current rules establishing disciplinary infractions and their maximum and presumptive punishments. The director shall assure that each of the following are given a copy of the most recent rulebook:

(1) each employee of the department and each confined person on the effective date of this Act;

(2) each new confined person upon admission to a facility; and

(3) each new employee at the outset of his employment.

(b) The director shall assure that employees and confined persons are kept currently informed of changes in the rules. The director shall either:

(1) distribute a written copy of changes in the rules to each employee or confined person; or

(2) post a written copy of rule changes in the facility in a location readily accessible to employees and confined persons and generally used for distributing information to them.

(c) Rules shall be translated into any language that is the sole language understood by a significant number of confined persons.

(d) Failure to give a reasonable notice of a rule establishing a disciplinary infraction is a defense to a charge of violation of the rule unless the conduct prohibited is also a criminal offense or actual knowledge of the rule by the confined person is proved by a preponderance of the evidence.

(e) The director may adopt methods in addition to written publication to assist employees and confined persons in understanding the rules establishing disciplinary infractions. Special efforts shall be taken orally to inform illiterate persons of the substance of the rules.

COMMENT

ACA Std. 4311 requires distribution of a rulebook. See also ABA Joint Comm., § 3.1.

SECTION 4-504. [Administrative Punishments.] The director shall adopt rules governing the imposition of administrative punishment by authorizing designated employees to allow a confined person charged with specified minor

disciplinary infractions to accept a loss of privileges of not more than 10 days rather than be tried by a disciplinary hearing officer. Acceptance of that punishment terminates any further proceeding upon the charge.

COMMENT

Informal resolution of minor misbehavior, preferably without any disciplinary infraction charge at all, is obviously desirable in any institution. See U.S. Dept. of Justice, U.S. Bureau of Prisons, Policy Statement No. 7400.5D, § 7(a) (July 7, 1975). Where a small sanction is permissible, however, it is still better, for both the prison and the prisoner, to achieve accommodation rather than resort to the hearing mechanism. See Nat'l Advisory Comm. Correc. Std. 2.12. Accord, L. Orland, Prisons: Houses of Darkness 197 (1975). Abuses of this power, either in terms of consistent overcharging, or by allowing "favored" prisoners to violate regulations, is a danger, however, and the limitation on the severity of the sanction may avert some of these pitfalls.

SECTION 4-505. [Disciplinary Hearing Officers.]

(a) The Attorney General shall appoint and train disciplinary hearing officers and assign them to facilities on a rotating basis. The Attorney General may remove a hearing officer in accordance with law and for good cause. Before removal, a hearing officer is entitled to a hearing.

(b) A hearing officer is an employee of the Attorney General and not of the department. The director shall provide hearing officers with adequate space and equipment in each facility.

(c) A hearing officer shall conduct disciplinary hearings on all charges of disciplinary infractions against confined persons except those who accept administrative pun-

ishment.

(d) A hearing officer may administer oaths.

COMMENT

One of the fundamental precepts of due process is the right to an impartial tribunal. In Re Murchison, 349 U.S. 133 (1955); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). In Wolff v. McDonnell, 418 U.W. 539 (1974), the Supreme Court held that prison officials, although directly involved in the daily life of the prison, could act as impartial triers in prison disciplinary hearings provided, of course, that the person actually bringing the charges, or one who had investigated the charges, did not personally sit on the tribunal.

It does not impugn the motives or capabilities of prison officers, however, to suggest that the more prudent, and much fairer, process would be to involve persons whose loyalty is not necessarily to the institution itself. See Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973); Batchelder v. Geary, No. C-71-2017 (N.D. Cal. April 16, 1973). Even the most extraordinarily objective person would find it difficult to retain total impartiality in a setting in which he was directly involved with a person bringing the charges.

To implement the concept of an impartial tribunal, this provision requires that all hearings be conducted by a person appointed by an outside agency, responsible only to that agency. It is consistent with the requirement that the officer or board be "impartial", Nat'l. Advisory Comm. Correc., § 2.12, and the American Bar Association standard requiring that at least "major" rule violations be heard "by one or more impartial persons not directly involved in the prison setting or employed by correctional authorities." ABA Joint Comm., § 3.2. See also Krantz, at 160-62 (suggesting that members of local churches, civic organizations and other such groups would be valuable resources for impartial hearers). But this provision goes beyond any of these, and recommends a specific method of achieving this impartiality. Cf. ACA Std. 4326 (impartial officer or panel of officers).

Many states already provide such impartial hearing officers in specific circumstances, e.g., Alaska Stat., § 44.62.350 (1959); Mo. Ann. Stat., § 161.252 (Vernon 1965). At least one state has established a separate agency, the Office of Administrative Hearings, which hires and trains all hearing officers for all state agencies, and assigns them on an as-needed basis. Cal. Gov't Code, §§ 11370.3, 11502 (1961, as amended 1971). Although these officers do not currently hear prison disciplinary cases, there is no apparent reason why that executive agency should be treated differently.

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The provision here places authority in the Attorney General's office, but a general statutory office such as that in California would be a viable alternative. In any event, the hiring and discharge of these officers should not be in the hands of the Department of Corrections.

Other than this change, the wording is adopted from the federal Administrative Procedure Act, 5 U.S.C., §§ 3105, 7521, 5362 (1976). There is no inconsistency with the Model State Administrative Procedure Act (1970), which does not address this question directly. Several states, including New Jersey, are not experimenting with such programs in prisons. See Avant v. Clifford, 69 N.J. 496, 341 A.2d 629 (1975).

SECTION 4-506. [Disciplinary Charges; Initiation; Prosecution.]

(a) The director shall adopt rules governing the initiation and prosecution of disciplinary charges. The rules must establish:

(1) a method for filing charges alleging that a confined person has committed a disciplinary infraction;

(2) the manner in which charges are to be investigated and require that whenever a confined person files charges against another confined person the person filing the charges is notified of the outcome of the investigation;

(3) procedures for the prosecution of charges and authorize dismissal of charges without prosecution if appropriate; and

(4) a procedure for the development and filing of a report that contains,

(i) the names of the person filing or investi-

gating the charges and the person charged; and

(ii) the time, date, place, and nature of the infraction alleged to have been committed including the facts and circumstances surrounding the alleged infraction and the names of persons present.

(b) A confined person charged with a disciplinary infraction is entitled to receive, at least 72 hours before a hearing on the alleged infraction:

(1) a copy of the report of the investigation of the charges;

(2) the text of the rule violated;

(3) a notice of the time and place of the hearing; and

(4) a notice of the maximum and presumptive punishment established for the alleged infraction.

(c) A confined person charged with an infraction is entitled to a hearing not later than 15 days after the report is filed with the hearing officer unless the person charged or the chief executive officer demonstrates to the hearing officer good cause for further delay.

(d) Hearings on charges against a person who is confined in his living quarters or placed in separate housing before the hearing must be given priority.

(e) This section does not require the disclosure to a confined person of information that a hearing officer determines, if disclosed, would subject another person to a

37 substantial risk of physical harm.

COMMENT

This provision establishes procedures for initiating the disciplinary process. The provisions as to time frames, particularly the 72-hour period between the time the prisoner receives notice and the time of the hearing are consistent with both case law and other recommendations. See Wolff v. McDonnell, 418 U.S. 539 (1974) (at least 24 hours required for prepartion); ABA Joint Comm., § 3.2 (hearing within 72 hours of receiving the charge); Krantz rule V-3 (three to five days after receipt of charge); U.S. Dept. of Justice, U.S. Bureau of Prisons, Policy Statement No. 7400.5D, § 9(c) (1) (July 7, 1975) (hearing no less than 24 hours after receipt of charge).

Because there may be some delay between the filing of the charge and the hearing, Section 4-509 allows confinement of persons pending certain serious charges. Thus, subsection (d) gives these persons priority in the hearing order, as they are already suffering substantial curtailment of their liberty. Accord, Krantz, rule V-3.

The section is in conformity with ACA Stds 4317, 4318, 4327, and 4328. The ACA Standards require a disciplinary hearing within 7 days, whereas the Act provides 15 days.

SECTION 4-507. [Disciplinary Hearings; Procedure.]

(a) At the disciplinary hearing the person charged is entitled to:

(1) appear and give evidence;

(2) present witnesses, but the hearing officer may exclude a witness for good cause;

(3) examine any witness and call and examine the employee of the facility who brought or investigated the charge or who has information about the incident; and

(4) immunity from the use of his testimony or any evidence derived therefrom in any other proceeding in which he elects to exercise his rights against self-incrimination except in a prosecution for perjury arising out of

that testimony.

(b) A person may not be confined in his own living quarters for more than 10 days, placed in separate housing for more than 10 days, deprived of privileges for more than 40 days, restricted in the realization of protected interests for more than 40 days, or deprived of good time, unless in addition to the rights enumerated in subsection (a), he is accorded the right:

(1) except as provided in subsection (c), to confront and cross-examine any person giving adverse information; and

(2) to representation by an employee of the office of correctional legal services, or by retained counsel.

(c) This section does not require a person to appear or be examined if the hearing officer makes a written factual finding that to do so would subject a person to a substantial risk of physical harm. If the hearing officer allows a person to forego appearance or examination and information the person has provided will be used against the person charged with an infraction, the hearing officer shall meet with the person giving adverse information and give the person charged a summary of the factual basis of his testimony.

(d) The hearing officer must preserve in a transcribable form a record of the hearing, which must be retained until the time for appeal has expired or the appeal has been concluded.

(e) A confined person may not be found guilty of a disciplinary infraction unless his guilt is established by a preponderance of the evidence in the record. If the hearing officer finds the person guilty, he shall inform the person in writing of his findings of fact, and, if he does not impose the presumptive punishment, the factual basis and reasons for the punishment imposed.

COMMENT

That prisoners are constitutionally entitled to some procedural due process protection before at least some sanctions may be imposed upon them is now clear. In Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974), the Court unanimously declared that "there is no iron curtain drawn between the Constitution and the prisons of this country." The Court then proceeded to hold that, before a prisoner could be sent to solitary confinement or deprived of good time (or otherwise subjected to a major "change in the conditions of confinement" 418 U.S. at 571 n.19. See commentary to Section 4-412 supra), he was entitled to written notice, and to present at the hearing his version of the facts underlying the charge. The Court was divided, however, on whether other rights generally associated with what the Court had previously called minimum due process, see Goldberg v. Kelley, 397 U.S. 254 (1970), applied in a prison disciplinary setting, the majority holding that the right to call witnesses, the right to cross-examine adverse witnesses, the right to appeal, and the right to counsel were not "at this time" required by the Constitution. Nevertheless, the majority admonished prison officials that the decision "is not graven in stone." Moreover, although the majority held that the rights were not required by the Constitution, in each of the discussions on the separate issues, the Court clearly expressed the view that the procedural protection should be given "unless" there was some specific reason of security to forego it in a particular instance. Id. at 563-72.

Both the commentators and the national studies have disagreed over the precise procedures that should be considered as part of the basic due process enunciated in Wolff. Thus, the ABA Joint Comm., § 3.2, provides for written notice, Miranda-type warnings, legal assistance, a written decision and appeal in "major" disciplinary hearings; this list is supplemented by the right to cross-examine any person except, as provided here as well, when that witness's life

might be endangered (the "danger" exception). See Wolff v. McDonnell 418 U.S. 539 (1974) ("suggesting" that same line). Cf. Krantz, rules V-3 to V-9, (providing for notice, a tape recording of the proceedings, cross examination (again, with the "danger" exception), representation by a law student (or, in major hearings, an attorney), and review by the superintendent). L. Orland, Prisons: Houses of Darkness 197-200 (1975) would require notice, substitute counsel, cross-examination, written reasons, and appeal.

Current practices are somewhat less liberal, but are still in basic accord. Illinois, for example, provides by statute the right to a hearing, the right to present evidence, the right on the part of the hearing officer to call any relevant witnesses, and a written statement of the reasons for sustaining the charge. Ill. Ann. Stat., § 1003-8-7 (Smith-Hurd 19). The federal system, by regulation, provides for written notice, the right to staff representation, the calling of witnesses (again, with the "danger" exception), a record of the proceedings, and a statement of the reasons for the sanctions imposed. U.S. Dept. of Justice, U.S. Bureau of Prisons, Policy Statement No. 7400.5D, § 9(c) (July 7, 1975). These rules also allow the hearing officer to exclude the prisoner from deliberations "and where institutional security would be jeopardized," but also provide that reasons for such latter exclusion "must be well documented in the record." Id., § 9(c) (5).

One of the most volatile questions has been whether prisoners are entitled to representation at disciplinary hearings and, if so, by whom. In Baxter v. Palmigiano, 425 U.W. 308 (1976), a divided Supreme Court held that the Constitution does not require the presence of appointed counsel. Counsel substitutes, however, may be present if allowed by prison regulation, such as those enunciated in U.S. Dept. of Justice, U.S. Bureau of Prisons, Policy Statement No. 7400.5D (July 7, 1975).

In 1974, a survey conducted prior to the Wolff decision found that 37 percent of the prison systems allowed representation by counsel, and 89 percent allowed substitute counsel. ABA Resource Center on Correctional Law, Survey of Prison Disciplinary Practices and Procedures 11 (1974). The lower courts have been divided on this issue both before and after Baxter, however, sometimes holding that in cases where felony charges may result, counsel must be allowed. See Frankos v. LaVallee, 535 F.2d 1346 (2d Cir. 1976), cert. denied 429 U.S. 918 (1977). Contra, Clardy v. Levi, 545 F.2d 1241 (9th Cir. 1976); Enriques v. Mitchell, 533 F.2d 275 (5th Cir. 1976). McGinnis v. Stevens, 543 P.2d 1221 (Alaska 1975). One court, while recognning that there was no right to counsel, has nevertheless required the appointment of an "effective spokesman" who would take the initiative in presenting a defense for an inmate who was psychologically incapable of representing himself. United States ex rel. Ross v. Warden, 428 F. Supp. 443 (E.D. Ill. 1977).

Subsection (b) (2), therefore, goes beyond present law in providing legal representation. In most instances, however, this service will be performed by the office of correctional legal services, see Section 2-601 supra, and will, therefore, not be a burden on the department of correction's budget. Other concerns about the presence of attorneys in such crucial proceedings, such as an increase in hearing time, or an elevation in acrimony, can be handled by the hearing officer, who is independent of the department. See generally ABA Resource Center on Correctional Law and Legal Services, Survey of Prison Disciplinary Practices and Procedures (1974); Alper, Due Process Behind Bars, 49 Fla. B.J. 240 (1975); Schupack, Process Due Prisoners: Wolff v. McDonnell, 54 Neb. L. Rev. 724 (1975); Sorenson, Due Process at In-Prison Disciplinary Proceedings, 50 Chi.-Kent L. Rev. 498 (1973); Special Project, Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia, 8 Ga. L. Rev. 919 (1974); Note, Fourteenth Amendment and Prisons: A New Look at Due Process for Prisoners, 26 Hastings L.J. 1277 (1975).

A second much mooted question is whether prisoner-defendants should be able to cross examine both other inmates and guards. It is often suggested that prisoner cross examination of accusing officers would breed disrespect for the officer by the prisoner. This is not persuasive. Fairness to a prisoner prior to a major change in conditions of confinement must outweigh whatever possible effect would occur in the prisoner's attitude. Moreover, even prior to Wolff, 64 percent of all prison systems allowed the inmate to confront the adverse witness and 57 percent allowed cross-examination. ABA Resource Center on Correctional Law and Legal Services Survey of Prison Disciplinary Practices and Procedures 11 (1974). Moreover, it has been argued with equal vigor that failure to allow the prisoner to confront his chief accuser will lead to greater feelings of hostility and disrespect than would cross-examination. See, e.g., Jacob, Prison Discipline and Inmate Rights, 5 Harv. Civ. Rts.-Civ. Lib. L. Rev. 227 (1970).

Where the life of a prisoner informant may be endangered, however, a different resolution of the balance is called for; the provision thus follows current practice of allowing the evidence to be considered in the absence of the prisoner. In such situations, however, the hearing officer must examine the witness to resolve the issue of his credibility. Cf. Birzon ex rel. Satz v. King, 469 F.2d 1241 (2d Cir. 1972).

The section also requires limited use immunity if the prisoner testifies. This is somewhat in conflict with the Baxter decision which specifically held that a prisoner's silence could be used against him in a disciplinary proceeding, even though his silence was motivated by the presence of a possible criminal prosecution. The Court did note, however, that if testimony were compelled at the disciplinary proceeding, use immunity should apply. Baxter v. Palmigiamo, 425 U.S. 308 (1976). This section extends

that concept, in accord with a number of court decisions. See, e.g., Shimabuku v. Britton, 503 F.2d 38 (10th Cir. 1974); Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973), remanded on other grounds, 491 F.2d 417 (5th Cir. 1974). Contra, Roberts v. Taylor, 540 F.2d 540 (1st Cir. 1976) U.S. cert. denied.

The ACA accreditation standards provide for some procedural regularity in disciplinary hearings but do not specifically require cross-examination by the confined person or representation by law trained persons. ACA Std. 4325 ("inmate may be represented by a staff member").

SECTION 4-508. [Appeal from Hearing Officer Decision.]

(a) A confined person may appeal to the chief executive officer of the facility from a decision finding him guilty or from the punishment imposed by a disciplinary hearing officer. The chief executive officer shall decide the appeal within 30 days if the imposition of the punishment is stayed pending the appeal and within 5 days in other cases.

(b) If the chief executive officer affirms any part of the hearing officer's decision, the confined person may appeal to the director, who shall affirm, modify, or reverse the decision within 30 days.

(c) Failure by the appropriate officer to act within the time provided entitles the confined person to treat such failure as an adverse decision.

