THE ROLE OF PRISONS IN SOCIETY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON PENITENTIARIES AND CORRECTIONS

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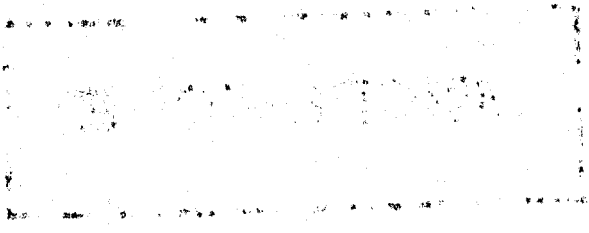

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THE ROLE OF PRISONS IN SOCIETY

WEDNESDAY, OCTOBER 5, 1977

U.S. SENATE,
SUBCOMMITTEE ON PENITENTIARIES AND CORRECTIONS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, in room 1114, Dirksen Senate Office Building, at 10:05 a.m., Hon. Joseph R. Biden (chairman of the subcommittee) presiding.

Staff present: Gerry Doherty, staff director; Mike Gelasak, chief counsel; Dennis Langley, counsel; Katrina Lantos, counsel; and Edna Panaccione, chief clerk.

Senator BIDEN. The hearing will come to order, please.

I have a brief opening statement, but prior to that a brief explanation of the anticipated interruptions which will take place today.

The Senate went into session this morning, and under the Senate rules, technically, a committee is not able to meet 2 hours beyond the time the Senate convenes if there is a request by any Member of the U.S. Senate that the hearing not continue.

Consequently, someone could suggest we not meet.

Secondly, the full Judiciary Committee is meeting over in the Capitol in an executive session to mark up the wiretap bill. And there will probably be a few interruptions in order to go and vote in an executive session.

We are meeting through the good graces this morning of the chairman of the full committee who, again, technically does not have to allow the subcommittee to meet.

That is part of the explanation as to why my colleagues on the subcommittee are not here this morning. They are in the markup session on the wiretap bill.

Also, I would like to take the liberty, as chairman of this subcommittee, to note—and probably embarrass—a good friend of mine and former colleague of ours, Senator Boggs, from Delaware who just walked in the room.

I would also like to recognize a distinguished visitor from Sweden, Mr. Roth Walburg. I hope I pronounced the name correctly.

You might find it particularly interesting, Mr. Carlson, since during the course of these hearings—not in your testimony—I am going to be asking questions and discussing the Swedish system and the recent report that has been issued in Sweden about rehabilitation and their success, or lack of it.

So much for the preliminaries.

Crime and punishment, in the minds of most of us, seem to be closely linked. We tend to think that crime calls forth punishment, and conversely punishment is the cost of committing a crime.

While incarceration is undeniably a sort of punishment, that has not been the historical purpose of the prison system. Instead, the goal of prisons has been—at least in the more recent history—to rehabilitate the criminal.

Now, of course, it's difficult to argue with the desirability of that goal itself—that is, rehabilitation.

However, serious questions in the recent past have been raised about the feasibility of accomplishing this goal. And one way, certainly, is to argue against basing our prison system on a concept which seems not to have as much practical validity as was argued initially at the turn of the century.

The rehabilitation theory has been tested for decades in our prison system, and the evidence seems to show that it's not working.

I, for one, am increasingly convinced that rehabilitation is an elusive goal which we have not accomplished yet, and it is not a necessarily workable premise upon which to base our entire correctional system, particularly our sentencing system.

I believe that the likelihood of rehabilitation is difficult to accurately predict, and it is difficult in any other measure than subjectively to be recognized by parole boards.

When rehabilitation does take place, many of us don't have any idea what caused the rehabilitation to take place.

For this reason, I feel the focus of our prison system should be to impose humane but strict punishment for the commission of crimes.

A sense of certainty in our criminal justice system which would be administered in an evenhanded and humane way.

This punishment, if I can call it that, should be uniform and based on a theory, I think, of just desserts.

In other words, people committing similar crimes should receive roughly similar penalties. The severity of the penalty must, of course, be weighed to the seriousness of the crime. Or, as a famous jurist, Roscoe Pound, used to say: "It should mirror in some way the juror postulates of the day. The social mores."

Regardless of one's personal opinion on what is the proper model for our prisons, it is clear that reexamination of it is in order.

I realize that there are other committees—and you, Mr. Carlson, on a number of occasions have testified before various subcommittees of this full committee, the Judiciary Committee.

That's the purpose for the hearings which we begin today.

We shall hear from a wide spectrum of academicians, sociologists, and those involved with the day-to-day problems of prisons, about what they believe to be the proper function of prisons in our society.

I am hopeful that some sort of consensus will emerge from these hearings and the ones that have been held in the past that will enable us to begin moving toward a new theory for prisons that will protect all of American society, including those in prisons.

These hearings are now open.

Our first witness is Mr. Norman Carlson. He has served in his present position as Director of the Federal Bureau of Prisons since 1970. He has been a career administrator in the Federal criminal justice system. He served as a correctional officer, parole officer, prison supervisor, project director for development of halfway houses,

and as Executive Assistant to the Director of the Federal Bureau of Prisons prior to assuming his present post.

Mr. Carlton received the Arthur S. Fleming award in 1972, honoring him as one of the 10 outstanding persons in the Federal Government.

He is president-elect of the American Correctional Association.

Mr. Carlson has a degree in sociology and a masters degree from the University of Iowa in criminology.

Mr. Carlson, I appreciate your coming here, especially in light of the time constraints you have this morning.

Since you have testified on this subject in the past, we are most anxious to hear from you again.

Mr. Carlson, please proceed in any way you feel you would like to.

STATEMENT OF NORMAN A. CARLSON, DIRECTOR, BUREAU OF PRISONS

Mr. CARLSON. Thank you.

I appreciate the invitation and opportunity to testify before your committee again. This is the first chance I've had since you've become chairman, Senator Biden, and I look forward to working with you and your staff in the months and years to come.

I've had a chance to talk with the staff members you've assembled, and have encouraged them to visit our institutions and talk with staff and inmates to get a firsthand view of some of the problems we face in corrections today—not only at the Federal level but also at the State and local levels.

Mr. Chairman, if you were to visit any of the Federal institutions today, the first thing you would observe is severe overcrowding. The major problem facing most prison administrators today in this country is "the body crunch"—the pressure of a rapidly increasing inmate population.

The population problem can be summed up in one sentence: More offenders are being committed to institutions, for longer terms, and for more aggressive and assaultive crimes.

Despite the fact that the Federal prison system has acquired or built nine new institutions in the past 6 years, which has added space for 3,800 offenders to our physical capacity, we have more than 30,400 inmates today in space designed for less than 23,000.

Congress has allocated funds to construct 6 additional institutions which will provide 3,100 additional beds. This, however, will still leave us with major overcrowding problems.

Because of the pressure of inmate population, we must continue to operate three large, old penitentiaries: at McNeil Island, Wash.; Atlanta, Ga.; and Leavenworth, Kans.

The newest of the three is 75 years old. All three have the majority of inmates living four, six, and eight men to a cell. They have the classic, old multiple tiers of cells and all of the problems that go with them. Supervision of the inmates is just one of those problems.

We believe that closing all three institutions is still a viable goal. We intend to close them as soon as overcrowding can be brought under control.

As you know, correctional administrators do not control who goes to prison or how long they stay. Rather we carry out the decisions others have made.

Imprisoning an offender is a series of decisions that begins with the authors of the law defining crime and punishment. Judges and attorneys carry out these laws.

Above this is a concerned public demanding more from the criminal justice system.

Each step adds some expectations as to what can be achieved—as to what are the purposes of imprisonment.

Traditionally, we have thought of four classical purposes which can be achieved by the use of criminal sanctions: retribution, deterrence, incapacitation, and rehabilitation.

In theory, of course, the ideal sentence of imprisonment might possibly achieve all four goals. In practice, however, these goals are elusive, as you have indicated.

Even if we are able to achieve any of these goals, we unfortunately lack reliable means to measure our success, and the lack thereof.

The use of criminal sanctions has been evolving throughout history. This process has been marked by a series of reforms adopted in the hope that they could improve its effectiveness and insure its humaneness.

There is a consistent undercurrent in our evolving philosophy of criminal justice which says that we are capable of administering a humane and decent system of punishment.

One such era of reform began in the 1930's with the emphasis on the rehabilitation of offenders. The ideal or goal was that convicted offenders could be turned into law-abiding and productive citizens, and that prisons would provide the means for such treatment.

The concept of rehabilitation fits not only into our religious beliefs about the perfectability of mankind, but also our utilitarian desire to reduce the impact of crime by preventing crime at the source.

Punishment and retribution were discredited as archaic and of no value to modern concepts of prison treatment.

Social and behavioral scientists were added to the staffs of institutions, and these new professionals classified inmates according to their needs for programs offered in the prison setting.

They attempted to diagnose needs and prescribe treatment. Educational and vocational training were high on the list of obvious needs.

The diagnosis of needs and the prescribing of treatment implies that somehow we can cure the disease of crime and recognize the time when treatment has been effective.

The vast majority of offenders, however, have no serious mental disease or defect. Crime may be a plague on society, but it is not a disease for which we have a guaranteed cure. We can all cite individuals who have truly been rehabilitated.

In fact, the majority of former Federal prison inmates are able to stay out of further legal entanglements once released. But it would be more accurate for us to say that while we know rehabilitation can take place in a prison setting, we do not know how it takes place, when it takes place, if it takes place, or why it takes place.

If there is a common thread among the many former inmates I have known who are now productive citizens, their reformation has been a

matter of personal will and desire. That is something that we can try to influence and facilitate, but it is something that we can clearly not coerce or control.

If rehabilitation cannot be uniformly guaranteed and reliably measured, what then is the responsibility of a prison administrator to the criminal justice system and to the public at large?

First, we have a responsibility to urge the implementation of a system of sentencing for convicted offenders which is just and fair in both fact and appearance.

I have closely followed the legal and academic debate during the past several years which has focused on the fairness of sentencing. Several authors have had a great impact on my thinking, and I share with them the feeling that the present Federal sentencing structure is in need of reform.

Dean Norval Morris, Andrew von Hirsch—who will testify later this morning—and James Q. Wilson are among those whom I have relied upon and who have influenced many of us in the criminal justice field.

Changes which are needed in the Federal sentencing system would reduce irrationality and enable it to function swiftly and with more certainty. A system of sentencing guidelines is, in my opinion, a significant innovation worthy of adoption.

Under a guideline system, judges must give written reasons for the sentences imposed, and sentences which fall outside the guidelines are subject to appellate review.

Because sentencing guidelines will, in large measure, determine the size and nature of our future prison population, it is critical that there be a close working relationship between the prison administrator and the commission which draws up those guidelines.

The Federal prisons are overcrowded, Mr. Chairman, despite the fact that only about 30 percent of the 96,000 convicted offenders who are under some form of Federal supervision today are, in fact, in prison. The remaining 70 percent are on probation, in halfway houses, or in some other community-based alternative to incarceration.

These community-based programs are more appropriate than imprisonment for many offenders, such as youth who have not been previously involved in crime.

These alternatives should be used when the public interest and need for protection can be served.

When looking at the use of imprisonment, we must face up to the way the courts look at prisons. I know that you, Mr. Chairman, are aware of the problems in States where courts object to overcrowded prisons as cruel and unusual confinement. The Federal Prison System, as a matter of fact, is now under its first court order to reduce the population of a new institution to its design capacity.

There is a second way courts look at prisons that is indirect, but in many ways more critical to the way our criminal justice system actually operates.

Judges and prosecutors are, after all, human beings. If they lack confidence in prisons as safe and humane places for the incarceration of convicted offenders, they may use every appropriate means to avoid a sentence of imprisonment.

I cannot say that they would be wrong in doing so, but it would conflict with the public interest in the fair and certain punishment of criminal behavior.

The correctional administrator has an interest in assuring the community that institutions provide a safe and humane environment, and that the means for self-improvement are available for all inmates who would choose that path.

When the Federal Prison System made the conscious decision several years ago to abandon the medical model of diagnosis and coerced treatment of prison inmates, some thought we would abandon our programs of education and training. Although enrollment in these self-help programs is voluntary, we find that most inmates today are enrolled in some program and many are enrolled in several.

A high percentage of inmates are successfully completing these programs, as evidenced by the fact that 198 college degrees, including two masters degrees, were awarded to Federal prison inmates last year.

The Federal Prison System is not alone in recognizing that the medical model of inmate rehabilitation will not guarantee that criminals will be turned away from crime.

The Danish and Swedish prison systems have long been considered models of progressive and humane treatment. A recent Swedish Government report, however, as you alluded to, noted a 70-percent recidivism rate with the comment that: "Our philosophy of rehabilitation is shipwrecked."

When the Federal Prison System reevaluated the medical model a few years ago, we had to be candid and acknowledge that offenders were using our rehabilitation programs to play games with the parole board. An inmate would complete programs in the hope that this would make a favorable impression on the Commission.

As you know, Mr. Chairman, the U.S. Parole Commission now uses a system of guidelines based primarily on the gravity of the offense and the offender's prior criminal record. These parole guidelines give credibility to decisions concerning the ultimate release of offenders.

The move away from the rehabilitation model, however, does not eliminate the need, in my opinion, for educational and vocational training programs.