(d) If the decision appealed from imposes punishment of confinement to a confined person's own living quarters for more than 10 days, placement in separate housing for more than 10 days, loss of privileges for more than 40 days, restrictions on protected interests for more than 40 days, or loss of good-time reductions, the confined person is entitled to judicial review.

COMMENT

Most prison systems now permit appeal from disciplinary determination. These may be to the grievance mechanism, as in Illinois, Ill. Ann. Stat., § 1003-10-8 (Smith-Hurt 1973), or through an elaborate review chain as provided in the federal system, see U.S. Dept. of Justice, U.S. Bureau of Prisons, Policy Statement No. 7400.5D (July 7, 1975), which in some ways is more complex than the appellate process envisioned in this section. ABA Joint Comm., § 3.2(e)(vii), L. Orland, Prisons: Houses of Darkness 200 (1975), and Krantz, R. V-9, provide for appeal to the superintendent. Appellate review has not been constitutionally required thus far. See Wolff v. McDonnell, 418 U.S. 539 (1974).

The provision does not mandate expungement of the charge if the prisoner is initially or ultimately vindicated, although most studies recommend the power, or duty, to expunge. ABA Joint Comm., § 3.2(h); Krantz, Nat'l Advisory Comm'n Correc. Std. 2.12. At least some systems now provide for such action. See U.S. Dept. of Justice, U.S. Bureau of Prisons, Policy Statement No. 7400.5D, § 9(f) (July 7, 1975). The Act does not, however, on the belief that a consistent record of findings of not guilty might later substantiate a prisoner's complaint about harassment by a specific correctional officer. Cf. Carle v. Gunter, 520 F. 2d 1293 (1st Cir. 1975); Collins vs. Bordenkircher, 403 F. Supp. 820 (N.D. W. Va. 1975): A 1974 survey found that 35 percent of the responding systems expunged the record. American Bar Association, Resource Center on Correctional Law and Legal Survey of Prison Disciplinary Practices and Procedures 11 (1974). Clearly, the use of a charge, otherwise found to be insubstantial, to affect the prisoner adversely would be out of keeping with the purpose of retaining the record.

Subsection (c), provides for judicial review in very narrow circumstances. The judicial review required here would be pursuant to Section 1-104.

SECTION 4-509. [Action Pending Disciplinary Infraction Hearing.] The chief executive officer may order a person charged with a disciplinary infraction that jeopardizes the safety of the public or the safety or security within a facility to be confined in his living quarters or placed in separate housing pending the disciplinary hearing. This status may

be continued pending an appeal. All time spent in this status must be credited against any punishment imposed.

COMMENT

The need, in some circumstances, to temporarily detain a charged prisoner while a hearing is being prepared is universally recognized, ABA Joint Comm., § 3.2(g); Krantz R. V-2; Nat'l Advisory Comm'n Correc., § 2.12; L. Orland, Prisons: Houses of Darkness, § 37, at 197 (1975), sec. 37 (1975) and is the current practice, e.g. U.S. Dept. of Justice, U.S. Bureau of Prisons, Policy Statement No. 7400.5D, § 11(a) (1) (a) (July 7, 1975). Obviously, the analogue to pre-trial detention, and bail, is inapposite, since the prisoner will assuredly return to the site of the hearing. Instead, the rationale is that either the prisoner, or potential adverse witnesses, would be more highly endangered in a closed prison setting than would be the case in a larger, freer, community. Case law is in accord. See Gilliard v. Oswald, 552 F.2d 456 (2d Cir. 1977); Faison v. Riddle, 425 F. Supp. 648 (E.D. Va. 1977); Patterson v. Riddle, 407 F. Supp. 1035 (E.D. Va. 1976) aff'd., mem. 556 F.2d 574 (1977). Of course, the hearing must be timely held; continued confinement in segregation pending a constantly delayed hearing would offend due process. See Patterson v. Riddle, supra.

SECTION 4-510. [Emergency Confinement.]

If necessary because of an emergency in the facility, the director, without complying with the procedures of this Part, may confine persons to their living quarters or place them in separate housing during the emergency and for 24 hours thereafter.

COMMENT

Due process rights generally can be suspended during an emergency situation; this section simply applies that rule to the prison setting. Courts are reluctant to interfere with administrative determinations that an emergency exists in a prison setting which requires postponement of hearings. See, e.g., Gilliard v. Oswald, 552 F.2d 456 (2d Cir. 1977). On the other hand, as the First Circuit Court of Appeals has noted, "The unreviewable discretion of prison authorities in [situations] which they deem to be an emergency is not open-ended or time unlimited." Hoitt v. Vitek, 497 F.2d 598, 600 (1st Cir. 1974). LaBatt v. Twomey, 513 F.2d 641 (7th Cir. 1975);

Morris v. Travisono, 509 F.2d 1358 (1st Cir. 1975).

The section is in general accord with other recommendations, e.g., ABA Joint Comm., § 3.2(j). But Krantz, R. V-10 requires that the emergency be "widespread".

SECTION 4-511. [Disciplinary Infraction Amounting to Offense.]

(a) If a confined person is charged with a disciplinary infraction that also is a felony the following apply:

(1) The chief executive officer of the facility promptly shall notify in writing the prosecuting attorney and suspend any disciplinary proceeding pursuant to this Part involving the infraction, but the chief executive officer may temporarily confine the person to his living quarters or place him in separate housing.

(2) Within 10 days after delivery or receipt of notification, whichever is earlier, the prosecuting attorney shall inform the chief executive officer whether he intends to prosecute the charged person.

(3) If prosecution is intended, the charged person may be confined to his living quarters or placed in separate housing for no more than 90 days, but if an indictment is obtained or an information filed the confinement may continue for the duration of the criminal prosecution.

(4) If the prosecuting attorney does not intend to prosecute or the prosecution terminates, the disciplinary proceedings in the facility may be resumed.

(b) If a person is both sentenced to confinement and

has good time forfeited or withheld in a disciplinary proceeding for the same course of conduct, any good time forfeited or withheld must be credited against the sentence imposed.

COMMENT

Current prison practice treats most major felonies committed by prisoners not as "crimes," but as "disciplinary matters." Thus, for example, the disciplinary code of the United States Bureau of Prisons lists, among proscribed activities, "killing," "counterfeiting," "assaults," "fights," "extortion, blackmail and protection," "escape," etc., U.S. Dept. of Justice, U.S. Bureau of Prisons, Policy Statement No. 7400.5D, § 6(f) (July 7, 1975), in addition to "prison offenses", such as insolence, possession of money or currency, etc. The ability of prison disciplinary committees to impose lengthy sentences for such activities effectively -- by the revocation of good time -- has led to a situation in which few of these felonies have been actually prosecuted in criminal courts.

This administrative handling of what would otherwise be serious felonies has several glaring deficiencies: (1) it treats the prisoner-victim of such a felony as less deserving of the law's protection and as less deserving of dignity than a free citizen-victim; (2) it avoids equal punishment for similar crimes, a basic proposition of this Act; (3) it permits "conviction" of the prisoner on a standard of proof far lower than that required in criminal trials. Thus, the present practice injures the interests of the victim, the perpetrator, and society generally. At least in part, this has motivated recent serious suggestions that criminal offenses (felonies) committed by prisoners in prison against prisoners be treated, and prosecuted, just like any other felony. See, e.g., ABA Joint Comm., § 3.3. Cf. McGinnis v. Stevens, 543 P.2d 1221 (Ala. 1975).

Suspension of the disciplinary proceeding is new; most systems now provide for continuation of the proceeding while the criminal prosecution is being prepared. See, e.g., U.S. Dept. of Justice, U.S. Bureau of Prisons, Policy Statement No. 7400.5D, § 9(e) (July 7, 1975). This, however, raises serious problems of Miranda warnings and the double jeopardy clause does not directly apply to those situations, see, e.g., Faison v. Riddle, 425 F. Supp. 648 (E.D. Va. 1977), the potential for unfairness seems great and, therefore this provision seeks to remove that tension.

On the other hand, suspension of the disciplinary proceeding cannot be thought to indicate absolution of the charged prisoner; automatic return to general population would be excessive. Thus, the

section allows retention in separate housing for 90 days, pending an indictment or information.

See ACA Std. 4320 requiring cases involving alleged violation of criminal laws to be "referred for consideration for criminal prosecution".

SECTION 4-512. [Offenses in Facilities; Prosecution.]

(a) The Attorney General may designate a representative from his office to [assist in the prosecution of] [prosecute] offenses charged against confined persons within facilities.

(b) The [department; Attorney General] shall pay the expenses of the prosecution of a confined person for an offense allegedly committed within a facility.

COMMENT

One possible reason for reluctance on the part of local prosecutors to try prison crimes is the expense, which is taken from the prosecutor's budget. This section recognizes that prosecution of crime in "state" facilities should be considered a "state" expense, rather than lie with the local governmental unit. This is particularly true when a large prison is located, as are so many, in a remote, small town, which clearly could not afford substantial prosecution costs. The section suggests two ways in which the "state" may recognize this prosecution as a state expense.

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PART 6
PERSONS AT RISK

SECTION 4-601. [Programs Placing Confined Persons at Risk.]

(a) A research or development program that exposes a confined person participating as a subject to the risk of significant physical or psychological injury is a program placing a confined person at risk.

(b) Consistent with other provisions of law, the director shall adopt rules to evaluate and approve programs placing confined persons at risk. A program placing a confined person at risk may not be approved unless:

(1) a board of at least 2 persons appointed by the [director] and professionally competent to evaluate the program certifies in writing as to its professional validity;

(2) after consultation with the department of corrections advisory committee the director finds that,

(i) the potential benefits to the confined person or the importance of the knowledge to be gained outweigh the risk to the confined person;

(ii) the program offers no undue inducement to confined persons;

(iii) the confined person will be offered a wage comparable to the market wage for similar programs, or if

there is no market wage, a reasonable wage based on the risk involved to the subject and the benefits to be gained by the person conducting the program; and

(iv) adequate assurance is provided in the program for payment of damages resulting from participation in the program, including provision for medical care, disability, rehabilitation, and future wage loss in an amount determined by the director as reasonably likely to cover the risks; and

(3) the director issues a written report containing the factual basis for the findings required in paragraph (2).

(c) The sponsors of the program are subject to liability to pay compensation for damages resulting from injury or death to a confined person:

(1) injured in a program with a potential direct therapeutic benefit for that person if the injury or death is caused by negligence or willful misconduct of persons operating the program; or

(2) injured in non-therapeutic programs without regard to the fault of the persons operating the program.

COMMENT

This chapter deals with an exceptionally controversial question concerning both the ethics and legality of prisoner experimentation. In early 1976, the Board of the American Correctional Association, representing all state prison agencies, announced that it would urge its constituents to totally abolish all prisoner experimentation. The United States Bureau of Prisons shortly thereafter announced that it would halt all prisoner experimentation in its prisons. In 1977, the National Commission on the Protection of Human Subjects in Biomedical and Behavioral Research commissioned by Congress to investigate this express problem, announced its conclusion that experimentation in prisons was not unethical, and that

it should continue, subject to more stringent guidelines and with more focus on prison conditions. 42 Fed. Reg. 3076 (1977). The ABA Joint Comm., § 5.8, on the other hand, urges the abolition of all non-therapeutic experimentation in prisons. This provision essentially adopts the view of the National Commission.

Most experimental programs, whether of behavioral science or medical technology, will be governed by either general guidelines of the Department of Health, Education, and Welfare, the Food and Drug Administration, or both. Each of these sets of guidelines requires so-called "peer review" by "institutional review committees" to assess the scientific or medical validity of the proposed study or experiment. In any event, subsection (b)(1) imposes a requirement of peer review by a board of two professionally trained persons. The director shall appoint the board if it is not already established by federal or other regulation.

Peer review, however, has proven less than a complete protection. See, e.g., B. Gray, Human Subjects in Medical Experimentation (1975). Lay review by a committee or agency without professional ties to the experimentor may thus prove more protective of subject rights. Indeed, regulations of the Department of Health, Education and Welfare on the Protection of Human Subjects in Experimental Processes, 45 C.F.R., § 46.0-46.22 (1974) require the establishment of an Institutional Review Committee, composed not only of doctors, but of "lay persons" as well. Subsection (b)(2) attempts to provide lay review by the requirement that the director consult with the advisory committee.

By requiring the facility in which the program is to be conducted to meet the statutory standards set out in this part, an effective moratorium on most such programs, in most such facilities, is imposed without placing a permanent ban on the programs.

The "sponsors" of a program as used in subsection (c) is intended to refer to those actually operating the program and not to a funding agency that has no operational control.

SECTION 4-602. [Information Provided; Consent; Review.]

(a) A confined person may not be a subject in a program placing him at risk unless he consents to participate after a program representative informs him of:

(1) the likelihood, nature, extent, and duration of known side effects and hazards of the program and how and to what extent they may be controlled;

(2) the extent to which there may be hazards of the program which are unknown;

(3) the extent to which the program is generally accepted or considered experimental by professionals in the relevant fields;

(4) his right to withdraw at any time, or, if peremptory withdrawal would or might cause injury, his right to a phased withdrawal; and

(5) if the program has a potential direct therapeutic benefit for the participant,

(i) the nature and seriousness of his disease or illness;

(ii) the reasonable alternative treatments available and the likelihood and degree of improvement, remission, control, or cure of alternative treatments;

(iii) the likelihood and degree of improvement, remission, control, or cure resulting from participation in the program; and

(iv) the likelihood, nature, and extent of changes in and intrusion upon the confined person's physical and mental processes resulting from participation in the program.

(b) The director shall appoint a reviewer to determine the validity of a confined person's consent. The reviewer shall interview each confined person no sooner than 48 hours after he has given his consent.

(c) A confined person may not participate in a program placing him at risk unless the reviewer finds and

reports in writing that the confined person understood the information provided him and exercised free choice with no undue inducement or element of fraud, deceit, duress, or other ulterior form of constraint.

COMMENT

This section is adapted from Cal. Wel. & Inst. Code, §§ 2673 (West 1974) with some minor changes, and the major addition of the requirement of informing each confined person that he may withdraw from a program at any time.

Subsections (b) and (c) are intended to assure that the confined person freely gave his consent and that consent was not given because the program was seen as a way to obtain a temporary respite from substandard living conditions in a facility.

PART 7
VOUCHER PROGRAM

SECTION 4-701. [Voucher Program; Gradual Implementation.]

(a) As used in this Act, "voucher program" means a program in which persons are given voucher credits that can be used to purchase specified treatment programs and services directly from either public or private agencies.

(b) To facilitate the availability of a wide variety of programs and services for persons in the custody of the department, the director shall:

(1) within one year after the effective date of this Act, establish an experimental voucher program for a limited number of offenders in the custody of the department; [and]

(2) provide for an independent evaluation of the effectiveness of the voucher program [; and] [.]

[(3) within 5 years after the effective date of this Act, establish a voucher program available to all offenders sentenced to terms of confinement or supervision for one year or more.]

(c) The director may extend the voucher program to all persons in the custody of the department.

(d) Within 3 years after the effective date of this Act, the director shall transmit to the [Legislature] any independent evaluations and his own report on the effectiveness of the voucher program.

COMMENT

This section requires the department of corrections to establish an experimental voucher program for providing services to offenders and to plan for its expansion to all offenders and other persons confined in correctional facilities. A voucher program is one under which offenders are given voucher credits which can be used to purchase treatment programs and services directly from either public or private agencies or individuals. Under such a program, offenders would not be forced to rely on those programs or services offered directly by the department of corrections. The program also serves to expand programs and services available to offenders since it provides an economical means of providing services to small numbers of offenders.

A voucher program also is designed to force the offender to develop his own self-motivation and initiative in planning his treatment, rehabilitative, or educational program. The offender who is participating in a program of his own selection is more likely to seek to obtain the full advantage of his expenditure.

Voucher programs have not been extensively employed in American society. The "G.I. Bill" was a voucher system for educational benefits and the food stamp program is a comparable system limited to food purchases. It is reported that some experiments have been conducted with vouchers for purchase of housing and education by low income families. And the U.S. Departments of Labor and Health, Education and Welfare have conducted a voucher demonstration project to provide job training to persons in the Work Incentive Program (WIN). U.S. Dept. of Labor & U.S. Dept. HEW, Sixth Annual Report to the Congress: The Work Incentive Program 23 (1976).

The major emphasis for extending vouchers into corrections has come from the American Correctional Association as part of its Mutual Agreement Programming (MAP) project. Under the project, prisoners individually contract for a treatment program and if successful, are paroled in accordance with the agreement. A voucher system was added to the MAP program in California in 1973. American Correctional Ass'n. The Mutual Agreement Program (Parole Corrections Project Resource Document #3, 1973). The project as it evolved did not have a research component but served as a demonstration project. Participating offenders received vouchers from $500-$1000 to apply toward tuition, tools, books, and other items related to their program. The nonempirical evaluations of the California experiment were favorable. "This experiment has demonstrated the feasibility of the concept as a valid alternative to traditional services, as well as one which is cost effective and provides utmost flexibility." Leiberg & Parker, Mutual Agreement Programs With Vouchers; An Alternative for Institutionalized Female Offenders, Am. J. Corrections, Jan.-Feb. 1975 at 10. Massachusetts and Maryland have adopted voucher programs in coordination with MAP programs for female offenders. Gettinger, Parole Contracts: A New Way Out, Corrections Sept.-Oct. 1975 at 2. Empirical evaluations of the programs are not available.

A voucher program with its emphasis on individual initiative and diversification of treatment resources is consistent with the underlying philosophy of this Act to avoid coerced rehabilitation programs.

Subsection (b) requires the implementation of a pilot voucher program within one year, an independent evaluation of the merits of the program, and a report to the legislature within three years. Some state legislatures may wish to provide greater incentive for the director to work for the effectiveness of the voucher plan by enacting the bracketed paragraph (3). This provision would require extension of the voucher program to all offenders within 5 years unless the legislature repealed the provision in the interim. The burden of inertia would be in favor of continuance and expansion of the voucher program. The bracketed provision does not require that each offender actually receive voucher credits; the eligibility of an individual offender would remain sub ject to the rules established by the director under Section 4-702 (2).