Because of a change in our reporting system, direct comparisons cannot be made, but enrollment and successful completion of training programs by inmates is at least as high as it was when the offenders looked on them as the key to their release on parole.

Senator BIDEN. Excuse me, Mr. Carlson.

Is it at least as high in numbers or percentages?

Mr. CARLSON. Both, sir.

Senator BIDEN. Is that right.

Mr. CARLSON. In terms of relative numbers as well as in the percentage of the total population.

Senator BIDEN. Thank you.

Mr. CARLSON. Educational and industrial programs are no luxury.

First, they are important to that portion of the inmate population which has a sincere desire to lead productive lives following their release from prison. They need education and job skills to make their way on the outside.

Second, education and work programs counteract the idleness and boredom which are the breeding ground of prison incidents and riots.

As a correctional administrator, I firmly believe we must provide offenders with the opportunity to utilize their time constructively and wisely. If work and training are not available, whatever useful skills and abilities the inmate had when he entered prison will be lost through idleness. That is something we can ill afford.

Mr. Chairman, I certainly applaud the efforts of your subcommittee in examining the way the Federal criminal justice system delivers and administers sanctions to criminal behavior. The scholarly and practical work of the academic individuals who have been invited by you to appear at this witness table have had a great impact on my personal thinking and upon the operation of the Federal prison system.

Changes in our sentencing system are needed that will give the public, including the victims of crime, a greater assurance that punishment will be meted out with fairness and certainty.

The resources must also be provided so that Federal institutions can administer those sentences which are handed down by the courts.

I look forward to working with you and your staff and with the members of the subcommittee to assure the public that these important tasks can be carried out in the Federal Bureau of Prisons.

That concludes my formal statement, Mr. Chairman. I would be pleased to answer any questions you might have.

Senator BIDEN. Thank you very much, Mr. Carlson.

I do have several questions, but I would like to ask you first when you have to catch your plane? You're going to be back a number of times, and I will have ample opportunity to question you.

Mr. CARLSON. I have a noon plane, but I can take a later flight.

Senator BIDEN. I appreciate that. But I will try not to prolong this.

I would like to explore several things in a somewhat general framework. I'll start from the end of your statement and work back.

You feel, and you've expressed it on a number of occasions, that although the medical and psychological models that were used in the past to directing and coercing prisoners into certain programs have not worked and we have abandoned that, there is still a strong need for the educational and vocational programs within the prisons for the reasons you have stated.

I would like to take that a step further.

There are some who argue—and I think that's a conclusion of that Swedish report, which I have not read all of but just excerpts and critiques of—state that in spite of the fact that in Sweden the society and the political climate was very enlightened in terms of humane treatment of prisoners, and they went on to describe the difference in the prisons and how they were constructed—no fences and conjugal visits and a whole range of things which so-called reformers have been arguing is the key to success in our prison system if we do those things—the one thing that struck me from the report that I read was that in spite of that enlightened point of view the vast majority of the population in Sweden still attached a stigma to an ex-con. And after that con became an ex-con, he or she met a number of societal problems on the outside.

The suggestion was raised as to whether or not what we do with prisoners once released is maybe more important than what we do with prisoners when we have them.

I wonder if you could comment on that generally.

For example, whether or not in States that still say convicted felons cannot participate in voting or practicing law or medicine or real estate or licenses for a whole range of things.

Whether or not employment programs of some significance are more important outside than what happens inside.

And the whole range of those types of issues, which I'm sure you've heard hundreds of times. If you could just comment generally on that.

Mr. CARLSON. Mr. Chairman, I agree fully with the observation that you've made.

I think the first 90 days after an inmate leaves the institution are by far the most critical of the entire sentence—either in the institution or subsequently under supervision on parole in the community.

The stigma that's attached, of course, is something that the offender has to live with. It's unfortunate, I think, that in many cases people do stigmatize the ex-offender even after he has served the sentence imposed.

It's difficult for him to find a job. Frequently, he goes back to the same community and the same peer influences that contributed initially to his delinquency.

There's no question in my mind but that's the critical time, as to what happens, whether or not he's going to make a successful readjustment later in life.

Senator BIDEN. Is there anything that we should be doing in society? Not necessarily at a Federal level, but just in a Federal and local level.

Does it impact upon the rate of recidivism, in your opinion, that a man or a woman can't "become a professional" once a convicted felon? Or, if they were, they can never practice their profession again? Or they can't vote?

Are those significant items in your mind? Or do they impact.

Mr. CARLSON. I think they are significant. They are also symbolic, Senator, of the problems the ex-inmate faces. For example, those who can't receive a license as a barber, even though they may have been a barber before commitment or received training in the institution.

I think it's a very archaic concept. I, for one, don't care if my barber has a prior record or not, and I don't think the average citizen does. But yet there are many statutes on the books that limit occupational licensing, such as taxi drivers and bartenders and a host of other occupational categories.

No only are those restrictions significant, they are also symbolic of the stigma society attaches to the person who has paid his debt to society and is back in the community, hopefully, to lead a productive life.

Senator BIDEN. It seems counterproductive to me that—and our theory has been—that we should do all we can in prison to not punish but to rehabilitate. And yet the laws that we have outside for the ex-con are clearly punishment.

I guess there are some rare cases where you don't have—a perjurer who has been convicted three times being a lawyer or a butcher—someone with the propensity to cutting people up—to become a surgeon.

I guess you could make those arguments, but they don't seem very pervasive and not very persuasive.

Mr. CARLSON. Also they are counterproductive to what the intent of the criminal justice system—to prevent crimes.

Senator BIDEN. As you know much better than I, the concept of just desserts that some of us—I used to be a criminal defense lawyer—began to talk about 5 or 6 years ago was viewed as somewhat reactionary. Now it seems that the bulk of the so-called enlightened opinion is at least leaning that way if not stating that position.

It all sounds fine and good, but on reexamination of that concept of just desserts as it affects criminal activity and behavior on society, it doesn't necessarily affect it very much. It just says that if you're going to commit a crime, you're going to pay for it. We're not sure that that's going in any way to affect the rate of recidivism; we don't have any evidence that it will or won't. But at least there will be a sense of fairness. Society will somehow be partially vindicated.

But the issue has been raised with me by the people that I have been attempting to speak to—from ex-cons to presently incarcerated prisoners to academicians—and I will raise it with you without attributing it to anyone in particular.

The argument goes like this:

The rate of recidivism among white collar criminals is much less than it is among all other categories of criminals.

I don't know if that's true.

Mr. CARLSON. It is true, Mr. Chairman.

Senator BIDEN. I think it is.

And the reason for that is not that sentences are disparatively different or not that they are consistent, but only that a white collar criminal usually comes from an economic background that when put in prison, it is a serious deprivation.

When you move someone out of a $75,000 home into even a humane, clean, nice prison cell with no fences or walls around it, it is a serious deprivation.

Whereas, many other people in our prison population, unfortunately, come from poor economic backgrounds. And there's not a correlation between a poor economic background and a propensity to hard criminal activity. That's not what I'm saying.

Mr. CARLSON. That's correct.

Senator BIDEN. But that when you move someone from a tenement into a prison, there is a distinct loss of freedom of movement, but in terms of the emoluments of life there is not much difference. Therefore, maybe what we must do is construct a punishment system that is somehow humane but is viewed by that person put into prison as punishment.

Theoretically, if we could find out one thing that every prisoner individually would least like to be exposed to, that would do the trick for us.

I'm sure you've heard that whole line of argument.

Mr. CARLSON. Yes.

Senator BIDEN. I'd like you to comment on it.

Mr. CARLSON. I basically agree.

In recent years, people have been unwilling to talk about the concept of punishment—as if it's something which is foreign to our way of life.

I, for one, don't believe so at all. I think punishment is basic to the way we raise our children and the way we manage any system of government or business in the private sector.

To me the important element is the certainty of punishment.

I've dealt with offenders in a number of institutions—State as well as Federal—and have known a number of them after they've been released. The one thing which strikes me is that the certainty of punishment is something that we've overlooked in this country. The fact that the criminal frequently plays the odds and realizes that the chances of apprehension are low, and the chances of conviction are lower, and the chances of incarceration are even lower.

If we could increase the certainty of punishment, we could accomplish a great deal in stemming the tide of crime in this country.

Senator BIDEN. Does the peer attitude toward conviction impact, in your opinion, very much?

For example, as I said, I did almost all criminal defense work. I found time and again, among both my black and white clients whose parents, brothers, and sisters had been arrested and/or had records, that there was just no stigma at all. As a matter of fact, if they were young, they were considered pretty heavy dudes if they ended up in the position where they also went to the "Big House."

Does that impact in any way?

Mr. CARLSON. It certainly does. I think that's one of the unfortunate characteristics of our society today, Mr. Chairman. There are some people who feel that having been convicted of a crime is not bad. It's something to be somewhat proud of as far as some young offenders are concerned.

Many offenders go back to the same environment they came from, the same peer pressure, and the same group experiences which frequently lead them back into further criminal activity.

Senator BIDEN. Last week, at the request of one of my colleagues from another State, I met with two gentlemen. One was a very successful businessman, and the other was a very successful convict who had spent 25 or 27 years of his life in prison—a bank robber—and a four-time loser. He is now involved in a program, which I think you have some acquaintance with.

Mr. CARLSON. Yes; I do.

Senator BIDEN. Transactional analysis.

I must admit a predisposition on my part, I guess because I've been conned so many times as a defense lawyer. When someone starts to discuss with me peace, love, brotherhood, you're all right and you've got it all together, I begin to look at him and wonder whether or not he's looking at me like he looks at the parole board.

I used to stand next to one of my clients at the parole board. They learned quickly what was the right thing to say.

I represented clients who know more psychiatric terms than most of the psychiatrists I go to cocktail parties with.

I wasn't sure whether I was being conned again or not.

The program that was described to me by these two gentlemen—and I hope this is the first of several hearings on this subject that we'll

be having and I hope to have maybe some people from this program—seemed to be fairly successful.

The premise, as I understood it, was that the only person who is really going to be able to get that inmate's head straight—to use the present-day jargon—is another inmate, someone else who has been there and somebody who understands the problem and someone to whom they can relate and not a straight, white collar, middle-class, honkey psychiatrist who doesn't have any idea what that person is going through—according to these two gentlemen, both of whom happen to be white, but still the same jargon was being used with me.

They are saying that the success of the program—assuming it is successful, as they argue it is—is based upon the ability of several bright, trained inmates—ex-cons—being able to gain the confidence of each of the people in the program.

They went on to say to me, to use their analogy, that there are of the 100 percent of the prison population, 60 percent who are ready to be cured; 20 percent are hardened and nobody can get to them; and another 20 percent is on the fence.

But the 60 percent that is there—the first thing that has to be done to prevent that criminal from going back and becoming a criminal again is for them to understand why they committed the crime in the first place.

When it is all said and done—and I apologize for this rambling explanation of my recollection of this presention—it seemed as though what they were asking and arguing for was the need for lay psychiatrists, which made me somewhat skeptical.

I wonder whether or not you would comment on the program to the degree that you are familiar with it.

Mr. CARLSON. Mr. Chairman, I am very familiar with the program.

Your colleague in the Senate also referred the two gentleman to my attention, and I talked with them while they were in Washington.

I met the former inmate on several occasions while he was in our system. He recalled those meetings better than I did.

But I do recall him from an experience I had at McNeil Island, Washington, some 7 years ago when I attended one of these group sessions.

I think it clearly points out there is no panacea for criminal behavior. The transactional analysis program he described is an excellent program for some inmates—those that are motivated, articulate and interested in that type of activity. I certainly stress the need to develop more programs of that type.

As you know, the man we are referring to became involved in the program while he was in custody. He did very well and was eventually paroled and has lived an exemplary life since he's been released from custody.

It points out that for those inmates who are motivated and have a desire to help themselves, we must provide opportunities for self help. I agree with you, Mr. Chairman, that we can't coerce change. It has to result because they want to take advantage of that particular type of activity.

Senator BIDEN. Swiftness and fairness of the sentence—speaking of swiftness and fairness, that was James O. Eastland, chairman of the full committee, who has requested my presence at the other hear-

ing. And if I do not go swiftly and fairly soon, we may not have any more hearings. [Laughter.]

But I would like to ask just a few more questions, at the risk of my job. [Laughter.]

The swiftness and fairness of a sentence: By swiftness, I assume you mean the time from which someone is arrested until the sentence is actually meted out?

Mr. Carlson. That's correct, Mr. Chairman.

Rather than 2 or 3 years of delay that we see all too frequently today.

Senator Biden. Is there any discernible difference between the activity of a prisoner awaiting trial for an extended period of time and a prisoner who has received his or her sentence?

Mr. Carlson. There is a fundamental difference, of course, in terms of the way they are handled.

First of all, the former group are presumed innocent in the eyes of the law, and we have to treat them as such. I think they ought to have greater privileges and greater opportunities than those who have already been sentenced. We do keep them separate. We keep them in different facilities, and try to keep them apart from one another, because they are two distinct groups. One has been adjudicated, and the other group is being held in custody because they lacked the resources to make bond.

Senator Biden. It seems to me that we in this country often, regardless of our idiological bent, do a lot of pontificating and don't follow up very much.