SECTION 4-702. [Establishment of Voucher Programs.]

In establishing a voucher program the director shall set forth:

(1) the form, method, and eligibility requirements for the distribution of vouchers;

(2) the programs for which vouchers may be used;

(3) a prohibition against transfer of vouchers among persons in the custody of the department without the specific approval of the director;

(4) the method of redemption of vouchers by individuals or public or private agencies or organizations providing programs or services; and

(5) the standards and procedures for certification of providers of programs or services in return for vouchers.

COMMENT

This section authorizes the director to establish the details of a voucher program. There are a variety of ways in which a program can be implemented and the experimental nature of the program dictates that operational details beyond fundamental principles not be firmly articulated in the statute. It is obvious that the available resources will dictate the manner in which the program is first implemented.

In most existing voucher programs the use of vouchers by clients is preceded by extensive counseling with staff to assist the client in making appropriate choices. This section would authorize but not require such preissuance counseling. The form in which voucher credits are distributed is also left to administrative discretion. Most institutions would probably prefer to use bookkeeping transactions rather than script as a means of distribution but in some community-based facilities, script might be found effective.

Section 4-703 (b) lists some programs for which voucher credits could be utilized. This section allows the director to extend that list to additional programs and services available with vouchers. The program in part is designed to increase the availability of services to confined persons, particularly those with idiosyncratic needs. The director may wish to develop the shopping list of programs and services based in part on the location and size of the facility and the needs of the persons confined therein.

The director may also promulgate rules for redemption of voucher credits by service providers and the procedures for certifying service providers. In many states, the director may be required to comply with state purchasing statutes or regulations. In all cases, the director may wish to consult with state purchasing officials and the state treasurer in drafting these regulations.

SECTION 4-703. [Vouchers; Allocation and Use.]

(a) The director shall provide that each person eligible for vouchers will receive a periodic allocation of vouchers unless that person:

(1) has sufficient personal resources available to purchase programs and services; or

(2) has continually refused to utilize his allocation of vouchers and is unlikely to use them in the future.

(b) A person may use his vouchers to purchase programs or services relating to his care, rehabilitation, treatment, or adjustment to life in the free community including:

(1) academic programs;

(2) vocational training programs;

(3) medical or psychiatric services;

(4) counseling services, including personal, marital, employment, or financial counseling; and

(5) any other program or service approved by the director.

(c) The director may supplement the voucher allocation to any person or group of persons in the custody of the department if required to assure the availability of suitable programs or services. In doing so, the director may:

(1) allocate additional vouchers to individuals or groups of persons;

(2) contract to bear directly a portion of the costs of the program or service; or

(3) provide a portion of the program or service from the resources of the department.

(d) The director may authorize persons receiving vouchers to accumulate them over a period of time. All vouchers held by a person and not obligated toward the

purchase of services expire at the discharge of the person's sentence.

COMMENT

Subsection (a) provides that once the director has established a voucher program each eligible person must receive a minimum periodic allocation of credits. For example, if a jail houses both offenders and pretrial detainees, the director may wish to limit application of the voucher system to offenders. The director may also vary the amount of voucher credits given to offenders in different facilities since one facility may lack any internal resources and thus must rely more heavily on purchased services. Once the class of eligible persons is established, however, each person must receive a minimum amount. This is to facilitate self-initiative by insuring that each person will be allowed to make some treatment choices on his own.

The section allows two exceptions to the minimum allocation. If resources were not scarce, a reasonable argument could be made that voucher credits should be distributed equally. However, where resources are limited, the correctional administration should be allowed to exempt from the voucher program persons who can afford to purchase services from their own resources. In such instances, which would be rare, the offender would in all likelihood not be in need of substantial services in any event. The Massachusetts voucher program is designed as a method of last resort to be used when other funding is unavailable.

Because a voucher is a drawing right on the resources of the department, the allocation of vouchers to persons who clearly will not use them prevents their use by other offenders. The section allows the director to exclude those offenders from the minimum allocation. In the same context, subsection (d) allows the director to determine the extent to which vouchers may be accumulated. This will allow him to limit his contingent liabilities.

In some instances, because of the nature of the services desired or the size of the population which can benefit from the services, voucher credits will not be sufficient to attract the resource. Subsection (c) allows the director to supplement the voucher credits with direct departmental resources. This will inevitably allow the department some control over the kinds of programs that can be acquired by vouchers and may set up a form of bargaining between confined persons and correctional staff.

The voucher program is a correctional program and hence persons are not authorized to accumulate vouchers for the purchase

of services after their sentence has expired. However the draft is sufficiently flexible to allow an offender to undertake a program that might extend a short period beyond the expiration of his sentence as vouchers obligated toward the purchase of services do not expire.

SECTION 4-704. [Application to Receive Vouchers.]

(a) An individual or public or private agency or organization desiring to provide programs or services in exchange for vouchers shall apply to the department for certification. In determining the qualifications of an applicant, the director shall consider the nature and extent of the programs or services to be provided and the integrity and reputation of the applicant. An application may not be denied solely because the applicant provides programs or services already available from the department or elsewhere.

(b) Programs or services provided directly to persons in the custody of the department solely in return for vouchers are not subject to [provisions requiring public bidding for state purchasing].

COMMENT

The director must certify agencies or individuals providing programs or services for voucher credits. Rules for certification should include provisions for monitoring and auditing the services provided, and means for terminating certification.

The last sentence of subsection (a) is designed to prevent the granting of a monopoly to a service provider. Part of the benefit of a voucher system is the development of competing programs and services. It would not prohibit denial of certification of an applicant proposing to provide services within the facility on the grounds that space allocated to programs is already subscribed, or that staff resources necessary to monitor outside per-

sons within the institution are scarce.

SECTION 4-705. [Redemption of Vouchers.]

Vouchers issued and used as provided in this Act are redeemable at face value by a provider of programs or services upon presentment to the [director, State Treasurer] pursuant to any applicable rules.

COMMENT

States should designate the appropriate state official for redeeming voucher credits. The subsection insures that voucher credits would be processed in accordance with general regulations for the payment of claims against the state.

SECTION 4-706. [Payment as Condition for Programs or Services.]

The director may require the payment of vouchers as a condition to participation in academic or vocational training programs or receipt of counseling services offered by the department.

COMMENT

This section allows the director to place the department's own programs in the competition for voucher credits. By doing so the director may evaluate the offender's perception of the merits of the programs offered by the department. The competition may also encourage staff in departmental programs to seek to improve their effectiveness.

At the outset of the voucher program, this section may take on added significance since resources will already be committed to programs within the department. By recapturing voucher credits from offenders for participation in these programs, the additional total expenditures for programs and services are not increased.

PART 8
EMPLOYMENT AND TRAINING OF CONFINED PERSONS

SECTION 4-801. [Director's Duties.]

To the extent feasible, the director shall:

(1) provide confined persons with opportunities to engage in productive activity by upgrading and expanding employment and vocational training opportunities available to confined persons in order that confined persons may develop marketable skills and good work habits;

(2) assist confined persons to develop a sense of responsibility by developing a realistic employment environment in which wages are comparable to those paid in the free community and requiring confined persons to assume financial obligations similar to those of persons in the free community; and

(3) assist confined persons in obtaining employment upon release.

COMMENT

There is a clear relationship between recidivism and the inability, upon release, to find and retain employment. See, D. Glaser, The Effectiveness of a Prison and Parole System 311-61 (1964); 6 ECON, Inc., Analysis of Prison Industries and Recommendations for Change, Study of the Economic and Rehabilitative Aspects of Prison Industry (Sept. 24, 1976) [hereinafter cited as ECON, Inc.] Developing adequate employment skills and habits for all confined persons and assisting them to find employment upon release is, then, a major priority of this Act and should be the goal of any correctional system. E.g., ABA Joint Comm., § 4.4 (b) and Commentary. In a 1974 study it was found, however, that only four percent of all persons confined in state and federal facilities were participants in a work-release program while only another 11 percent worked in prison

industries. Levy, Abrams, and LaDow, Final Report on Vocational Preparation in U.S. Correctional Institutions, iii-iv (U.S. Dept. of Labor 1975). It has been said, moreover, that in the typical prison industry shop today "idleness, make-believe work, short work shifts, work interruptions, overmanned shops, and obsolete industrial methods, material and equipment do not enhance the job acquisition prospects of ex-inmate workers." ECON, Inc., at 4. See, e.g., Nat'l Advisory Comm'n Correc. Std. 16.13 and Commentary; President's Task Force on Prisoner Rehabilitation, The Criminal Offender -- What Should Be Done? 10 (1970) [hereinafter cited as President's Task Force on Rehabilitation]; Jensen, Mazze and Miller, Legal Reform of Prison Industries: New Opportunities for Marketing Managers, 12 Am. Bus. L.J. 173, 177 (1974). This section generally obligates the director to attempt to provide vocational training or realistic work experience to all confined persons as well as to assist in job placement upon release. In essence, then, the approach reflected in this part is that work provided confined persons should be:

> "--not busy work, but productive labor with outside world efficiency, outside world wages, and outside world relevance--having as its dual objective financial self-sufficiency and success in the reintegration of ex-offenders into society."

ECON, Inc., at 21. Accord, e.g., ABA Joint Comm., § 4.4 (c) and Commentary; Committee on Correctional Facilities and Services, Georgia State Bar Ass'n, (1975); Nat'l Advisory Comm'n Std. 1613 and Commentary; President's Comm. on Corrections at 176; President's Task Force on Prisoner Rehabilitation, at 12 (1970); Barnes and Teeters, Inmate Labor in the Correctional Program in New Horizons in Criminology 741-42 (2d ed. 1963). The general objectives reflected in this section are supported by the American Correctional Association Standards for Accreditation, Std. 4386 (sufficient employment opportunities); 4387 (relevant work experience); 4388 (work day similar to free community); 4395 (educational and vocational training opportunities).

SECTION 4-802. [Employment and Training of Confined Persons; Authority.] To fulfill his responsibilities set forth in Section 4-801, the director may:

(1) establish and administer business, commercial, industrial, and agricultural enterprises and educational or vocational training programs for confined persons;

(2) permit private business, commercial, industrial, and agricultural enterprises to operate on the property of a facility;

(3) permit the employment of confined persons by public or private enterprises; and

(4) adopt measures relating to the development and maintenance of employment and training opportunities for confined persons while confined and upon release.

COMMENT

This section contains a general authorization for the employment, training, and placement after release of confined persons. The encouragement to provide a wide variety of employment and training opportunities is consistent with a basic goal of this Part -- the gainful employment of all confined persons. See, e.g., ACA Std. 4386 (sufficient employment opportunities); 4395 (educational and vocational training opportunities); ABA Joint Comm., § 4.1; ECON, Inc.; Nat'l Advisory Comm'n Correc. Std. 1613 (1973); President's Task Force on Prisoner Rehabilitation.

SECTION 4-803. [Employment or Training Outside Facility.]

(a) The director may establish criteria and procedures for authorizing confined persons under prescribed conditions to work at paid employment or participate in educational or vocational training programs in the free community.

(b) Confined persons employed in the free community or participating in training programs in the free community may be housed in facilities designated for those purposes.

COMMENT

This section authorizes what are commonly referred to as work-release programs. Such programs have received wide support as one way to instill good work habits and generally upgrade the employment opportunities available to confined persons. ABA Joint Comm., § 4.4 (b) and Commentary; Johnson, Report on an Innovation -- State Work-Release Programs, 16 Crime and Delinq. 417 (1970); Riskin, Removing Impediments to Employment of Work-Release Prisoners, 8 Crim. L. Bull. 761 (1972); Root, Work Release Legislation, 36 Fed. Prob., March 1972, at 38; Swanson, Work Release -- Toward an Understanding of the Law, Policy, and Operation of Community-Based State Corrections (U.S. Dept. of Labor 1973).

More than half of the States presently have such programs. Alaska Stat., § 33.30.250 (1975); Ariz. Rev. Stat. Ann., §§ 31-331 to 31-336 (West 1976); Ark. Stat. Ann., § 46-117 (Supp. 1975); Cal. Penal Code, § 2910 (West 1970); Colo. Rev. Stat., § 16-11-212 (1973); Conn. Gen. Stat. Ann., §§ 18-100 to 18-101a (West 1975); Del. Code tit. 11, §§ 6533 to 6534 (Supp. 1976); Fla. Stat. Ann., § 945.091 (West 1973 & Supp. 1976); Ga. Code Ann., § 77-309 (1973); Haw. Rev. Stat., § 353-22 (Supp. 1975); Idaho Code, § 20-242 (Supp. 1976); Ill. Ann. Stat. ch. 38, §§ 1003-9-3, 1003-13-1 to 6 (Smith-Hurd 1973 & Supp. 1976); Ind. Code Ann., §§ 11-7-9-1 to 11-7-9-11 (Burns 1971); Iowa Code Ann. ch. 247A (West 1969 & Supp. 1977); Kan. Stat., § 22-4603 (1974); La. Rev. Stat. Ann., § 15:1111 (West Supp. 1977); Me. Rev. Stat. Ann. tit. 34, § 527 (West Supp. 1976); Md. Ann. Code art. 27, § 700A (1976 & Supp. 1976); Minn. Stat. Ann., § 241-26 (West 1973 & Supp. 1977); Mont. Rev. Codes Ann., §§ 95-2217 to 2226.1 (Supp. 1977); Neb. Rev. Stat., § 83-184 (Reissue 1976); Nev. Rev. Stat., § 209.483 (1973); N.J. Stat. Ann., § 30:4-91.1 to 30:4-91.4 (West 1977); N.M. Stat. Ann., § 42-1-78 to 82 (1972 & Supp. 1975); N.Y. Correc. Law, § 851-858 (McKinney Supp. 1976); N.C. Gen. Stat., § 148-33.1 (1974 & Supp. 1975); N.D. Cent. Code, § 12-48-05 (1976); Ore. Rev. Stat., § 144-420 to 525 (1975); Pa. Stat. Ann. tit. 61, § 1052 (Purdon Supp. 1977); S.D. Compiled Laws Ann., §§ 24-8-1 to 14 (1967 & Supp. 1976); Tenn. Code Ann., §§ 41-1810, 1816 (1975); Tex. Rev. Civ. Stat. Ann. art. 6166x-3 (Vernon 1970); Utah Code Ann., §§ 77-36-20 to 21 (Supp. 1975); Wash. Rev. Code Ann. ch. 72.65 (West Supp. 1976); Wis. Stat.

Ann., § 56.065 (West Supp. 1977). Work release is also authorized in the District of Columbia. D.C. Code Encycl., §§ 24-461 to 467 (West 1966). Persons confined in federal facilities are eligible for work release under the Federal Prisoner Rehabilitation Act, 18 U.S.C., § 4082 (1976). See also ACA Std. 4392 and 4408 which contemplate community-based work or training experiences.

Although work-release programs generally have been viewed favorably, several states have limited the reach of such programs. For example, some states exclude from eligibility confined persons who are considered high security risks, have committed particular types of crimes, or are serving life sentences. E.g., Alaska Stat., § 33.30.250 (1975). It has been recognized, moreover, that the "half-free" status of a confined person on work release cannot only be unsettling to him but may well increase the potential for contraband to be smuggled into a facility. E.g., Johnson, Report on an Innovation -- State Work-Release Programs, 16 Crime and Delinq. 417, 423 (1970). It is also true that community sentiment must be dealt with in developing community-based programs. Cf, e.g., Colo. Rev. Stat. Ann., § 27-27-103 (Cum. Supp. 1975); Fla. Stat. Ann., § 944.026 (1976). In some states confined persons may participate in work release only after a determination that free laborers will not be adversely affected and, occasionally, after representatives of local labor organizations are consulted. E.g., N.J. Stat. Ann., § 30.4-91.3 (1976); N.Y. Correc. L., § 856 (McKinney Supp. 1976); Tex. Rev. Civ. Stat. Ann., § 6166x (Vernon 1970). Work release programs are often seen as a confined person's bridge to resumption of life in the free world, Johnson, Report on an Innovation--State Work Release Programs, 16 Crime and Delinq. 417, 421 (1970). Hence, several states limit eligibility for participation to confined persons serving the last portions of their sentences. E.g., Fla. Stat. Ann., § 945. 091 (West 1973); Mont. Rev. Code Ann., § 95-2217 (1975); N.Y. Correc. L., § 853 (McKinney Supp. 1976).

There are, of course, many legitimate reasons for excluding confined persons from eligibility for work release or from participation in educational or training programs in the community. This section would leave the delineation of those classes of confined persons to be excluded to the sound discretion of the director consistent with his obligations to act reasonably and to attempt to provide gainful employment to all confined persons.

Continuity of a confined person's work experience is one of the major goals of a work release program. Johnson, Report on an Innovation -- State Work-Release Programs , 16 Crime and Delinquency 417, 421 (1970); Root, Work Release Legislation, Fed. Prob., March 1972, at 38, 41. Work-release opportunities, how-

ever, are often concentrated in geographical areas far removed from one or more of a state's correctional facilities. Johnson, Report on an Innovation -- State Work-Release Programs, 16 Crime and Delinq. 417, 423-24 (1970). To limit the effects of geography on employment and training opportunities paragraph (b) permits placement in other facilities. Similar authorization is provided by statute in most states. E.g., Cal. Penal Code, § 2910 (West Supp. 1970); Colo. Rev. Stat. Ann., § 27-27-103 (Cum. Supp. 1975); La. Rev. Stat. Ann., § 15:1111 (West Supp. 1976); Nev. Rev. Stat., § 209.441 (1975); Tex. Rev. Civ. Stat. Ann. art. 6166x (Vernon 1970); Wis. Stat. Ann., § 56.065 (West 1977).