For example, those who are suggesting that we have to get tougher with the criminals and we have to do away with those pointy-headed judges and we're going to have to really see to it that we try a different system, are the ones who are arguing against my prison construction bill.

We have a confluence of two streams. The conservatives say that we want to get tougher with criminals and we have to mete out punishment that is deserved. Liberals say that we must swiftly bring people to trial and determine whether or not they are innocent or guilty.

All of that seems to create sort of a funneling effect. We're putting these tens of thousands of accused into this funnel, and we're moving them down into a bottleneck.

Once we get through the system, whether it results in conviction as a consequence of the swiftness of the judicial process or the desirability to see that they go to jail, we don't have enough places to put them.

In my State, for example, the Federal district court judge has said—and we have a new, modern prison in Delaware that was supposed to be a model and is now already outmoded and considered to be a white elephant but was built only about 4 or 5 years ago—you must reduce the prison population 10, 20, or 30 percent. I forget—it's 15 percent. That's a significant percent.

Judges at the State level—we were calling up the Army, the Navy, the military in the neighboring States, the Federal prison system saying:

Can you take any of these people that we have? And when they couldn't, we found that we were literally having to release people who were convicted, sen-

tenced and in many instances hardened criminals and we were putting them back in the stream.

Yet we say: If society wants people to be locked up—if they want a just desserts system—it's going to cost a great deal of money for that system, isn't it?

Mr. CARLSON. Yes; it is Mr. Chairman.

I think many people overlook the fact that you can't have longer sentences, and you can't have more people incarcerated, without providing resources to take care of them.

Senator BIDEN. You pointed out that 30 percent—only 30 percent—of those convicted of a felony or all crimes?

Mr. CARLSON. All crimes.

Senator BIDEN. All crimes are in prison. Was that the Federal system or total?

Mr. CARLSON. That's the Federal system, Mr. Chairman.

Senator BIDEN. So only 30 percent—7 out of 10—convicted persons in the Federal system are not in jail for one reason or another. Either they never got there, they received probation, or they were paroled, or whatever reason.

Mr. CARLSON. That's correct.

Senator BIDEN. And many of those people are convicted felons aren't they?

Mr. CARLSON. Yes; they are. The substantial percentage would be.

Senator BIDEN. As I said, I have many more questions for you, but I'm going to take the liberty of assuming that you will be as cooperative with me as you have been with everyone up here. You are able and nearby so we could meet, both privately and publicly in a forum like this. So I won't hold you up much longer.

I really appreciate your testimony this morning, and I will be asking you back another time if I may do that?

Mr. CARLSON. I look forward to the opportunity, Mr. Chairman.

Senator BIDEN. Thank you very much. I appreciate your coming.

Our next witness I would like to beg his indulgence and ask if he minds if I go over and see what the chairman of the full committee wants.

Professor von Hirsch of Rutgers University is our next witness.

He was scheduled at 10:45. Professor, believe it or not, we are on time at 10:45, which is rare. But, if I may, I am going to briefly recess the hearing. I must go over to the Capitol.

I don't expect I will be there very long, and hopefully I'll be back by 11 o'clock.

Do you have particular time constraints? Is there a plane you have to catch?

Mr. VON HIRSCH. No.

Senator BIDEN. Fine. Hopefully I'll be back by 11 o'clock. If I'm going to be any later, I'll call and they'll inform you of the time.

So we will recess for 15 minutes.

[Recess taken.]

Senator BIDEN. Would the hearing please come to order.

Professor, I apologize for the delay and for your indulgence.

Andrew von Hirsch is Associate Professor at the Graduate School of Criminal Justice, Rutgers University of Newark, N.J. He is also

senior research associate at the Center of Policy Research in New York City.

He was the principal author of "Doing Justice: The Choice of Punishments" the report of the committee for the study of incarceration, an interdisciplinary study group founded by the Field Foundation and the New World Foundation. The report was published by Hill and Wang in 1976.

He is now heading the study on alternatives to parole funded by the Law Enforcement Assistance Administration, Washington, D.C.

The report is expected to be completed in late fall of 1977.

Mr. von Hirsch also was a member of the Twentieth Century Fund Task Force on criminal sentences, whose report "Fair and Certain Punishment" was published recently.

He worked with the Oregon Legislature in the drafting of the State's parole reform statute enacted in 1977.

He is a graduate of Harvard College and Harvard Law School. He is a member of the New York Bar and is 43 years old.

You look much younger than that.

Again, I apologize and would suggest that you proceed in any way you would like.

We can put your entire statement in the record, and you can read excerpts from it or proceed through the entire statement, however you prefer.

STATEMENT OF ANDREW VON HIRSCH, GRADUATE SCHOOL OF CRIMINAL JUSTICE, RUTGERS UNIVERSITY, NEWARK, N.J.

Mr. VON HIRSCH. Thank you, Mr. Chairman.

First of all, it's a great pleasure to be here. I think these are important hearings.

I think what they are doing is focusing on the fact that there are some important changes in thinking in the area of punishment.

I think it's very important to have hearings on the question of the ideas underlying the punishment of convicted criminals. Until we have a better idea of what the rationale should be, I don't think we know what measures should be taken in this area.

As far as my testimony, let me place it in the record rather than read it. I find that I tend to doze off when other people read their statements into the record, so I will refrain from reading mine.

Senator BIDEN. Your entire statement will be put in the record.

[The material follows:]

PREPARED STATEMENT OF ANDREW VON HIRSCH, GRADUATE SCHOOL OF CRIMINAL JUSTICE, RUTGERS UNIVERSITY

I am honored to participate in the Subcommittee's hearings on rehabilitation and the other aims of punishing convicted criminals. There have been important changes in thinking on these subjects in the last decade, and the Subcommittee is doing a service in focusing Congress' and the public's attention on them.

My own credentials can be stated briefly. I was principal author of "Doing Justice: The Choice of Punishments",[1] a study of the aims of criminal sentencing, funded by the Field Foundation and the New World Foundation. The report urged abandoning traditional rehabilitatively-oriented penal philosophy,

[1] Andrew von Hirsch, "Doing Justice: The Choice of Punishments" (New York: Hill and Wang, 1976).

as unworkable and unjust. It recommended, instead, a "just deserts" rationale in which the severity of penalty would depend on the seriousness of the defendant's crime or crimes. I am now completing a study on alternatives to parole, funded by the Law Enforcement Assistance Administration.[2]

I. WHY PUNISH?—REHABILITATION AND ITS ALTERNATIVES

The decline of the traditional rehabilitative penology.—The dominant penal philosophy during this century has been a therapeutic one. Punishment was supposed to rehabilitate. Judges, parole boards and correctional officials were supposed to have wide discretion so they could tailor the disposition to the offender's needs. Ten years ago, when the President's Crime Commission wrote its report, this conception was still preeminent.[3] Now—as the very fact of these hearings suggests—its influence is waning.