The section is silent on whether to treat the willful failure to return to a facility pursuant to the conditions of a work-release program as an escape, a disciplinary infraction, or in some other manner. At present, state law generally treats such willful failure as an escape. E.g., Alaska Stat., § 33.30.250 (1975); Cal. Penal Code § 4530 (West Supp. 1976); Colo. Rev. Stat. Ann., § 16-11-212 (1973); Fla. Stat. Ann., § 945.091 (West 1973); Ill. Stat. Ann. ch. 38, § 1003-13-4 (Smith-Hurd Supp. 1977); La. Rev. Stat. Ann., § 15:1111 (West Supp. 1976). Occasionally, although treated as an escape, the willful failure to return to a facility from a work-release assignment is classified as a misdemeanor. E.g., Md. Ann. Code art. 27, § 700 (a)(1966). States contemplating adoption of this Act should include a provision in this Act -- if not otherwise provided in existing substantive law in the state -- to clarify what will be the treatment for such willful failures to return.

SECTION 4-804. [Private Enterprise on Property of Facility.]

(a) The director may lease property at a facility to a private business, commercial, industrial, or agricultural enterprise agreeing to provide employment to confined persons.

(b) Before leasing to a private enterprise, the director shall:

(1) obtain a valuation from the [state assessor]

[State Auditor] of the property to be leased; and

(2) prepare a written report describing the [State Assessor's][State Auditor's] valuation of the property, terms and conditions of the lease, including the projected necessity for an adjustment of lease payments as provided in Section 4-805, and the director's reasons for approving the proposed lease. The report shall be reviewed by [the Attor-General] [State Purchasing Agent] and is effective upon approval by the Governor.

(c) In awarding leases, the director shall consider:

(1) the nature of the enterprise and its compatibility with the administration of the facility;

(2) the number of confined persons to be employed;

(3) the nature and prevailing wage for the employment offered and the availability of similar employment opportunities for confined persons upon release;

(4) the willingness and capability of the private enterprise to train confined persons for employment in the enterprise;

(5) the financial gain to be derived by the department from the lease; and

(6) the views of appropriate civic, business, and labor organizations.

ALTERNATIVE A

[(d) If a private enterprise leases property pursuant to this section, a tax must be imposed for the privilege of

using the property in the same amount and to the same extent as if the private enterprise owned the property. It must be assessed to the private enterprise and be payable in the same manner as taxes assessed to owners of real and personal property, but the tax may not become a lien against state-owned property.]

ALTERNATIVE B

[(d) If a private enterprise leases property pursuant to this section, the director shall assure that the payments made by the private enterprise include an amount equivalent to the taxes which might otherwise have been lawfully levied. The director, from payments made for the leased property by the private enterprise, may make payments in lieu of taxes to the [city, township, and county] in which the property is located.]

COMMENT

Full employment of confined persons requires, of course, an upgrading and expansion of the present prison industries programs at most facilities. See, e.g., ECON, Inc. ; Barnes and Teeters, Inmate Labor in the Correctional Program, New Horizons in Criminology, 741-42 (2d ed. 1963). This upgrading and expansion is supplemented, in this section, by allowing private enterprise to operate on the grounds of a facility and to employ confined persons. There is increasing support for the concept embodied in this section. ABA Joint Comm., § 4.4 (c) and Commentary; Nat'l Advisory Comm'n Correc. Std. 16.13; President's Task Force on Prisoner Rehabilitation, at 9-10 (1970); Committee on Correctional Facilities and Services, Georgia State Bar Ass'n, Prisoner Employment in Georgia, Summary of Proposal (1975). The South Carolina Department of Corrections has produced a film and a brochure, An Important Message to Private Industry from the South Carolina Department of Corrections, to attract private industry to build factories on or near correctional facilities. Although the concept is not universally accepted, Letter from W. J. Estelle, Jr., Dir., Texas Dept. of

Corrections, to J. R. Potuto (Dec. 29, 1976) (on file in Model Sentencing and Corrections Act Project Office, U. Neb. L. College, Lincoln, Neb.) at least one state has enacted legislation permitting private industry to operate on the grounds of correctional facilities and to employ confined persons. Minn. Stat. Ann., § 243.88 (West 1973). For a description of the Swedish penal system in which private enterprise operates on the grounds of correctional facilities, see Ericsson, Labor-Market Wages for Prisoners (Dec. 1972).

Subsection (b) is intended as a check on the discretion to lease property to private enterprise. E.g., La. Rev. Stat. Ann., § 15:853 (West 1967) ["(the superintendent) may with the approval of the governor, lease . . . ."] (emphasis added); Minn. Stat. Ann., § 243.88 (West 1973) ("the commissioner of administration, with the approval of the governor, may lease . . . .") (emphasis added).

Subsection (c) is a recognition that the financial gain to be derived from a potential lease arrangement is not the only nor even the most compelling factor to be considered when determining whether to lease space to a particular private enterprise. For example, as one recent survey of all federal and state facilities discovered:

> "Only 20 percent of the inmates indicated that specific job programs or persons in the institution assisted them in obtaining outside employment. Less than half of the inmates who participated in training stated that the job waiting for them was related to the training they received in the institution.
>
> "The wardens of the institutions estimate that 70 percent of the inmates need to acquire job skills in order to obtain steady outside employment. They also estimate that only 34 percent are likely to acquire sufficient job skills during their stay."

Levy, Abrams, and LaDow, Final Report on Vocational Preparation in U.S. Correctional Institutions iii (U.S. Dept. of Labor 1975). Accord, Nat'l Advisory Comm'n Correc. Std. 11.10, 1613 and Commentary (1973); ECON, Inc., at 1. Cf., e.g., Cal. Penal Code, § 5091 (West 1970); Colo. Rev. Stat., § 27-27-104 (Cum. Supp. 1975); Ill. Ann. Stat. ch. 38, § 1003-12-2 (Smith-Hurd 1973).

Subsection (d) presents states with two alternatives for collecting payments in lieu of taxes for state property. Neither

alternative is preferred; a state should choose the alternative which best reflects its taxation system. Alternative A is derived from Minn. Stat., § 272.01 (1974).

SECTION 4-805. [Adjustment for Additional Costs Incurred by Private Enterprise on Property of Facility.]

(a) If a private enterprise operating on the property of a facility incurs additional costs because of the nature and size of the confined-person work force or the location of the facility, the director may, whenever necessary and appropriate:

(1) provide services and other assistance to the private enterprise;

(2) permit the private enterprise to supplement the confined-person work force with other employees; and

(3) after obtaining approval by the [Governor] pursuant to subsection (b), forgive payments to be made by the private enterprise, or make direct payments to the private enterprise, equivalent to the unavoidable additional costs incurred by employing confined persons.

(b) Before forgiving or making payments to a private enterprise, the director shall prepare a written report describing the terms and conditions of the adjustment, including a statement as to whether the adjustment was contemplated at the time the lease was approved, and his reasons for approving the adjustment. The report must be reviewed by [the Attorney General] [State Purchasing Agent] and approved by the [Governor].

COMMENT

Operation of a private enterprise at a facility can be expensive due to the distant location of the facility, Johnson, Report on an Innovation -- State Work-Release Programs, 16 Crime and Delinq. 417, 423-24 (1970), the possible high employee turnover rate , and the lack of training, education, discipline, and good work habits of the confined-person work force. E.g., Levy, Abrams, and LaDow, Final Report on Vocational Preparation in U.S. Correctional Institutions iii (U.S. Dept. of Labor 1975); President's Task Force on Prisoner Rehabilitation, at 10. These potential additional costs should be weighed against the societal costs of not providing employment and training opportunities to confined persons or of maintaining the present inefficient prison industries system. E.g., ECON, Inc., at 4. See, e.g., President's Task Force on Prisoner Rehabilitation, at 10; Nat'l Advisory Comm'n Correc. Std. 1613 and Commentary; Jensen, Mazze and Miller, Legal Reform of Prison Industries: New Opportunties for Marketing Managers, 12 Am. Bus. L. J. 173, 177 (1974). The societal costs of not providing employment, moreover, will be greater than just the costs of recidivism, however great they may be. Unemployment among confined persons means loss of taxes that employed confined persons would be paying, loss of room and board payments (See Section 4-812 infra), and loss of productivity which, based on a 15 percent factor for unemployment, may well amount to nearly $2 billion annually. N. Singer, The Value of Adult Inmate Manpower (ABA Commission on Correctional Facilities and Services 1973). See ECON, Inc., at 19 (savings include: "savings to the state in terms of reduced state agency purchasing expenditures, reduced criminal justice costs, prison industry wages and profits, benefits for the prison in terms of a reduced rate of disciplinary infractions and a more normal social atmosphere; benefits to the inmate worker in terms of his ability to provide family support and to participate in individual training and job placement."). N. Singer and V. Wright, Cost Analysis of Correctional Standards: Institutional-Based Programs and Parole, 111 (1976).

This section reflects a judgment that the benefits to be derived from a fully employed confined-person work force warrant the potential adjustments contemplated here. The section thus complements Section 4-804 (c) and is another reflection of the awareness that employment by private enterprise can serve many correctional needs. ECON, Inc., at 1; Levy, Abrams, and LaDow, Final Report on Vocational Preparation in U.S. Correctional Institutions iii (U.S. Dept. of Labor 1975); Nat'l Advisory Comm'n Correc. Stds. 11.10, 16.13 and Commentary.

Subsection (b) is intended as a check on the discretion to make adjustments for additional costs incurred by private enterprise. It is a provision parallel to Section 4-804 (b) and reflects the fact that employment on grounds of confined persons

may impose expenses on a private enterprise that would not otherwise be incurred. For example in a state in which an employer's unemployment experience rating is charged upon an employee's voluntary leaving the extra costs attendant upon such charging could be costs calling for adjustment under this subsection.

SECTION 4-806. [Private Enterprise on Property of Facility Not State Agency.]

(a) A private enterprise employing a confined person is not for that reason alone an agency of the State, and the enterprise remains subject to the laws, rules, and regulations of the State governing the operation of similar private enterprises.

(b) A confined person is an employee of the private enterprise employing him while he is acting within the scope of his employment.

COMMENT

This section states expressly that the status and general obligations of a private enterprise do not change solely because it employs confined persons. See Minn. Stat. Ann., § 243.88 (West 1973) ("Any factory established under the provisions of this section shall be deemed a private enterprise and subject to all the laws, rules and regulations of this state governing the operation of similar business enterprises elsewhere in this state. . . .").

SECTION 4-807. [Employment and Training Assignments.]

(a) The director shall adopt rules governing the eligibility of confined persons for assignment to employment and training positions. The rules must provide that a confined person's preference be considered in making an employment or training assignment.

(b) The director shall establish which classes of confined persons are eligible for employment in each enterprise based on the security classification of confined persons and the risk to security presented by employment in the enterprise. Until there are sufficient training or employment opportunities to accommodate all confined persons, the director may utilize additional factors in determining which confined persons are eligible for each enterprise, including:

(1) the amount of time remaining to be served on the sentence;

(2) the amount of time served on the sentence;

(3) the amount of time served without training or employment opportunities; and

(4) whether the confined person has, as a condition to employment by an enterprise, spent a specified period of time employed in general maintenance work or in other services essential to the administration of a facility.

(c) Decisions to employ, promote, or discharge individual confined persons must be made by the manager of the enterprise, but a confined person may become ineligible for employment by an enterprise because of a reclassification to a higher security level or a transfer to another facility.

(d) The director, to the extent possible, shall assure that educational and other programs are scheduled so as not to restrict a program participant's opportunities

for employment.

COMMENT

This section is an accomodation between the responsibilities of the director to maintain order and security and the responsibility of the manager of an enterprise to make management decisions relating to it. In proposing its free venture model, ECON, Inc. would require until full employment of confined persons can be achieved, that the facility classification committee define with "explicit, written criteria" which groups of confined persons would be eligible for employment by prison industries. Prison industry managers would then freely recruit from the eligible group and all employment decisions would be theirs. ECON, Inc., at 56-57. This section, applicable to private enterprise as well as prison industries, contemplates a similar division of responsibilities.

Subsections (a) and (b) in part reflect aspects of current classification systems. E.g., Alaska Stat., § 33.30.020 (1975); Fla. Stat. Ann., § 945.09 (West Supp. 1977); La. Rev. Stat. Ann., § 15.324 (West Supp. 1976). The factors going beyond security interests that are listed in (b) represent other objective criteria by which the director may allocate a scarce commodity.

Subsection (d) reflects an interest in limiting, to the extent possible, the necessity for a confined person to choose between remunerative employment and educational and other programs which would be of benefit. Such flexibility in scheduling is often urged so as to permit confined persons to progress at their own rates. E.g., ACA Std. 4403. It is, of course, recognized that one major study has suggested that employment activities regularly be supplemented by training. Levy, Abrams, and LaDow, Final Report on Vocational Preparation in U.S. Correctional Institutions viii (U.S. Dept. of Labor 1975).

SECTION 4-808. [Required Work.]

(a) A confined person may be required to keep his his own living quarters clean and orderly.

(b) A confined offender may be required to perform general maintenance work in the facility and assist in providing other services essential to the administration of the facility such as food and laundry service.

(c) A confined offender may be required to work in a business, commercial, industrial, or agricultural enterprise operated by the department.

COMMENT

It has been fairly said that:

> "a constructive member of the community, by definition, is a working member. A common characteristic of offenders is a poor work record; indeed it is fair to conjecture that a considerable number of them took to crime in the first place for lack of the ability or the opportunity -- or both -- to earn a legal living."

President's Task Force on Prisoner Rehabilitation.

Employment opportunities for confined persons, through work-release programs, employment by private enterprise on the grounds of facilities, and upgraded prison industries, should eventually be available to all confined persons. It is contemplated, moreover, that there will be ample incentive for confined persons to seek and retain employment while confined once a realistic wage scale becomes the norm and employment opportunities are provided in occupations in which it is possible to obtain employment upon release. It is also true that forced rehabilitation is often seen as counter-productive as well as violative of personal dignity. E.g., ABA Joint Comm., § 3.4 and Commentary; Nat'l Advisory Comm'n Std. 2.9 and Commentary.

Subsection (a) reflects the view that each confined person, even if also employed in gainful employment, has an institutional obligation to maintain his own living quarters and to assist in general maintenance of the facility in which he lives. Whether or not to require confined persons to work, particularly at paid employment, is a question which has provoked much debate. E.g., ABA Joint Comm., § 3.4 and Commentary. The ACA Standards on Accreditation, while silent with respect to whether confined offenders may be required to work do urge that incentives be provided to encourage confined offenders to work. ACA Std. 4391. Subsections (b) and (c) reflect a decision that the benefits derived from employment by the confined offender and society, at least when the confined offender is not employed by private enterprise, may outweigh other interests. See Ericsson, Labor-Market Wages for Prisoners 2 (Dec. 1972):

> "Compulsory work in the institutions has been criticized in various connections on the grounds that compulsion has no therapeutic effect. This opinion is mainly based on the belief that institutional work is independent of other

> treatment. This in turn presupposes that the prisoner makes a clear distinction between his position as an employee at one of the correctional administration's workshops and his total situation as a prisoner at an institution. Experience shows that this is rarely the case. Aggression and dislike directed toward some factor within the institution often lead to protests against some other factor. A survey a few years ago of fifty cases of refusal to work showed that only in one case was this form of protest caused by conditions at the place of work. It is unlikely that doing away with compulsory work would bring about the desired therapeutic effect: making work more attractive to the prisoner. Doing away with compulsory work or the responsibility for taking part in other similar activities would be more likely to bring about the opposite effect. Many prisoners who now keep their physical and mental health through working would probably sink into a passive, undemanding institutional existence."

Subsections (b) and (c) apply specifically to confined offenders and not to confined persons generally because it is believed completely inappropriate, if not unconstitutional, to force a confined person not yet convicted of a criminal offense to work for wages in employment provided by the department. It is clear, however, that requiring confined offenders to work is not violative of the 13th Amendment although "wide-scale forced work" may be prohibited by the 14th Amendment. Id. The National Advisory Commission on the ABA Joint Committee are opposed to the concept reflected in this section. The Model Penal Code, although not unambiguous, appears to support the concept. Model Penal Code, § 304.6. Several states compel confined person employment by statute. See, e.g., Cal. Penal Code, § 2700 (West Supp. 1977); Colo. Rev. Stat. Ann., § 27-24-101 (Cum. Supp. 1975); Fla. Stat. Ann., § 944.49 (West 1973); Me. Rev. Stat. Ann. tit. 34, § 504 (West Supp. 1965).

SECTION 4-809. [Enterprises Operated by Department.]

(a) The director shall adopt measures governing the administration of enterprises operated by the department. The director shall:

(1) provide for the pricing and marketing of goods and services produced by those enterprises;

(2) assure that goods and services produced by these enterprises do not unfairly compete with those produced by private enterprise; and

(3) require that each enterprise maintain separate, accurate, and complete records and accounts in accordance with accepted accounting practices for business enterprises.

(b) The director may provide for the management of the enterprises operated by the department [.] [and may, if appropriate, incorporate one or more enterprises in accordance with the law of this state.]

(c) The director may expend funds generated by enterprises operated by the department and other available funds to:

(1) pay the capital and operating expenses of the enterprise;

(2) expand the size and scope of the enterprises;

(3) increase the rate of wages paid to employees of the enterprises;

(4) supplement the wages paid to confined persons employed in general maintenance work or other essential services;

(5) establish a placement program to assist confined persons in obtaining employment upon release; and

(6) support other activities related to the employment and training of confined persons.

COMMENT

This section is derived in part from Minn. Stat. Ann., § 243.85 (West 1973). For statutes concerning the establishment and maintenance of prison industries see, e.g., Cal. Penal Code, §§ 2716, 2911, 5091 (West 1970 & Supp. 1978); Colo. Rev. Stat. Ann., §§ 27-27-103 and 104 (Cum. Supp. 1975); Fla. Stat. Ann., § 944.023 (West Supp. 1977) and § 945.13 (West 1973); Ill. Ann. Stat. ch. 38, § 1003-12-1 and 2 (Smith-Hurd 1973); La. Rev. Stat. Ann., § 15.832 (West Supp. 1976); Me. Rev. Stat. Ann. tit. 34, § 5 (West 1973); Mont. Rev. Code Ann., § 80-1501 (1974); Nev. Rev. Stat., § 209.350 (1975); N.J. Stat. Ann., § 30:4-98 (West 1964); N.Y. Correc. L., § 45 (McKinney Supp. 1976); Pa. Stat. Ann. tit. 71, § 305 (Purdon 1962); Tex. Rev. Civ. Stat. Ann. art. 6203c (Vernon 1970); Wis. Stat. Ann., § 56.01 (West 1976).

The present prison industries system reflects poor management techniques and inadequate record-keeping. ECON, Inc., Analysis of Prison Industries and Recommendations for Change, VI, Study of the Economic and Rehabilitative Aspects of Prison Industry (Sept. 24, 1976). See, e.g., Nat'l Advisory Comm'n Correc. Std. 16.13 and Commentary; President's Task Force on Prisoner Rehabilitation, The Criminal Offender -- What Should Be Done? 10 (1970); Jensen, Mazze and Miller, Legal Reform of Prison Industries: New Opportunities for Marketing Managers, 12 Am. Bus. L.J. 173, 1977 (1974). It is contemplated that prison industries under the Act will be upgraded and expanded. The ECON, Inc. study proposed that prison industries operate on a "free venture" model which would approximate the free work world. ECON, Inc., Analysis of Prison Industries and Recommendations for Change, VI, Study of the Economic and Rehabilitative Aspects of Prison Industry (Sept. 24, 1976) at 21. The Law Enforcement Assistance Administration is presently funding a "Model Prison Industries Project" in Connecticut which operates prison industries following the free venture model; the project will likely be expanded to include the States of Minnesota, Illinois, and Washington. Letter from John Manson, Commissioner, Connecticut Dept. of Corrections, to J. R. Potuto (Nov. 29, 1976) (on file in Uniform Corrections Act Project Office, U. of Neb. L. College, Lincoln, Neb.).

Subsection (a) requires adequate record keeping and also obligates the director to assure that goods and services produced by enterprises operated by the department do not obtain a competitive advantage in the free market resulting from the enterprise's status as a part of government.

SECTION 4-809

Subsection (c) contemplates that, as has been the ECON, Inc. experience, in selected Connecticut prison industries, with good management, enterprises operated by the department will generate profits. Subsection (c) requires that these profits be expended only in employment-or training-related activities and in paying the costs of such activities. This requirement is consistent with the goal of this Part to provide meaningful employment and training opportunities for all confined persons. Subsection (c) also permits the director to expend other funds in employment and training activities.

SECTION 4-810. [Handcrafts.]

The director may authorize confined persons to engage in handcrafts and to sell their products to the public.

COMMENT

See, e.g., Ill. Ann. Stat. ch. 38, § 1003-12-2 (Smith-Hurd 1973); Nev. Rev. Stat., § 209.350 (1975).

SECTION 4-811. [Terms and Conditions of Employment.]

(a) A confined person employed by private enterprise, an agency of government other than the department, or in a business, commercial, industrial, or agricultural enterprise operated by the department is entitled to be paid at least the wages paid for work of a similar nature performed in private enterprise by employees having similar skills working under similar conditions in the locality in which the work is performed. The [State Commissioner of Labor] [director] shall certify the prevailing wage for each job for which the department or other governmental agency employs confined persons.

(b) Notwithstanding subsection (a), if an enterprise operated by the department does not produce sufficient income to support payment of prevailing wages, the director may authorize wage payments to be based on the productivity of the enterprise until such time as the income of the enterprise can support a prevailing wage rate.

(c) A confined person employed by the department for work other than in a business, commercial, industrial, or

agricultural enterprise operated by the department is entitled to be paid at least the lowest of the following rates:

(1) the prevailing wage for similar services performed in private industry;

(2) the minimum wage as established by [federal; state] law; or

(3) a sum equivalent to the lowest hourly wage paid to confined persons employed in an enterprise operated by the department.

(d) A confined person may not be paid for keeping his own living quarters clean and orderly.

(e) Termination of employment resulting from final release from a facility of a confined person employed by private enterprise is a voluntary leaving of employment without good cause [attributable to the employer; attributable to work] for purposes of [state unemployment compensation act].

COMMENT

To achieve the goal of full employment in a realistic employment setting, confined persons should be employed under the same terms and conditions of employment operative in the free world. E.g., ABA Joint Comm., § 4.4 (c), (d) and Commentary; ECON, Inc., at 21; Nat'l Advisory Comm'n Std. 16.13 and Commentary. See

Minn. Stat. Ann., § 243.88 (West 1973). It is the intent of this Section to accomplish this.

Subsection (a) requires payment of a prevailing wage at least when the employer is a private enterprise or an agency of government other than the department. Support for payment of a prevailing wage to a confined person employed by private enterprise comes from various groups. E.g., ACA Std. 4392, ABA Joint Comm., § 4.4 (c) and Commentary; Committee on Correctional Facilities and Services, Georgia State Bar Ass'n, Prisoner Employment in Georgia, Summary of Proposal (1975); Nat'l Advisory Comm'n Correc. Std. 1613 and Commentary; President's Task Force on Prisoner Rehabilitation, at 12; Barnes and Teeters, Inmate Labor in the Correctional Program in New Horizons in Criminology 741-42 (2d ed. 1963). A successful prevailing wage system is used in Sweden. N. Morris & G. Hawkins, The Honest Politician's Guide to Crime Control 131 (1970). Further, work-release programs which provide, perhaps, the closest parallel to employment of confined persons by private enterprise on the grounds of a facility, generally require payment of a prevailing wage. Nat'l Advisory Comm'n Correc. Std. 16.13 and Commentary.

Additional support for at least a minimum wage standard comes from the National Council on Crime and Delinquency, Policy Statement on Compensation of Inmate Labor 34 Am. J. Corrections 42, 43 (1972), and the New York State Special Commission on Attica, Report on Attica 49-51 (1972). Both a Minnesota statute (permitting private enterprise to lease space on correctional grounds) and a bill under consideration by Congress (permitting the interstate shipment of prison-made goods) do not require a prevailing wage; they require, instead, payment of no less than the prevailing minimum wage for work of a similar nature performed by free employees. Minn. Stat. Ann., § 243.88 (West Supp. 1975-1976); H.R. 4871, 94th Cong., 1st Session (1975). It is nonetheless the intent of the Minnesota Department of Corrections to pay "wherever possible, the same wage as received on the street for the same production." Letter from Kenneth E. Schoen, Comm'r, Minn. Dept. of Corrections, to J. R. Potuto (Dec. 15, 1976) (on file in Uniform Sentencing and Corrections Act Project Office, U. of Neb. L. College, Lincoln, Neb).

A different and more difficult problem exists when considering what wage scale should be paid by the department. Presently of course, confined offenders are paid at a very minimal daily rate. It is true however, that proposals are under consideration by state legislatures that would require payment by the department of a minimum wage (E.g., LB 850 (Neb. 1978)) and that other state departments of corrections are beginning to pay increased wages.

See, e.g., letter from John R. Manson, Comm'r, Conn. Dept. of Corrections, to J. R. Potuto (Nov. 29, 1976) (on file in Model Sentencing and Corrections Act Project Office, U. of Neb. L. College, Lincoln, Neb.). The ACA Standards on Accreditation urge payment of wages sufficient to permit canteen purchases and to also permit an accumulation of funds to assist a confined person when released. Std. 4390. It is contemplated under this Part that eventually enterprises operated by the department can support payment of a prevailing wage and that all confined persons able to work will be paid, whether by government or private enterprise, a prevailing wage. It is clear, however, that it may be some time before this becomes reality. Subsection (b) thus authorizes the director to pay wages based on the productivity of the enterprise during the transition period before enterprises operated by the department can support a prevailing wage rate.

Subsection (c) reflects a balance between the needs and operating funds of the department and the intent of the Part to provide gainful employment to all confined persons. It is intended that persons employed by the department for work other than in a business, commercial, industrial, or agricultural enterprise will be paid a prevailing wage at least once there is full employment at a prevailing wage rate.

Subsection (d) prohibits payment of wages for what is considered to be the obligation of each confined person--his responsibility to keep his living quarters orderly.

Subsection (e) governs the operation of the unemployment com-ensation system with respect to confined persons. It seems likely that, absent a provision in this Part, a confined person otherwise eligible who is employed by private enterprise on the property of a facility would be covered by the provisions of a state unemployment compensation act to the same extent as other employees in the state. For such confined-person employees the question upon release from a facility would be whether release should be treated as a voluntary leaving for purposes of state unemployment law (and, thus, trigger the temporary disqualification provisions attendant upon a voluntary leaving in most states) or whether, absent other disqualifying acts by the confined person, the leaving would render the confined person immediately eligible for unemployment compensation. Subsection (e) resolves this question by statutorily equating a release with a voluntary leaving. Thus a confined person upon discharge would be treated similarly to any employee who voluntarily leaves his employment. See, e.g., Report 247-71, VL-50-93, No. BR-72380-D & E (Decision of Board of Review) (New Jersey, August 3, 1970) (termination of work experience by releasee granted parole treated as voluntary leaving at least when releasee could have remained with job after parole).

The bracketed language in (f) attempts to track the various language used to define a voluntary "leaving" in the different state unemployment systems.

The usual situation at state law for an employer whose employee voluntarily leaves employment is that the employer's experience account is not charged (charges on employer experience accounts ultimately increase rates of compensation required to be paid by employers). In a state in which an employer experience account is charged for employee voluntary leavings an employer who would otherwise contemplate operating on grounds might choose not to so locate because of projected increased unemployment insurance rates. This projected increase might well prove an additional cost incurred for which an adjustment may be allowed under Section 4-805 supra.

Although Subsection (e) does not by its terms exclude confined persons employed by the department, such employed confined persons are presently excluded from unemployment coverage in virtually every state (California has eliminated this exclusion and Minnesota is now considering such legislation). There are strong policy reasons for including all confined persons within the scope of unemployment protection so that a confined person, while confined, is not treated differently based on whether or not his employer was the department. Nonetheless, it was decided to leave this decision to each state in the development of its employment program. It may well be that as department employment endeavors become profit-making ventures the costs incident to providing unemployment compensation will not unduly implicate other state funds.

Finally, there is no express prohibition against confined persons receiving unemployment compensation while confined. It was determined not to interfere with the normal operation of a state unemployment system. Thus, a confined person may receive, while confined, unemployment benefits to which he is eligible due to his employment before confinement. On the other hand, under a state unemployment system a confined person who leaves without good cause employment by private enterprise that is provided him while confined would be ineligible for benefits. Moreover, since a wage earner must be unemployed to receive unemployment compensation, Section 4-808 supra, which permits the department to require that a confined person accept employment by the department, could operate to prevent a confined person from receiving unemployment compensation.

It is recognized that the implementation of this section requires the opening of free markets to prison-made goods and, most particularly, the repeal of legislation preventing this. See Section 4-816 and comment infra.

SECTION 4-812. [Disposition of Wages.]

(a) The director shall provide for the disposition of a confined person's wages. A confined person's monthly gross wages minus required payroll deductions and necessary work-related incidental expenses must be distributed in the following manner:

(1) 10 percent to be deposited in the account of the confined person to be used by him for any lawful purpose;

(2) 25 percent to be paid to the department toward monthly room, board, and other maintenance costs. The director may reduce or waive these charges if he determines that their collection is unreasonable.

(3) 10 percent to be deposited for the confined person and held until his release; and

(4) the remainder to be paid in accordance with the following priority:

(i) first in accordance with the law otherwise applicable to the collection of civil obligations against wage payments, and

(ii) second at the direction of the confined person for any lawful purpose.

(b) Wages earned by confined persons must be paid to the director and are not subject to judicial process or assignment except as provided in this section.

COMMENT

If a confined person is gainfully employed in conditions approximating, as nearly as possible, those operative for workers in the free world, then he should also meet the expenses he would

be paying in the free world. See, e.g., Minn. Stat. Ann., § 241.01 (West Supp. 1976); ABA Joint Comm., § 4.4 and Commentary; Committee on Correctional Facilities and Services, Georgia State Bar Ass'n, Prisoner Employment in Georgia, Summary of Proposal (1975); ECON, Inc.; Model Penal Code, § 303.7; President's Task Force on Prisoner Rehabilitation, at 12; Barnes and Teeters, Inmate Labor in the Correctional Program in New Horizons in Criminology 741-42 (2d ed. 1963). Most work-release statutes do, indeed, contain provisions for confined persons to pay room and board and maintenance costs, family support, and other expenses. E.g., Alaska Stat., § 33.30.250 (1975); Ariz. Rev. Stat. Ann., § 31-334 (West 1976); Ark. Stat. Ann., § 46-117 (Supp. 1975); Colo. Rev. Stat., § 16-11-212 (1973); Iowa Code Ann. ch. 247A (West 1969 & Supp. 1977) Md. Ann. Code art. 27, § 700A (1976 & Supp. 1976). Most of the statutes do not include a ceiling on the amount which can be charged for room and board and maintenance costs. But see Idaho Code, § 20-242 (Supp. 1976) (maximum daily charge $5.00); Ill. Ann. Stat. ch. 38, §§ 1003-9-3 & 1003-13-1 to 6 (Smith-Hurd 1973 & Supp. 1976) ("reasonable fees"). Some states allow the department of corrections to adopt rules concerning disbursement of earnings of confined persons. E.g., Fla. Stat. Ann., § 945.091 (West 1973 & Supp. 1976); Me. Rev. Stat. Ann. tit. 34, § 527 (West Supp. 1976). In a 1972 survey of work-release statutes in 20 states it was discovered that 19 states list room and board payments as a first priority; 18 states list work-related incidental expenses as a second priority; support of dependents is generally the third priority in disbursements. Root, Work-Release Legislation Fed. Prob., March 1972 at 38, 41.

The priority of payments in this section represents an attempt to provide employment incentive to confined persons while leaving unaffected the law otherwise applicable to civil obligations. See, e.g., Del. Code tit. 11, §§ 6533-6534 (Supp. 1976) (wages may be used by confined persons as spending money); N.Y. Correc. Law, §§ 851-858 (McKinney Supp. 1976) (wages may be used for commissary purchases by confined persons). Paragraph (2) reflects the intention that this section would fully operate only in instances where a confined person is paid at least a prevailing minimum wage.

The federal wage garnishment statute limits garnishable wages to 25 percent of weekly disposable earnings (excluding, inter alia, court-ordered support payments). 15 U.S.C. § 1623 (1970). The statute speaks in broad language and does not exclude confined person wages from its limitation on creditor garnishment. On the other hand, the possibility of gainfully employed confined persons was likely not considered at the time of the statute's enactment. Further, the limitation under the statute was designed to meet the debtor's need of immediate cash resources for life's essentials. Gainfully employed confined persons do not, of course, experience comparable needs. Suitable interpretation of the wage garnishment statute, therefore, would seem to leave room for the wage disposition contemplated by this section.

SECTION 4-813. [Funds of Confined Persons Held by Department.] Funds of a confined person held by the department for his release must be credited to the confined person

and deposited in an interest-bearing state or federally insured account.

COMMENT

See, Me. Rev. Stat. Ann. tit. 34, § 757 (West 1978).

SECTION 4-814. [Employment Upon Release.]

(a) The director shall adopt measures designed to assist confined persons in obtaining employment upon release.

(b) Whenever the director is unable to find an opportunity for employment for a confined person upon release that is comparable in remuneration and general working conditions to the employment last provided him while confined, the director shall pay him weekly a sum equal to his last weekly wage until he is employed, but for not more than [4] weeks.

COMMENT

A released confined person who is unemployed is more likely to recidivate than one who has found gainful employment. See D. Glaser, The Effectiveness of a Prison and Parole System 311-61 (1964); 6 ECON, Inc., at 3-4, 76. Nat'l Advisory Comm'n Correc. Std. 16.13 and commentary. The employment and training opportunities to be provided by the director are an attempt to provide confined persons with marketable skills and good work habits and, thus, to equip them to find and retain jobs upon release.

Subsection (a) specifically obligates the director to assist confined persons to find employment. Subsection (b) is intended both as an incentive to the director to establish a meaningful placement program and as an assurance that a confined person who has not been placed in employment will have income to support him for a reasonable time while he seeks employment. It is contemplated that the director may use funds generated by departmental enterprises (Section 4-809(c)) to make such severance payments.

SECTION 4-815. [Correctional Employees; Financial Interest in Offender Employment.] To supplement other provisions of law governing state employees, the director shall adopt rules to:

(1) define prohibited conflicts of interest by employees of the department arising out of the employment of persons in the custody of the department;

(2) require disclosure of any financial interest held by an employee of the department in a private enterprise providing employment to persons in the custody of the department; and

(3) prevent exploitation of the labor of confined persons.

COMMENT

A specific section dealing with correctional employees and conflicts of interest is thought necessary because of the unfortunate history of exploitation of the labor of confined persons, an exploitation which, in large part, led to the restrictive legislation dealing with employment of confined persons. E.g., ABA Joint Comm., § 4.4 (a) and Commentary. See, e.g., Cal. Penal Code, § 2540 (West 1970); Fla. Stat. Ann., § 944.38 (West 1973); La. Rev. Stat. Ann., § 15:862 (West 1967); Me. Rev. Stat. Ann. tit. 34, § 555 (West 1964); N.Y. Correc. Law, § 22 (McKinney Supp. 1976-1977).