The defects of this therapeutic philosophy—which have been described in my book and several other recent studies[4]—can be summarized briefly.

The capacity to cure criminality is lacking. A wide variety of rehabilitative programs have been tried and evaluated, ranging from psychiatric counselling to Skinnerian behavior modification techniques. The results have been unimpressive. Not only do prison-based treatment programs fail, but "community based" programs outside prisons have been disappointing also.[5] This is not to say that nothing will ever work. Treatment methods might eventually be refined so they do succeed on carefully selected subgroups of offenders. But such sophistication may elude us for some time; and even when achieved, is apt to be limited in scope: A select minority might prove responsive to treatment, but hardly the bulk of the offender population. Nor is this to say that most offenders are incorrigible. Contrary to oft-quoted recidivism statistics of 70 or 80 percent, recent evidence suggests that most convicted offenders do not choose to return to crime.[6] The failure of rehabilitation consists, rather, in the fact that the offender's choice cannot readily be influenced by correctional therapy. It is his own experiences, character and outlook—rather than the state's treatment programs—which seem to determine whether he offends again.

The wide discretion which judges, parole boards and other penal officials have been granted, in the name of treatment, has led to gross disparities. Decisionmakers whose decisions are unchecked by general standards, we have learned, decide similar cases differently.[7]

Worst of all, the rehabilitative penology was simply unjust. It made the severity of punishment depend, not on the seriousness of the defendant's crimes, but on his supposed amenability to treatment. The defendant convicted of a grave offense could be treated in the community if he was considered a good prospect for rehabilitation; the individual convicted of a lesser infraction could be imprisoned if thought unresponsive to therapy. Offenders thus were being punished on the basis of what they were expected to do in the future, rather than on the basis of the blameworthiness of their criminal acts.[8]

In thus criticising the treatment rationale, I am not suggesting that we should stop experimenting with treatment programs. But what is essential is that we stop making the severity of punishment depend on treatment considerations: the offender's supposed needs for treatment ought not determine whether or how long he is confined. Once that decision is made on other grounds—once

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[2] This study, under LEAA Grant No. 76-NI-99-0038, will be completed in the late fall of this year.

[3] "Doing Justice," supra note 1, chs. 2–4.

[4] Ibid.; American Friends Service Committee, "Struggle for Justice" (New York: Hill and Wang, 1971); Twentieth Century Fund, "Fair and Certain Punishment" (New York: McGraw-Hill, 1976).

[5] James O. Robison and Gerald Smith, "The Effectiveness of Correctional Programs," 17 "Crime and Delinquency" 67 (1971); Robert Martinson, "What Works?—Questions and Answers About Prison Reform," "The Public Interest" (Spring 1974), p. 22; Douglas Lipton, Robert Martinson and Judith Wilks, "Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies" (New York: Praeger, 1975); Paul Lerman, "Community Treatment and Social Control" (Chicago: University of Chicago Press, 1975).

[6] See, e.g., studies reported by Robert Martinson in "In My Opinion," "Corrections Magazine" (December 1976).

[7] Marvin E. Frankel, "Criminal Sentences" (New York: Hill and Wang, 1972); Willard Gaylin, "Partial Justice" (New York: Knopf, 1974); Anthony Partridge and William B. Eldridge, "The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit" (Washington, D.C.: Federal Judicial Center, 1974). See, also, Caleb Foote, "The Sentencing Function," in "A Program for Prison Reform" (Cambridge, Mass.: Roscoe Pound—American Trial Lawyers Foundation, 1972).

[8] "Doing Justice," supra note 1, ch. 15.

it is decided (say) that the offender deserves so many months' confinement for his crime—then and only then should one be able to select a treatment that can be offered within that space of time.[9]

The dangers of easy substitutes: Isolation instead of rehabilitation.—The first step—of rejecting the traditional rehabilitative penology—is easy to take, for the latter's defects are now well known. What is more difficult is finding an adequate alternative conception. It is upon this critical task which I hope the Subcommittee will focus its efforts.

There is a real danger that, when the rehabilitative view is rejected, we accept substitutes that are, in fact, little or no better. A striking illustration is found in an editorial a fortnight ago in the New York Times. After describing the failures of rehabilitation, the editorial seizes the next most obvious replacement: isolation. If we cannot cure criminals, the thinking runs, we should lock up those who are dangerous. In the edtorial's words: "* * * the realistic priority today is simply to keep thee apparently incorrigible from menacing others."[10]

But before embracing this view, we should stop and ask: How good are we at identifying who is and is not incorrigible? Is our capacity to predict dangerousness accurately so much better than our capacity to cure? It does not seem to be. Careful studies of prediction methods have shown that when forecasting serious criminality, there is a strong tendency to overpredict; most persons identified as risks will be "false positives"—persons mistakenly predicted to offend again.[11] And is this theory any more just than the rehabilitative conception it would replace? I think it is not. The severity of the offender's punishment—whether and how long he is to be imprisoned—would still depend on the offender's predicted future behavior, rather than on the blameworthiness of his past criminal conduct.

In fact, a shift to this kind of incapacitative rationale may be little change at all. Isolation of the dangerous was always present in the conceptions of rehabilitators. The idea was that—while the good risks should be cured—the bad risks should be separated from society until they are no longer a public hazard. A reading of any of the originators of the treatment ideal—Warden Brockway in later 1870's for example[12] discloses that (despite the rhetorical emphasis on rehabilitation) the point was always made that the system should seek to isolate those likely to return to crime.

Toward a fairer conception: Looking to the seriousness of the criminal conduct.—Punishment is a solemn act of imputing blame. Its severity should thus comport with the blameworthiness of the defendant's criminal conduct. To achieve a more just system, we should stop trying to base decisions about punishment on what we think the offender (or other potential offenders) will do. Instead, we should try to make penalties commensurate with the seriousness of the offender's crimes.

In my book, Doing Justice, I try to develop a model for punishing criminals which is based on this simple idea. The model is more fully described in the attached article which I wrote for Current History last year,[13] but its main features may be summarized as follows:

The primary criterion for the severity of punishment should be the gravity of the defendant's past crime or crimes. His supposed likelihood of offending again ought not determine the penalty.

Sentencing discretion should be considerably reduced, through standards which describe the quantum of punishment for different crimes. These would take the form of "presumptive sentences." For each gradation of seriousness, a definite penalty—the presumptive sentence—would be set. Offenders convicted of crimes of that gravity would normally receive that specific sentence. However, variations would be permitted when there were unusual circumstances of mitigation or aggravation.

Imprisonment, because of its severity, would be limited to serious crimes, such as offenses of actual or threatened violence and the more heinous white

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[9] *Ibid.*; Norval Morris, "The Future of Imprisonment" (Chicago: University of Chicago Press, 1974).

[10] Editorial, New York Times, September 16, 1977.

[11] A. von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," 21 "Buffalo Law Review" 717 "Doing Justice," supra note 1, ch. 3; Norval Morris, supra note 9, ch. 3.

[12] Zebulon R. Brockway, "The Ideal of a True Prison System for a State," National Congress on Penitentiary and Reformatory Discipline, "Transactions" (1870).

[13] Andrew von Hirsch, "The Aims of Imprisonment," "Current History" (July/August 1976), p. 1.

collar crimes. And even then, time in prison would be measured with strict parsimony: most stays in prison would be three years or less. For the non-serious offenses, penalties less severe than imprisonment would be used. These would not be rehabilitative measures but simply and explicitly, less severe punishments. Warnings, limited deprivations of leisure time and, perhaps, fines would be used.[14]

Several states have recently been moving in this direction. Oregon has just adopted legislation which calls for the setting of standards on duration of imprisonment, and provides that the primary objective of those standards should be "punishment which is commensurate with the seriousness of the prisoner's criminal conduct."[14] Pennsylvania's House Judiciary Committee only this week reported a bill which creates a commission to set sentencing standards, and requires the commission to follow a similar rationale.[15]

A model such as this is intended to suggest the kinds of questions that we should be asking, rather than to provide neat answers. Important unresolved issues include the following:

How can criteria for the seriousness of crimes be devised? While sociologists have found considerable popular consensus as to which crimes are more serious than others,[16] translating such perceptions into workable standards will be a considerable task.

What would the collateral crime-control effects be? In the "Doing Justice" model, for example, anyone convicted of a sufficiently serious crime would face some time in prison. Would this enhance deterrence, by increasing the likelihood of substantial punishment for such crimes? Would it have incapacitative benefits, as James Q. Wilson has suggested?[17] (Were all offenders convicted of serious crimes imprisoned for specific periods, he argues, those inclined to offend again would be taken out of circulation for a portion of their criminal careers.) A panel of criminologists and economists working under the auspices of the National Academy of Sciences has been studying how such effects could be measured—and found reliable estimates exceedingly difficult to make.[18] But the matter is certainly worthy of further study.

Were such estimates possible, how much should they influence the penalty structure? Here, there are a number of possible variants from the strongly desert-oriented view suggested in "Doing Justice." One is that suggested by James Q. Wilson in an article this spring—using a mixed model in which desert is given primary emphasis, but deterrent and incapacitative effects are given some weight; in Wilson's words:

"Were I given the task of designing penal sanctions, I would begin as a retributivist—i.e., as one who sees the first to be that of justice. I would try to propose penalties that seemed morally suitable for crimes and circumstances of various kinds. [Others] and I might disagree about some of these penalties, though I am willing to guess that, locked in a room for a day or so, we would find that we disagree on relatively few. But in justifying that schedule of penalties, based in the first instance on a concept of "just deserts," I would try to estimate the gains to society that might result from the deterrent or incapacitative effects of those penalties. Such facts and estimates would help society decide whether it agreed with those penalties and whether it was prepared to spend much or little to see them institutionalized."[19]

Another mixed model has been suggested by Norval Morris: the seriousness of the crime should determine the permissible range of severity; but within that range, deterrence and other crime-control factors should be looked to.[20]

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[14] Oregon Session Laws, 1977, Chapter 372.

[15] General Assembly of Pennsylvania, House Bill No. 953 (Printer's No. 1102), as reported by House Judiciary Committee, Oct. 3, 1977.

[16] Thorsten Sellin and Marvin Wolfgang, "The Measurement of Delinquency" (New York: John Wiley, 1964); Peter H. Rossi, et al., "The Seriousness of Crime: Normative Structure and Individual Differences," 39 "American Sociological Review" 224 (1974). For discussion of some of the philosophical problems of using popular ratings for this purpose, see "Doing Justice," supra note 1, fn at p. 82.

[17] James Q. Wilson, "Thinking About Crime" (New York: Basic Books, 1975), chs. 8 and 10; see also Andrew von Hirsch, "Giving Criminals Their Just Desserts," "Civil Liberties Review" (April/May 1976), pp. 23, 33–4.

[18] National Academy of Sciences—National Research Council, "Report of the Panel on Deterrent and Incapacitative Effects" (Draft, 1976).

[19] James Q. Wilson, "Thinking About 'Thinking About Crime'," Society (March/April 1977), pp. 10, 20.

[20] Norval Morris, "Punishment, Dessert and Rehabilitation," (Bicentennial Lecture sponsored by the U.S. Department of Justice at University of Denver College of Law, November 12, 1976).

Underlying the debate on such specifics, however, should be a common objective: devising a system of punishments that is more fairly proportioned to the gravity of the crime. The principal defect of the traditional rehabilitatively-oriented penology was its preoccupation with trying to engineer lower crime rates to the exclusion of questions of justice. It is time we recognize that no penal methods, however enlightened or ingenious, are likely to work great changes in our crime rates. We would be wiser to seek the more modest and humane goal of trying to make the penal system a juster—or at least, a less unjust—one.

II. IMPLEMENTATION PROBLEMS

Institutionalizing this new conception presents problems which the Subcommittee should also consider. If there are to be standards for duration of imprisonment, which agency should set them? Which agencies, if any, should be abolished as obsolete? Unwise implementation choices can—and already have in some jurisdictions destroy the usefulness of the changes we have been urging. To illustrate, let me touch upon two such issues: (1) The role of the legislature, and (2) the role of the parole board.

The Role of the legislature.—It has sometimes been assumed that if there are to be standards for punishing criminals, the legislature should set them. California tooke this approach in its new code of determinate sentences—and the results were most unfortunate. Last year, the California Legislature did enact a reasonably coherent code of presumptive sentences—but this year, the code has been overwhelmed with numerous amendments that not only will lengthen sentences greatly but revive much of the wide discretion which the legislation was originally designed to restrict.[21]

The fact is that a legislature—faced with so many other pressing public concerns—has little time and resources to devote to the laborious and technical task of setting penal standards—The fact is also that politics interfere. The public's fear of crime makes it tempting, in a legislative forum, to refer the difficult questions to some other official's discretion, or to adopt unrealistically harsh penalties in order to demonstrate "toughness on crime" to the electorate.