SECTION 4-816. [Interstate Commerce.]

Goods produced in whole or in part by confined persons in this State may be transported and sold in the same manner as goods produced by free persons. Goods produced in

whole or in part by persons confined in another state or territory may be transported and sold in this State in the same manner as goods produced by confined persons in this State may be transported or sold in that state or territory.

COMMENT

Almost every state restricts the sale of prison-made goods (with an occasional exemption usually relating to agricultural products) to state or local governmental agencies. See, e.g., Cal. Penal Code, § 2873 (West Supp. 1978); Colo. Rev. Stat. Ann., § 27-24-115 (Cum. Supp. 1975); Fla. Stat. Ann., § 945.16 (West 1977); La. Rev. Stat. Ann., § 51:691 (West 1965); Mont. Rev. Code Ann., § 80-1503 (1974); N.Y. Gen. Bus. Law., § 79 (McKinney 1976); Tex. Rev. Civ. Stat. Ann. art. 9007 (Vernon 1976); Wis. Stat. Ann., § 56.06 (West 1957). Current federal legislation divests prison-made goods of their interstate character. 49. U.S.C., § 60 (1970). States are thus free to restrict sale of prison-made goods transported from other states. See, e.g., Cal. Penal Code, § 2880 (West 1970); Colo. Rev. Stat. Ann., § 27-24-115 (Cum. Supp. 1975); Me. Rev. Stat. Ann. tit. 34, § 503 (West 1964); N. J. Stat. Ann., § 46:31-1 (West 1940). Recently there have been attempts to amend this section by affording interstate character to all prison-made goods produced by confined persons paid a prevailing minimum wage. E.g., H.R. 4871, 94th Cong., 1st Session (1975).

This section eliminates the state-use restrictions on domestic prison-made goods and thus eliminates a prime obstacle to the full employment contemplated by this Part. It is a step already taken in, among others, Minnesota where state-use provisions were recently repealed. Minn. Stat. Ann., § 11-1-1.1-39 (Burns 1973). The intent of the section is also to eliminate state-use restrictions on prison -made goods transported from another state; it would do so in all cases in which the transporting state has eliminated state-use restrictions on prison-made goods transported from other states.

The goal of this part will not fully be reached, of course, until all legislation restricting use of prison-made goods is repealed. See, e.g., 18 U.S.C., § 1761 (1976) (transporter of prison-made goods in interstate commerce is guilty of a misdemeanor). As the National Advisory Commission found:

> "So engrained are these approaches to prison labor that prohibitions against the use of prison labor are routinely inserted in legislation authorizing public projects. In 1958, Public Law 85-767, authorizing Federal aid to highway construction, prohibited the use of offender labor except offenders on probation or parole and in 1970, Public Law 91-258 authorizing

> Federal assistance in airport development, prohibited offender labor completely."

Nat'l Advisory Comm'n Correc. Std. 16.13 at 583. The National Advisory Commission has called for the repeal of such legislation, id., as have among others, the ABA Joint Committee on the Legal Status of Prisoners, the Georgia State Bar Association Committee on Correctional Facilities and Services, the President's Task Force on Prisoner Rehabilitation, and ECON, Inc.

PART 9
COMPENSATION FOR WORK-RELATED INJURIES TO CONFINED PERSONS

SECTION 4-901. [Application of Worker's Compensation Act.] Subject to the provisions of this Act, if a confined person is injured in the performance of his work in connection with the maintenance or operation of the facility or in any business, commercial, industrial, or agricultural enterprise, he is subject to the provisions of [here insert reference to state worker's Compensation Act].

COMMENT

This section makes a state workers' compensation act applicable to prisoner injuries incurred during work-related activity. The Act seeks to greatly expand the work opportunities available to persons in confinement and to make the working conditions as comparable to free world employment as possible. Workers' compensation is an important aspect of that task. The Council of State Governments has recommended making workers' compensation applicable to prisoners. Council of State Governments, Workmen's Compensation and Rehabilitation Law (Rev. 1974). And eight states and the federal government have enacted legislation entitling persons engaged in labor while confined to compensation for their injuries. Iowa Code Ann., § 85.62 West Supp. 1977-78; Md. Ann. Code art. 101, § 35 (a) (Supp. 1977); N.C. Gen. Stat., § 97-13(c) (1972); Or. Rev. Stat., §§ 655.505-.550 (1975); S.C.Code, §§ 72-11.1-.3 (Supp. 1975); Wyo. Stat., § 27-317(b) (ii) (Supp. 1975); 18 U.S. C., § 4126 (1976). For a description of the various approaches taken in the above legislation see Note, Workers' Compensation for Prisoners, 51 N.Y.U. L. Rev. 478 (1976). Indeed, the tentative draft of the American Bar Association standards relating to prisoners recommends workers' compensation benefits for all injuries received during confinement regardless of whether they are work-related. ABA Joint Comm. at 545.

The section and those that follow take as a general proposition that the person working during confinement should be treated in the same manner as free laborers regarding compensation for injuries. States should insert in the bracketed space specific statutory reference to existing workers' compensation. However, there are aspects of confinement which do create differences in how workers' compensation should be applied and the sections in this part address these issues.

SECTION 4-902. [Insurance.] The director may [acquire insurance from a private insurance carrier] [contribute to the state worker's compensation plan] to discharge the liability imposed by this Part. In the absence of insurance or other source of funds, liability imposed by this Part is payable from the general funds available to the department.

COMMENT

Methods of funding workers' compensation vary. In a few states, compensation is paid by a central fund to which employers contribute. In most states, employers are obligated to purchase private insurance to cover the contingency or to self-insure. This section authorizes the director to purchase private insurance or contribute to the state fund and also provides that he may choose to self-insure out of the general funds available to the department.

SECTION 4-903. [Compensation; Distribution.] Compensation for disability paid pursuant to this Part shall be distributed in the same manner as wages earned by confined persons.

SECTION 4-903
SECTION 4-904
SECTION 4-905

COMMENT

Some statutes allowing disability compensation for confined persons provide that compensation payments begin only upon release. These provisions are at least in part based on the idea that a confined person is already provided with "free" necessities by the department of corrections. However, they ignore the interest of dependents of the confined person. Also, this Act provides for expanded employment opportunities, for the payment of higher wages to confined persons, and for reimbursement to the state for room and board expenses incurred by confined persons who are employed. Hence, this section makes compensation payable immediately (or in the same manner as the general workers' compensation law) and provides that it be distributed in the same manner as wages. The distribution clause would allow reduction for room and board as well as payment of fines, restitution orders, and support of dependents.

SECTION 4-904. [Liability for Compensation Continued After Release.] The release of a person from the custody of the department does not terminate the liability of the department to pay compensation already awarded.

COMMENT

This section insures that the obligation of the department to pay compensation does not terminate on release but continues as long as the general workers' compensation law provides for payment.

SECTION 4-905. [Liability for Compensation Limited; Subrogation.] The department is not liable pursuant to this Part for injuries or death to a confined person arising out of his employment by private enterprise if worker's compensation benefits are provided for him by the private enterprise. The department is subrogated to a confined person's claim for worker's compensation against a private enterprise to

the extent the department has provided medical or other services pursuant to the claim.

COMMENT

This section provides an incentive for the department to insure that private employers who employ confined persons provide workers' compensation coverage. The department is not liable for work-related injuries incurred during employment for a private employer only if that employer provides benefits himself. The second sentence of the section entitles the department to recoup from the private employer at fault medical or other expenses provided to an injured confined person resulting from a work-related injury.

PART 10
COLLATERAL CONSEQUENCES OF CHARGE AND CONVICTION

SECTION 4-1001. [Rights Retained.]

(a) A person convicted of an offense does not suffer civil death or corruption of blood.

(b) Except as provided by [the Constitution of this State or] this Act, a person convicted of an offense does not sustain loss of civil rights or forfeiture of estate or property by reason of a conviction or confinement; he retains all rights, political, personal, civil, and otherwise, including the right to:

(1) be a candidate for, be elected or appointed to, or hold public office or employment;

(2) vote in elections;

(3) hold, receive, and transfer property;

(4) enter into contracts;

(5) sue and be sued;

(6) hold offices of private trust in accordance with law;

(7) execute affidavits and other judicial documents;

(8) marry, separate, obtain a dissolution or annulment of marriage, adopt children, or withhold consent to the adoption of children; and

(9) testify in legal proceedings.

(c) This section does not affect laws governing the right of a person to benefit from the death of his victim.

COMMENT

Sections 4-1001 to 1005 require the withdrawal of the present Uniform Act on the Status of Convicted Persons approved in 1964 by the National Conference of Commissioners on Uniform State Laws [hereinafter cited as Uniform Act on Status of Convicted Persons]. Section 4-1001 derives from section 3 of the Uniform Act, the general provision eliminating collateral consequences, with the addition of paragraphs (7) through (9) and an expansion of paragraphs (1) and (2) to include candidacy for and appointment to public office or employment. Subsequent provisions in this Part narrow the exceptions to this general provision from those given in the Uniform Act.

Imposition of collateral consequences upon conviction of an offense belongs to a common law background in which a felony conviction was generally followed by death and forfeiture of property, in which life imprisonment resulted in "civil death," and in which conviction of certain crimes resulted in loss of certain rights of citizenship. See 4 R. Pound, Jurisprudence 363 (1959); R. Perkins, Criminal Law 15 (2d ed. 1969). Present state statutory schemes vary greatly and are "inordinately complex and confusing. The relevant statutes are hard to locate, even within one jurisdiction." President's Comm'n on Corrections at 89. In 1973 the National Advisory Commission reported that 13 states still considered an offender civilly dead and thus prohibited, for example, an offender's right to contract and to sue and be sued. Nat'l Advisory Comm'n Correc. Std. 16.17 and commentary.

There is a growing list of authorities supporting elimination of all collateral consequences except those that are narrowly defined and, in general, those that directly relate to the offense for which the offender was convicted. See, e.g., ABA Joint Comm., §§ 10.1 to 10.7 and commentary;; Model Penal Code, §§ 306.1 to 306.6; Proposed New Federal Criminal Code, §§ 3503 to 3504; President's Comm'n on Corrections at 88-92; Special Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929 (1970).

Subsection (c) is included to expressly preserve those state laws prohibiting, for example, a murderer from inheriting from his victim.

SECTION 4-1002. [Juror Eligibility.] A confined offender and an offender convicted of a felony are disqualified to serve on a jury.

COMMENT

The present Uniform Act does not affect state law requirements on juror qualifications. Uniform Act on Status of Convicted Persons, § 4(c). Many states prohibit persons convicted of crime

from serving as jurors. This section applies to confined offenders as well as offenders who are not confined but who were convicted of a felony. The Model Penal Code, § 306.3, would make all offenders ineligible until sentence discharge. Other authorities would prohibit only offenders who are confined from serving as jurors. ABA Joint Comm., § 10.3(b); Nat'l Advisory Comm'n Correc. Std. 16.17 (1973); President's Comm'n on Corrections at 90.

SECTION 4-1003. [Voting.] A confined person otherwise eligible may vote by absentee ballot. For voting purposes, the residence of a confined person is the last legal residence before confinement.

COMMENT

An offender's right to vote is probably not protected by the Equal Protection Clause of the 14th Amendment. Richardson v. Ramirez, 418 U.S. 24 (1974). At present many states do not provide for even the automatic restoration of the right to vote after discharge from a sentence. See, e.g., Ark. Const. amend. 8, § 1; Idaho Const. art 6, § 3; Ala. Code tit. 17, § 15 (1958); Alaska Stat., § 15.05.030 (1976); Ariz. Rev. Stat. Ann., § 16-10 (West 1975); Conn. Gen. Stat. Ann., § 9-46 (West Supp. 1977); Del. Code tit. 15, § 1701 (1974); Fla. Stat. Ann., § 293.540 (1975). Other states provide for automatic restoration after a first conviction. See, e.g., La. Rev. Stat. Ann., § 15:572 (West Supp. 1977) and, § 18:111 (West 1969); Md. Ann. Code art. 33, § 3-4 (1957). Under the present Uniform Act a person sentenced for a felony may not vote in an election until his sentence is discharged unless execution of sentence is suspended or the person is paroled after confinement. Uniform Act on Status of Convicted Persons, § 2 (a) (1). See Model Penal Code § 306.3.

This section specifically authorizes the exercise of the right to vote by confined offenders. Section 4-112 requires the confined offender to be informed of his right to vote by absentee ballot and to be given assistance in exercising that right. As was stated by the President's Commission on Law Enforcement and Criminal Justice, "[t]he convicted person may have no strong personal interest in voting, but to be deprived of the right to

representation in a democratic society is an important symbol." President's Comm'n on Corrections at 89-90. See ABA Joint Comm., § 10.2 and Commentary; Nat'l Advisory Comm'n Correc. Std. 16.17 and Commentary.

One often-expressed fear is that if confined offenders are eligible to vote those in large facilities located in sparsely populated areas could unfairly dominate local politics. The residency requirement provided in the section is intended to alleviate that fear. It would not appear that the administrative burden in providing absentee ballots would be overly great. See Legal Assistance to Prisoners, Civil Legal Assistance to Prisoners Progress Report 15-16 (Jan. 72 to Nov. 75) (a description of the Connecticut experience with prisoners voting in the 1972 Presidential election). It is a burden, moreover, that probably must be met for confined persons other than offenders. See, e.g., Goosby v. Skinner, 414 U.S. 524 (1974).

SECTION 4-1004. [Forfeiture of Public Office.]

(a) Unless the qualification or provisions with respect to length of term and procedures for removal are prescribed by the Constitution of this State, a person forfeits any public office he holds or to which he has been elected if thereafter convicted of any of the following offenses;

(1)

(2)

(3)

(b) This section applies if the person was convicted of a comparable offense under the laws of another state or of the United States.

(c) If the sentence is imposed in this State, a person forfeits his public office on the date sentence is imposed or, if the sentence is imposed in another state or

in a federal court, on the date a certification of the sentence is filed in the office of [Secretary of State]. An appeal or other proceeding taken to set aside or otherwise nullify the conviction or sentence does not affect the application of this section, but if the conviction is reversed the defendant must be restored to any public office forfeited under this Act from the time of the reversal to the end of the term for which he was appointed or elected and is entitled to the emoluments thereof from the time of the forfeiture.

COMMENT

Subsections (a) and (b) derive from Section 3501 of the Proposed New Federal Criminal Code. It is the intent of the section that each state should enumerate the specific offenses or kinds of offenses for which forfeiture applies. The kinds of offenses most appropriately to be included here are those directly related to performance in office, i.e., bribery and other offenses involving unlawful influence upon public affiars, offenses involving misconduct in public office, unlawful acts committed under color of law, felonious theft, and other fraudulent acts against the public. There is much support for including only offenses directly related to performance. See, ABA Joint Comm., § 10.4 and Commentary; President's Comm'n on Corrections at 90. At present the states vary widely on the kinds of offenses for which automatic forfeiture of public office follows conviction. Special Project, The Collateral Consequences of Criminal Conviction, 23 Vand. L. Rev. 929 (1970). See also Van Der Zee v. Means, 225 Iowa 871, 28 N.W. 460 (1938); Arnett v. Stumbo, 287 Ky. 433, 153 S.W.2d 889 (1941); State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968); State ex rel. Cloud v. Election Bd., 169 Okla. 363, 36 P.2d 20 (1934). The present Uniform Act requires automatic forfeiture of any public office held at the time of sentence for commission of a felony. Uniform Act on the Status of Convicted Persons, § 2 (a) (2) and (b). See, Model Penal Code, § 306.2 (automatic forfeiture upon commission of a felony, an offense involving malfeasance in office or dishonesty, or other offense for which automatic forfeiture is required by Constitution or statute); Nat'l Advisory Comm'n Correc. Std. 16.17 (automatic forfeiture only upon

confinement). Subsection (c) derives from subsection 2 (b) of the present Uniform Act.

SECTION 4-1005. [Discrimination; Direct Relationship.]

(a) This section applies only to acts of discrimination directed at persons who have been convicted of an offense and discharged from their sentence.

(b) It is unlawful discrimination, solely by reason of a conviction:

(1) for an employer to discharge, refuse to hire, or otherwise to discriminate against a person with respect to the compensation, terms, conditions, or privileges of his employment. For purposes of this section, "employer" means this State and its political subdivisions and a private individual or organization [employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year];

(2) for a trade, vocational, or professional school to suspend, expel, refuse to admit, or otherwise discriminate against a person;

(3) for a labor organization or other organization in which membership is a condition of employment or of the practice of an occupation or profession to exclude or to expel from membership or otherwise to discriminate against a person; or

(4) for this State or any of its political subdivisions to suspend or refuse to issue or renew a license, permit,

or certificate necessary to practice or engage in an occupation or profession.

(c) It is not unlawful discrimination to discriminate against a person because of a conviction if the underlying offense directly relates to the particular occupation, profession, or educational endeavor involved. In making the determination of direct relationship the following factors must be considered:

(1) whether the occupation, profession, or educational endeavor provides an opportunity for the commission of similar offenses;

(2) whether the circumstances leading to the offense will recur;

(3) whether the person has committed other offenses since conviction or his conduct since conviction makes it likely that he will commit other offenses;

(4) whether the person seeks to establish or maintain a relationship with an individual or organization with which his victim is associated or was associated at the time of the offense; and

(5) the time elapsed since release.

(d) [The State Equal Employment Opportunity Commission has jurisdiction over allegations of violations of this section in a like manner with its jurisdiction over other allegations of discrimination.]

COMMENT

There is a direct correlation between employment and recidivism. E.g., ECON, Inc. at 3-4, 76; D. Glaser, The Effectiveness of a Prison and Parole System 311-61 (1964); Nat'l Advisory Comm'n Correc. Std. 16.13 and Commentary. Providing employment opportunities to persons convicted of crime would seem, then, to be a primary goal of the criminal justice system. See, e.g., Article IV, Part 8 supra; ABA Joint Comm., §§ 4.1 to 4.4, 10.4 and Commentary; Nat'l Advisory Comm'n Correc. Stds. 16.13, 16.17 and Commentary. The intent of this section is to implement this goal by prohibiting discrimination against offenders by the State or when the offender is engaged in employment-related activities unless there is a direct relationship, as defined in subsection (c), between the offense and the activity which the person seeks to pursue. See, e.g., ABA Joint Comm., §§ 10.1 to 10.7 and Commentary; Nat'l Advisory Comm'n Correc. Std. 16.17 and Commentary. See also Smith v. Fussenich, 440 F. Supp. 1077 (D. Conn. 1977) (Conn. statute barring released felony offender from employment as security guard or private detective found overbroad because it does not recognize differences in fitness and character of felony offenders nor the relationship between the offense committed and the requirements of the job).

The great majority of states, in their licensing requirements, presently require no such relationship nor, indeed, exhibit any rational purpose for most of the restrictions imposed. E.g., President's Comm'n on Corrections at 90-91. As the Task Force found:

> "[I]t seems appropriate to suspend or revoke licenses for offenses involving dangerous driving, both to remove the unfit driver from the road and to deter such behavior. But to bar convicted persons from numerous activities without regard to the particular conviction's relevance to the particular activity can be expected seriously to impede efforts to rehabilitate offenders by encouraging their participation in society, without any compensating benefit to society.
>
> "Most of the law in this area is overly broad. Thus, good character is often made a prerequisite for activities where it is of no particular relevance. It is, for example, a common requirement for obtaining a barber's license. Yet it is doubtful whether good character is of any more importance to exercise of one's duties as a barber than to most other occupations. And regulatory legislation generally makes no effort to define the kind of character, and thus the kind of convictions, relevant to fitness. . . . In the area of individual licenses, professional and occupational groups are often given the power to determine who is initially qualified to receive a license and to regulate the standards of those licenses by defining rules of conduct and revoking or suspending licenses for breach of those rules. Such groups tend to be primarily concerned with the interests of their own members. Thus, when faced with the problem of whether to license persons with criminal records, they may be unduly concerned with the effect on the status of their professions. Further, to the extent they try to consider the public interest, they are likely to have an unrealistic view of the importance of their own profession or occupation . . . ."

Id. at 91. For a comprehensive survey of statutory restrictions on the ability of a person convicted of an offense to obtain or retain a license, see, ABA Clearinghouse on Offender Employment Restrictions, Removing Offender Employment Restrictions (March 1976). It is there reported, for example, that 47 states require evidence of good moral character (22 of these states also require that the applicant be free of a criminal record) in order for an applicant to obtain a barber's license.

The House of Delegates of the American Bar Association adopted, in 1975, a resolution recommending the repeal of laws that discriminated against ex-offenders in state employment and licensing when the discrimination is based solely on the existence of prior convictions. 61 A.B.A.J. 1088 (1975). At least three states now require that, unless the offense relates to the employment sought, a person convicted of an offense may not be disqualified from employment by the state or from practicing any occupation or profession for which the state must issue a license. E.g., Conn. Gen. Stat. Ann., § 4-61n to 61s (West Supp. 1977); Fla. Stat. Ann.,

§ 112.011 (West Supp. 1977); Wash. Rev. Code Ann., §§ 9.96A.010 to (West 1977). Hawaii has a similar statute prohibiting discrimination by private employers. Haw. Rev. Stat. ch. 378 (Supp. 1975). Offenses include those committed in another jurisdiction.

Subsection (a) is intended to permit an employer to discontinue in his employ an employee charged with an offense who is awaiting trial or sentence or has been convicted and commited to the division of community based services. It is hoped that an employer would not normally choose to discontinue employment but might do so in the case of a well publicized trial.

The bracketed language in subsection (b)(1) restricts the reach of the section to private employers that come under the purview of the Equal Employment Opportunity Act of 1972. A state that has enacted its own Equal Employment Opportunity Act may choose to track the requirements of its own Act.

Subsection (d) derives from the Proposed New Federal Criminal Code, § 3505.

Subsection (e) provides a method for initial agency determination for a state that has enacted its own state Equal Opportunity Act. E.g., Haw..Rev. Stat. ch. 378 (Supp. 1975) Hawaii E.O.C. has jurisdiction to hear ex-offender employment discrimination complaints); Conn. Gen. Stat. Ann., § 4-61 q. (West Supp. 1977) (Conn. Human Rights and Opportunities Commission has jurisdiction to hear ex-offender discrimination complaints with respect to state employment or licensing). The attached table provides Hawaii statistics as to its experience with ex-offender employment discrimination complaints. It indicates that such complaints will not be unduly burdensome; their number is small compared to the total number of complaints brought.

This section includes no exemption of the profession of law from the operation of the section. It is recognized that courts have traditionally viewed the regulation of the practice of law within their inherent power. E.g., In re Mackay, 416 P.2d 823, 836-37 (Alaska 1964), cert. denied, 385 U.S. 890 (1966); Brotsky v. State Bar, 57 Cal. 2d 287, 301, 19 Cal. Rptr. 153, 159, 368 P.2d 697, 703 (1962); In re Lavine, 2 Cal. 2d, 324, 327-328, 41 P.2d 161, 162-64 (1935); State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 230, 140 A.2d 863, 868 (1958); In re Opinion of the Justices, 279 Mass. 607, 610, 180 N.E. 725, 727 (1932); In re Fox, 296 So. 2d 701, 703-04 (Miss. 1974); In re Buckles, 331 Mo. 405, 53 S.W.2d 1055 (1932); In re Integration of Nebraska State Bar Ass'n, 133 Neb. 283, 286-287, 275 N.W. 265, 266-68 (1937); In re Community Action for Legal Services, Inc., 26 App. Div. 2d 354, 361, 274 N.Y.S.2d 779, 784 (1966); Jenkins v. Oregon State Bar, 241 Or. 283, 286, 405 P.2d 525, 526 (1965).

It is further recognized that courts generally view legislative statements concerning qualification for the practice of law to state minimum standards beyond which they may require additional qualifications. E.g., In re Lavine, 2 Cal. 2d 324, 41 P.2d 161, 163 (1935). The decision not to exempt the legal profession reflects a determination that such exemption from the operation of the section would create an anomaly in terms of policy of this Part. More important, it was considered that to exclude offenders from the practice of law solely because of the commission of an offense is to create a discrimination unwarranted in its overbreadth. Cf. Smith v. Fussenick, 440 F. Supp. 1077 (D. Conn. 1977). It is, of course, true that this section will not control in a jurisdiction in which a court determines that it represents an intrusion into the court's perogative to govern the practice of law. It is hoped, however, that in such jurisdictions courts will consider and expressly assume the policy choice reflected in the section.

The present Uniform Act contains no section equivalent to Section 4-1005.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS - STATE OF HAWAII
ENFORCEMENT DIVISION

TIME PERIOD	RACE	SEX	AGE	COLOR	RELIGION	ANCESTRY	PHYSICAL HANDICAP	MARITAL STATUS	ARREST AND COURT RECORD
1/64 - 6/30/64			1						
FY1964-1965	4	1	1						
FY1965-1966	4		4	1	1	1			
FY1966-1967	2	3	2	1		1			
FY1967-1968	6	2	4			1			
FY1968-1969	12	6	1						
FY1969-1970	6	10	5		2				
FY1970-1971	9	15	8	1					
FY1971-1972	16	14	6	1		4			
FY1972-1973	8	33	6	4		6			
FY1973-1974	31	35	12		2	8			7
FY1974-1975	31	31	16	3	3	4			2
FY1975-1976	37	38	25		3	5	20	6	6
7/76 - 2/28/77	30	24	22		1	7	9	7	3

ARTICLE 5

VICTIMS

PREFATORY NOTE

Offender assaults Victim and takes his money. Offender and Victim are neighbors; both are undereducated, unskilled, and unemployed. Under this Act, Offender, once he is placed in the custody of the department of corrections and until his release, is guided to educational opportunities, job training, and even a paying job; after release he will be assisted in finding gainful employment. The provisions in Article 5, which are designed to complete the correctional picture, begin to provide similar assistance to victims.

Victims have been described as the "real "clients," of the criminal justice system" Comm'n on Victim Witness Assistance Nat'l Dist. Attorneys Ass'n, A Primer for Model Victim Witness Assistance Centers (Undated). Their role in the criminal justice system has become the focus of a growing awareness among commentators in law and related disciplines. See, e.g., Marquette University Center for Criminal Justice & Social Policy, Victims and Witnesses (1976) [hereinafter cited as Marquette University Center]; Greacen, Arbitration: A Tool for Criminal Cases?, 2 Barrister 10 (Winter 1975); Hall, The Role of the Victim in the Prosecution and Disposition of a Criminal Case, 28 Vand. L. Rev. 931 (1975); Sander, Varieties of Dispute Processing, 70 F.R.D., 111 (1976). See also H. Hentig. The Criminal and His Victim (1948).

The system, however, has afforded its "clients" inadequate treatment at best. E.g., Comm'n on Victim Witness Assistance, Nat'l Dist. Attorneys Ass'n, Help for Victims and Witnesses (1976) [hereinafter cited as Help for Victims and Witnesses]; Marquette University Center. Victims of crime may need, among other things, medical and counseling services, compensation for injury suffered and its consequences, employment training, assistance in claiming personal property used in evidence, information about the criminal trial process and their role in it and, perhaps most importantly, recognition that they do have a role, an important role, in that process. See Jones, A Cost Analysis of Federal Victim Compensation, in Sample Surveys of the Victims of Crime 189, 196 (W. Skogan ed. 1976); Help for Victims and Witnesses. Victimization studies indicate that much crime goes unreported by victims. See, e.g., Crimes and Victims, A Report on the Dayton-San Jose Pilot Study of Victimization 23-24 (1974). Although many reasons are given for such non-reporting, id., it is clear that the present operation of the criminal justice system does little to encourage victim participation. Help for Victims and Witnesses.

Although the majority of states do not as yet have programs to provide compensation to the victims of crime, progress is being made in this area. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Crime Victims Reparations Act in 1974. It has been enacted in Ohio and Minnesota. Several other states have instituted programs of crime victims reparations and the federal government is also considering enactment of such a program. S. 1437, 95th Cong., 1st Sess. ch. 41, §§ 4111-4115 (Criminal Code Reform Act of 1977). There has also been progress in the development of victim-witness assistance projects. The National District Attorneys Association, through funds provided by the Law Enforcement Assistance Administration, has established several such projects. Similar projects are being conducted by courts (the Vera Institute is operating one such project at the Brooklyn Criminal Court), local law enforcement agencies (an example is the Indianapolis Victims Assistance Project) and at least one university (Marquette University Center for Criminal Justice and Social Policy).

There is, however, no concerted, organized, and comprehensive effort to provide for the wide range of victim needs. Without such an effort victims will continue to be "revictimized" by the criminal justice system itself. See, e.g., Marquette University Center, at 9-10; Comm'n on Victim Witness Assistance, Nat'l Dist. Attorneys Ass'n, What Happens Now? (Undated Brochure). What is required is a statewide commitment offering centralized responsibility with sufficient flexibility for regional implementation. A state department of corrections, with the community programs and facilities contemplated by this Act, would seem well-suited to fulfill this requirement and is of course, equipped to provide many of the services needed by victims since it is already providing similar service to offenders.

It is likely that the provisions of Article V, even when read with other sections in the Act designed in part to meet victim needs, e.g., Section 3-205, Presentence Reports; Section 3-207, Sentencing Hearing; Section 3-602, Restitution, do not go far enough. Their primary thrust is to require the department to refer victims to services, See Section 2-203 (7), supra, rather than to provide the services within the department. It is therefore contemplated that experience with this provision may well lead states to authorize the direct provision of services to victims. It is further recognized that there are many other ways in which a legislature may choose to assist victims. See, e.g., Cal. Penal Code, § 1413 (b) (West Supp. 1977) (authority to photograph evidence in lieu of retention of evidence). The provisions are presented, however, as a necessary beginning -- and as a base upon which development and expansion of victims services can and should be raised.

ARTICLE 5
VICTIMS

PART 1
VICTIMS ASSISTANCE SERVICE PROGRAM

SECTION 5-101. [Victims Assistance Service Officer; Appointment.] The associate director for community-based services shall appoint, and he may remove in accordance with law, a victims assistance service officer who has appropriate training in counseling or a related discipline at an accredited college or university.

COMMENT

This section parallels other similar sections of the Act requiring the appointment of particular employees of the department of corrections. See Section 2-202, supra. Locating overall program responsibility in one place will aid in the development of a cohesive program. It will also provide victims with a person to speak for their needs within and without the department.

SECTION 5-102. [Duties of Victims Assistance Service Officer.] The victims assistance service officer shall:

(1) administer a victims assistance program to assist victims who incur physical or emotional injury or property damage due to the commission of an offense;

(2) cooperate with individuals or public or private agencies or organizations concerned with the treatment or assistance of persons in the program and refer victims and their immediate families to providers of services including:

(i) medical care:

(ii) employment placement;

(iii) placement in educational, vocational, and rehabilitation programs;

(iv) legal assistance; and

(v) financial assistance;

(3) explain to a victim the criminal-trial process, court and police procedures, pre-trial release decisions, and other aspects of the legal system as they may affect him;

(4) if requested by the victim,

(i) assist in filing a criminal complaint;

(ii) assist the victim in preparing a sentence recommendation for inclusion in the presentence report; [and]

[(iii) assist in filing and pursuing a claim with the crime victims reparations board; and]

(5) explain and publicize the victims assistance program to the public; and

(6) prepare and transmit to the director, for inclusion in his annual report to the governor, a written summary of the program, including the nature and number of cases handled and the nature and number of services provided.

COMMENT

This section delineates the duties of the Victims Assistance Service Officer. Paragraph (2) requires the referral of victims to the appropriate provider and not the provision of services by the department. Paragraphs (3) and (4) respond to a particular problem encountered by victims -- their "outsider" status in the criminal justice process:

> "Most current studies indicate that victims and witnesses receive limited satisfaction when they experience the crime event and are faced with the need to participate actively within the criminal justice process. Too often, their satisfaction tends to depend upon the punishment of the offender rather than upon services rendered to the victim, often forgotten within the criminal justice system, and, concerned for their own manipulation by others, they have frequently expressed negative attitudes to the existing criminal justice system."

Marquette University Center at 1-2. It is intended that these services will be essentially explanatory in nature and that they will not interfere with the traditional prosecutorial function.

SECTION 5-103. [Victim Attendance at Investigative or Criminal Trial Process.]

(a) If a victim attends any stage of the investigative or criminal trial process at the request of a law enforcement officer or the prosecuting attorney, he is entitled to receive the same fees provided for witnesses who appear in obedience to a subpoena in criminal cases in [the district court].

(b) A person may not discharge a victim from employment because of absences from the employment caused by attendance at a stage of the investigative or criminal trial process at the request of a law enforcement officer or the prosecuting attorney.

(c) A person who violates this section is liable in a civil action to the victim for loss caused by a wrongful

discharge and reasonable attorney's fees, and he may also be required to show cause why he should not be held in contempt of court.

COMMENT

Subsection (a) represents an attempt to compensate victims for actual losses incurred for participation in the criminal justice process. See Section 3-601 (e) (2), supra. Although witness fees are quite low, see, e.g., help for Victims and Witnesses at 62-64, it was considered inappropriate to provide for a different schedule of fees in this section. It is hoped, however, that states will begin to provide fees that approximate the losses incurred by appearing at trial.

Subsection (b) derives from Mich. Comp. Laws Ann., § 600.1348. (West Supp. 1978). (employer discharging or threatening to discharge employee for serving on a jury is guilty of misdemeanor). The Alameda County District Attorneys Association is urging enactment of legislation which would guarantee state witnesses in criminal trials against loss of wages and would grant tax credit assistance to small businesses incurring losses due to employee absence resulting from appearance in court. Help for Victims and Witness at 20.

PART 2

[Reserved for the Uniform Crime Victims Reparations Act.]

COMMENT

The Uniform Crime Victims Reparations Act was adopted in 1973 by the National Conference of Commissioners on Uniform State Laws. It has been enacted in Ohio, Ohio Rev. Code Ann., § 2743.51 to 2743-52 (Page Supp. 1976), and in substantially similar form in Minnesota, Minn. Stat. Ann., §§ 299B.01 to 299B.16 (West Supp. 1978). Congress has under consideration a federal program for victim compensation S.1437, 95th Cong., 1st Sess. ch.41, §§ 4111-4115 (Criminal Code Reform Act of 1977). In addition, there is a growing number of states that provide compensation to victims. E.g., Uniform Crime Victims Reparations Act (1974); Alaska Stat., §§ 18.67.010 to .180 (1974); Cal. Gov't Code, §§ 13960-13966 (West Supp. 1977); Haw. Rev. Stat. ch. 351 (Supp. 1975); Ill. Ann. Stat. ch. 70, §§ 71 to 84 (Smith-Hurd Supp. 1977); Md. Ann. Code art. 26A (Supp. 1977); Mass. Ann. Laws ch. 258A (Michie/Law Co-op Supp. 1977-1978); Mich. Comp. Laws Ann., §§18.351 to .362 (West Supp. 1977-1978); Nev. Rev. Stat. ch. 217 (1975); N.J. Stat. Ann., §§ 52:4B-1 to 21 (West Supp. 1977-1978); N.Y. Exec. Law, §§ 622-635 (McKinney 1972 & Supp. 1977).

Compensation to crime victims is an important aspect of victims services. The victims provisions provided in Article V Part 1 have specifically avoided those kinds of services which are by their nature should be included as among the functions of a Crime Victims Reparations Board (examples of this include the reimbursement of hospital costs for an examination conducted to gather evidence for a criminal prosecution and payment by the state, after investigation by a Crime Victim Reparations Board, of actual costs incurred in the criminal justice process).

A state enacting the Uniform Sentencing and Corrections Act should consider its integration with crime victims reparations. Responsibilities of the Board, for example, could be to present its views to the Sentencing Commission or particular sentencing hearings. The Board could make compensation payments to victims and then seek a restitution award from a particular, identified offender. Further, in a fully integrated system there are probably many ways in which the Victims Assistance Service Officer could work with the Board.

ARTICLE 6
TRANSITION AND APPLICATION

PART 1
TRANSITION

SECTION 6-101. [Effective Date of Act.]

(a) Except as provided in this section, this Act takes effect one year after the date of its enactment.

(b) For the purpose of preparing for the effective date of this Act, the following provisions of this Act become effective on the same date as acts without an expressed effective date:

(1) provisions authorizing the creation and the appointment of officers and employees of,

(i) the department of corrections and its divisions;

(ii) the office of correctional legal services;

(iii) the office of correctional mediation; and

(iv) the sentencing commission.

(2) provisions authorizing the adoption of rules and sentencing guidelines;

(3) provisions establishing the manner in which rules and sentencing guidelines are to be adopted; and

(4) provisions establishing requirements for the design and construction of new facilities and the remodeling of existing facilities.

(c) A rule or sentencing guideline does not become effective until the effective date of this Act.

(d) Appropriated funds may be expended before the effective date of this Act to develop and adopt rules and sentencing guidelines and to take other necessary action to prepare for the effective date of this Act.

COMMENT

The effective date of this Act is one year after it is enacted. However, the Act requires many policies of the department of corrections and other agencies to be established by rule and outlines a notice and comment rule making procedure. Similarly, the sentencing commission must promulgate guidelines after public hearings. This section authorizes the formation of the organizational structure provided in the Act and the appointment of officers and employees during the one-year transition in order to provide an opportunity to recruit qualified personnel and to allow policies, rules, and sentencing guidelines to be promulgated in preparation for the Act coming into effect. No action taken during the one-year transition is effective until the Act becomes effective.

Subsection (d) authorizes the expenditure of funds necessary for this initial planning and preparation. The section would limit the hiring of employees of new agencies to those necessary to perform these initial functions.

SECTION 6-102. [Transition of Sentencing Provisions.]

(a) Except as provided in this section, sentences for offenses committed before the effective date of this Act must be imposed and served pursuant to the law in force for this purpose as if this Act were not enacted.

(b) A person whose offense has been committed but whose sentence has not been imposed before the effective date of this Act may elect to be sentenced under this Act.

(c) Within one year after the effective date of this Act, the [board of parole] or a hearing officer designated by the [board] shall hold a parole hearing for each person held in the custody of the department pursuant to a sentence imposed under prior law for which the possibility of parole by the [board] was provided. The [board] or hearing officer shall consider in each case the available information relevant to the exercise of its parole powers pursuant to prior law.

(d) Within 10 days after the hearing, the [board] shall establish a release date, which must be the likely date the person would have been released under the law as it existed before the enactment of this Act. The [board] may establish an earlier release date if it believes that the prior parole practice would have resulted in confinement longer than the guidelines of the sentencing commission on similar offenders for similar offenses. The release date established may not be earlier than any minimum parole eligibility date applicable to the offender under prior law.

(e) A person sentenced to confinement under prior law must be released on the date established by the [board], subject to applicable, good-time reductions. Upon release, he is entitled to assistance as provided in this Act in lieu of any parole supervision required under prior law.

(f) A person sentenced pursuant to prior law is entitled to receive good-time reductions under this Act unless he elects

to receive the good-time reductions authorized by prior law. Restoration of good-time reductions forfeited pursuant to prior law may be restored pursuant to prior law. Good time reductions earned after the effective date of this Act are subject to forfeiture and withholding, as provided by this Act.

(g) On the effective date of this Act, a person under parole supervision must be discharged from parole as if he had satisfactorily completed his sentence. A person confined as a result of a parole revocation must be given a release date pursuant to subsection (c).

(h) One year after the effective date of this Act:

(1) all powers and duties vested in and imposed on the [board of parole], including those in this section, are transferred to and imposed upon the sentencing commission for as long as required to determine the release dates of persons sentenced pursuant to prior law; and

(2) the [board of parole] is abolished.

(i) On the effective date of this Act, all powers and duties vested in and imposed on [any official or agency having powers or duties relating to sentencing other than a court, such as local probation departments, sheriffs, local jailers, local parole boards] necessary to determine the length or conditions of a sentence imposed for an offense committed prior to the effective date of this Act are transferred to the director of corrections for as long as

required for the confinement, supervision, or release of persons sentenced pursuant to prior law.

(j) Nothing in this Act authorizes an offender sentenced pursuant to prior law to be retained in the custody of the department or in confinement in a facility for a period of time longer than he could have been retained in custody or confinement pursuant to prior law.

(k) The legislature finds that it is in the best interest of the State to adjust sentences imposed under prior law to make them comparable to those that would be imposed under this Act whenever to do so does not extend the sentence of any particular offender. The legislature requests that the [Governor; Pardon Board] exercise [his; its] commutation powers to effectuate that adjustment.

COMMENT

The method of transition from sentencing under prior law to sentencing pursuant to this act must take into account the prohibition in Article I, Sec. 10 of the United States Constitution against ex post facto law application by state legislatures. The reach of the prohibition was first articulated in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798):

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexted to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the offence, in order to convict the offender."

Id. at 390. Balanced against this mandate is the state's interest in providing, to the extent possible, equal treatment of all persons in the state's custody. A secondary interest is to reduce the necessity for continuing the existence of the parole board, when its caseload is continually being reduced by the abolition of parole by this act. This section seeks to promote these interests consistently with the prohibition against ex post facto laws.

As a general principle, a law imposing a more onerous sentence cannot be applied to persons who have committed the offense prior to enactment. What is "more onerous" and which type of changes are subject to the prohibition are not clear. See generally Note, Ex Post Facto Limitations on Legislative Power, 73 Mich L. Rev. 1491 (1975). The United States Supreme Court has utilized a distinction between provisions affecting "substantive rights" and those involving procedures, with the former alone subject to the ex post facto limitation. However, as the Court noted in Beazell v. Ohio, 269 U.S. 167, 171 (1925):

> "Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation... and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance."

Id. (citation omitted).

It is nearly certain that the existence of a parole system and the standards for eligibility for parole could not be retroactively altered to a prisoner's disadvantage. There are some older decisions allowing retroactive change in parole eligibility based on the view of parole as an act of "grace". E.g., State ex. rel. Koalska v. Swenson, 343 Minn. 46, 66 N.W.2d 337 (1954), cert. denied 348 U.S. 908 (1955). This justification for circumventing constitutional requirements has been rejected in the parole context. Morrissey v. Brewer, 408 U.S. 471 (1972). More recent decisions hold parole eligibility to be a substantial right subject to the ex post facto clause; Zink v. Lear, 28 N.J. Super. 515, 101 A.2d 72 (1953); Love v. Fitzharris, 460 F 2d 382 (9th Cir. 1972) (administrative interpretation of parole eligibility laws could not be changed retroactively because both the defendant and the sentencing court have the right to rely on existing interpretations). The Supreme Court has not directly resolved the issue although in Scafati v. Greenfield, 390 U.S. 713 (1968), aff'g per curiam 277 F.Supp. 644 (D. Mass. 1967), the Court held change in good time eligibility subject to the clause. See also Warden v. Marrero, 417 U.S. 653, 663 (1974), in which the Court in dictim noted that a retroactive change in parole eligibility would pose a "serious question under the ex post facto clause . . ." In re Griffin 63 Cal. 2d 757, 408

P.2d 959 (1965); 48 Cal. Rptr. 183; Goldsworthy v. Hannifin, 468 P.2d 350 (Nev. 1970).

The legislature has greater flexibility in altering the structure and composition of the board of parole. Duncan v. Missouri, 152 U.S. 377 (1894) (retroactive change in appellate court approved). See also Voorhees v. Cox, 140 F.2d 132 (8th Cir. 1944), cert. denied, 332 U.S. 733 (1944) (retroactive shift of parole revocation hearings from entire board to hearing officer approved); Jones v. State, 233 Ga. 662, 212 S.E.2d 832 (1975) (change from jury to judge sentencing did not involve change in "substantive right").

The most difficult question is whether change in the standards for the exercise of parole discretion could be applied to persons already sentenced. It would seem that as long as the power to grant parole is subject to discretion the board itself would not be precluded from altering its own policies regarding the exercise of that discretion, and thus legislative guidance on the exercise of discretion, could similarly be applied retroactively. No case was found expressly addressing the point. As a practical matter it would be difficult to show that a change in the policies of parole would inevitably create a more onerous standard for release. However, with such proof, a constitutional question would be raised and the section seeks to avoid that issue.

Subsection (a) is a specific savings clause which retains prior law for sentencing persons committing offenses prior to the effective date of this Act. The subsection prevents operation of the doctrine of "abatement" by which repeal of a criminal law abates all prosecutions under it. States with general savings statutes should still retain this specific savings clause because of the exceptions provided in remaining subsections.

Subsection (b) authorizes persons who have committed offenses prior to the effective date of this Act to elect to be sentenced in accordance with this Act. For purposes of application of the ex post facto clause, it is impossible to determine the extent to which sentences under this act will be more onerous than sentences imposed under prior law. Indeed, each individual offender must balance the gains from a sentence restricted by the guidelines and a relatively liberal good time provision against the potential sentence derived from unstructured judicial discretion with the release date fixed in accordance with prior law. By giving the choice to the offender, the limitation of the ex post facto clause would appear to be eliminated. Lloyd v. Oliver, 397 F.Supp. 882 (S.D.N.Y. 1974) (approved allowing an election between prior law which provided a discretionary release date but earlier termination date and a new law which provided a fixed release date but extended the total potential liability for state supervision).

The difficult question is the scope of the class of offenders authorized to make an election. Three alternatives exist: no election, election by those whose sentence is not "final," or an intermediate course of authorizing election for those whose sentence has not yet been imposed. Authorizing an election would allow some movement toward equality among all persons in the custody of the department. Traditionally, a sentence becomes "final" when the appeal time has run or all direct appeals have been exhausted. Application of this standard would extend the provisions of this act over the largest number of persons without affronting the executive pardon power. However, it would also entail some costs since persons who had already been sentenced would be entitled to a new hearing in accordance with this act and a new appeal of that sentence. Restricting the election right to those not yet sentenced by the sentencing court would eliminate these costs but would provide an incentive for defendants to delay the date of sentencing.

Existing state laws vary on the extent to which ameliorative sentencing provisions are available to persons committing offenses prior to enactment. The issue requires in most jurisdictions an interpretation of a general savings statute. The federal rule allows no retroactivity. Warden v. Marrero, 417 U.S. 653 (1974). The leading case applying the "final judgment" rule is In re Estrada, 63 Cal. 2d 740, 408P.2d 948 48 Cal. Rptr. 172 (1965). New York, Pennsylvania, and North Carolina also follow this rule. Note, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 133 (1972). The intermediate position is followed by Alabama, Illinois, Kentucky, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, Utah, Virginia, Washington and West Virginia. Id. at 136.

Subsection (c) requires the existing board of parole to hold parole release hearings on all persons subject to its jurisdiction within one year after this act is effective. The board is to apply whatever standards were imposed under prior law. This may result in less information being available, but it would be difficult to prove that it is more onerous. It is also unlikely that the time at which the parole decision is made affects "substantive rights" as long as law-imposed eligibility rules are maintained. And in all cases the hearing under this section will be held earlier than it would have been under prior law and thus can be seen as an advantage to the prisoner.

Subsection (d) requires the board to set a release date within 10 days after the hearing. The board is to determine the release date which would probably have been imposed under prior law. However, the board is authorized to impose an earlier date to make the sentence of each offender substantially compatible with

those which will be imposed under the Act. In no case, however, may the board ameliorate a minimum sentence imposed on the offender which would include any parole eligibility requirements established by the prior law. Thus if the prior legislation required an offender to serve one-third of his sentence before becoming eligible for parole, the board under this section could not establish a release date earlier than one-third of the sentence imposed. Any application of the act which results in an amelioration of a sentence which has become final may violate the pardon powers of the executive branch. In re Kline, 70 Ohio St. 25, 70 N.E. 511 (1904); Note, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 145-47 (1972).

Subsection (e) provides for the release of persons sentenced under prior law. Even though prior law may have required supervision upon release, subsection (e) applies the policy of this Act to authorize a period of assistance without the coerced supervision of the former parole system. Subsection (f) governs the awarding of good time credits under prior law. Subsection (g) deals with parolees under prior law. Subsection (h) transfers all power of the board to the sentencing commission after a one-year transition is completed. In some instances, offenders entitled to be sentenced by prior law will not be apprehended and sentenced until after the one-year transition has expired. This section allows for a continuation of the prior law indefinitely without the duplication of resources represented by the continued existence of the board.

In some states local officials may have discretionary power to effectuate the release of misdemeanants held in local jails or otherwise ameliorate a sentence to imprisonment. In other states, a local probation service may have the power to impose or modify conditions of probation or otherwise affect the length or conditions of a sentence. Subsection (i) transfers these powers to the director of corrections for persons sentenced under prior law.

Subsection (j) is a general provision to prevent application of the ex post facto clause. In any particular case, if application of these transition sections would make a sentence more onerous, subsection (j) would prevent its application. This section should also reduce the opportunity for constitutional attack on the statute as written and require that a showing be made that it is applied to a particular offender's disadvantage.

To the extent that a sentence has become final, use of the executive pardon power may be the only way to make these sentences compatible with sentences imposed under this act. Subsection (k) requests that the executive pardon authority exercise that power

to accomplish the end of making sentences uniform. A similar approach was used in Washington to obtain application of an ameliorative penalty provision to offenders already sentenced. Wash. Rev. Code Ann., § 9.95.040 (Supp. 1971).

Those states that have shifted from a discretionary release system to flat sentences have taken a variety of approaches. Indiana and Maine retained the Board of Parole and its authority over persons sentenced prior to the flat sentencing act. Ind. Sess. Laws of 1976, P.L. 148, § 27. Me. Rev. Stat. Ann. tit. 17-A, § 1254 (1976). The California act abolishes the Adult Authority outright and creates a new board with authority to adjust existing sentences to conform with the new act. Cal. Penal Code, § 1170.2 (West Supp. 1977).

PART 2
APPLICATION

SECTION 6-201. [Short Title.] This Act may be cited as the Model Sentencing and Corrections Act.

SECTION 6-202. [Severability.] If any provision of this Act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 6-203. [Repeal.] The following acts and parts of acts are repealed:

(1)

(2)

(3)

and all other acts, or parts thereof, to the extent that they are inconsistent with this Act.

APPENDIX

The following abbreviated citation forms were used in the Act:

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President's Task Force on Prisoner Rehabilitation, the Criminal Offender--What Should be Done? (1970)[President's Task Force on Rehabilitation]

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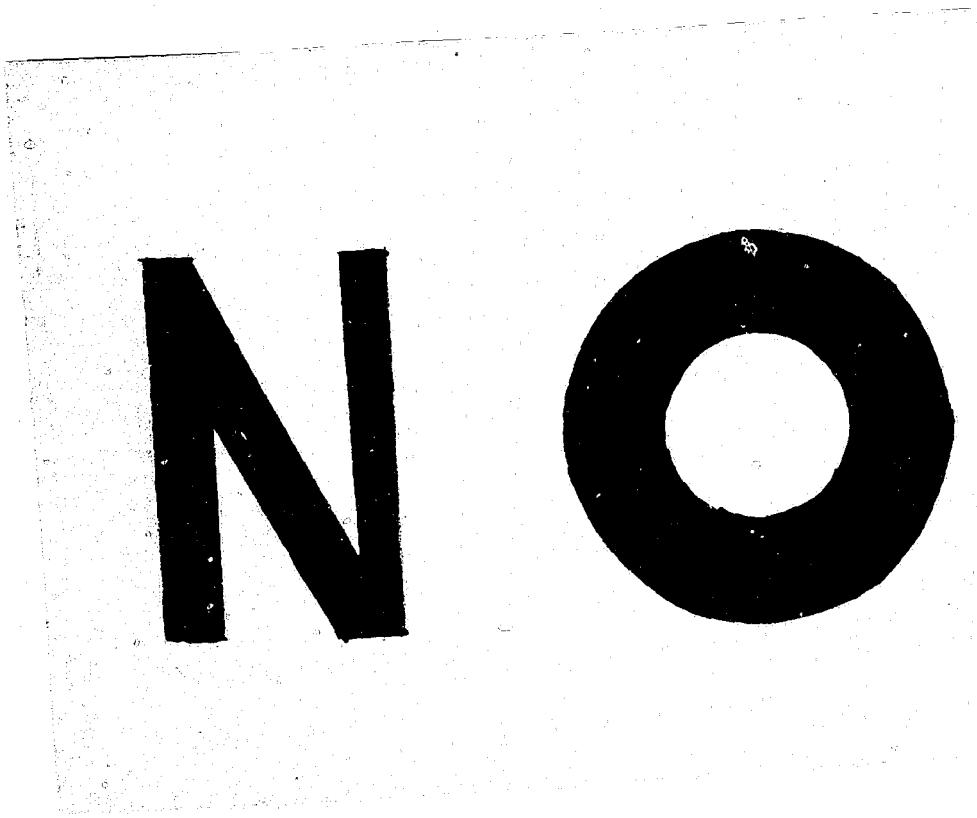

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