A legislature may delegate its rule-making powers on specialized subject-matters to other agencies—as Congress has done with such regulatory agencies as the S.E.C., F.T.C., F.C.C., etc. This is an area where delegation seems appropriate. The legislature could continue to prescribe maximum permissible penalties and give the standard-setting agency guidance as to the rationale to be followed. But the details of the standards should be developed by a specialized agency which has more time to devote to the task, and which is somewhat freer of political pressures. A variety of agencies could be selected for the task: a new sentencing commission (as the present Federal Criminal Code bill and the Hart-Javits bill propose[22]); a new body whose responsibility is to decide releases from prison (as the A.B.A.'s Committee on the Legal Status of Prisoners has proposed[23]); or else, by the parole board, as the new Oregon statute would do.[24]

Abolish parole?—The Attorney General and Senator Kennedy have recently called for the abolition of parole, and the Federal Criminal Code bill, in the form reported by the Subcommittee on Criminal Laws and Procedures, would create a near-presumption of no parole. The argument made in support of abolition sounds simple and plausible enough: parole was historically based on the rehabilitative penal philosophy; hence if this philosophy is abandoned, so should parole. But matters are actually more complicated.

I have no sympathy with much of the parole board's present practice. There are no standards for release; the release decision is needlessly delayed until well into the offender's sentence;[25] too much emphasis is given to rehabilitative/pre-

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[21] California Session Laws, 1976, Chapter 1139; Phillip Johnson and Sheldon Messinger, "California Determinate Sentencing Statute, History and Issues," paper presented at the Determinate Sentencing Conference, Earl Warren Legal Institute, University of California at Berkeley, June 2, 1977.

[22] Federal Criminal Code bill, 95th Congress, 1st Session, S. 1437 (Committee Print, August 4, 1977); Hart-Javits bill, 95th Congress, 1st Session, S. 204 (January 12, 1977).

[23] American Bar Association, "Tentative Draft of Standards Relating to the Legal Status of Prisoner," 14 "American Criminal Law Review" 377 (1977), Standard No. 9.

[24] Oregon Statutes, supra note 14.

[25] This is no longer true, however, of the United States Parole Commission. It has now established guidelines for its release decisions; and has moved toward informing prisoners early of their expected time of release.

dictive notions of whether the offender is "ready" for release; and post-release supervision may be largely a waste of money.[26] But these are all matters that could be reformed. The board could be directed to formulate standards for release, and be required to give primary weight to the seriousness of the offense in formulating those standards. The board could be called upon to inform the offender of his release date shortly after he enters prison. And the supervision could be scaled down or even eliminated. In fact, the new Oregon statute would do precisely these things (except for the elimination of supervision.)[27 28]

Would it be better to keep parole in this revised form? Or eliminate it entirely? Before opting for its elimination, it is worth considering how parole affects the way time in prison is calculated. There is now a dual system of reckoning time. Judges are accustomed to imposing lengthy sentences of confinement—which the participants in the process do not expect to be carried out; which could not be carried out given the limitations of prison resources; and which would be disproportionately severe were they carried out. The parole board's function—perhaps its most important practical role—is to decide shorter, actual durations of imprisonment. The prisoner who gets a six-year sentence can normally expect to be paroled after two or three.

Were parole abolished, there would be a single reckoning: real time in prison. The judge's sentence would define the period to be actually served. The transition from dual to single time could easily give rise to misunderstanding, however. The appearance of a shift towards leniency can be created, even when there has been no change in the real quantum of punishment. Suppose the practice in a given jurisdiction had been to give first-time armed robbers an average sentence of six years, and parole them, in most cases, after about one-third their sentence had expired. Suppose parole is abolished and a two-year presumptive sentence is prescribed for first offenders convicted of armed robbery. That would involve little actual change in the average stay in prison: it remains at two years. But to those accustomed to hearing sentences expressed in the old manner, it will seem to be a large sentence reduction: two years instead of six![29]

Is such misunderstanding worth risking? Perhaps it might be, with sufficient precautions taken. If a single-time system is established, the agency setting the standards would need a clear directive that it adjust sentence durations downward to reflect the fact that it is dealing with real, not apparent time. The Hart-Javits bill, which eliminates parole and creates a sentencing commission to set the standards, would accomplish this by setting strict limits on the amount of actual confinement which the commission is permitted to prescribe. The bill expressly requires that the commission's standards make sparing use of durations in excess of five years.[30]

Without such precautions, a shift to single time could lead to a large escalation of sentences. This is a major defect of the Federal Criminal Code bill's present provisions. The bill calls upon the sentencing commission to prescribe "real time" sentences that are not parolable. Yet it contains no clear requirement that the commission reduce sentence durations downward to reflect the fact that it is dealing with real rather than apparent time. And the statutory maximum sen-

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[26] See. e.g., David T. Stanley, "Prisoners Among Us: The Problem of Parole" (Washington, D.C.: The Brookings Institution, 1976).

[27] Oregon Statutes, supra note 14.

[28] The new law requires the parole board, after consulting a joint advisory commission of judges and parole officials, to set standards for its release decisions—(in its language) to prescribe "ranges of duration of imprisonment to be served for felony offenses prior to release on parole." The statute prescribes a desert-oriented rationale which the board must follow in setting those standards, as follows:

"§ 2 * * * (2) The ranges [of duration of imprisonment prescribed by the board] shall be designed to achieve the following objectives:

"(a) Punishment which is commensurate with the seriousness of the prisoner's criminal conduct; and

"(b) To the extent not inconsistent with paragraph (a) of this subsection:

"(A) The deterrence of criminal conduct; and

"(B) The protection of the public from further crimes by the defendant.

"(3) The ranges, in achieving the purposes set forth in subsection (2) of this section, shall give primary weight to the seriousness of the prisoner's present offense and his criminal history."

The board is required to inform the offender early of his release date and that date can later be changed only for "serious misconduct" in prison.

[29] This argument will be elaborated in my forthcoming report on alternatives to parole, supra note 2.

[30] Hart-Javits bill, supra note 22, sec. 8.

tences prescribed in the bill are still the very high ones associated with the traditional dual-time system—twelve years for burglary, six years for auto theft, and so forth.[21] The dangers are evident. I very much hope that—as this important legislation continues through Congress—these needless risks will be eliminated.

BIOGRAPHICAL STATEMENT

Andrew von Hirsch is associate professor at the Graduate School of Criminal Justice, Rutgers University, in Newark, New Jersey. He is also Senior Research Associate at the Center for Policy Research in New York City.

He was principal author of "Doing Justice: The Choice of Punishments," the report of the Committee for the Study of Incarceration, an interdisciplinary study group funded by the Field Foundation and New World Foundation. The report was published by Hill and Wang in 1976.

He is now heading a study on alternatives to parole, funded by the Law Enforcement Assistance Administration, Washington, D.C. The report is expected to be completed in the late fall of 1977.

Mr. von Hirsch was also a member of the Twentieth Century Fund's Task Force on Criminal Sentencing, whose report, "Fair and Certain Punishment," was published recently.

He worked with the Oregon legislature in the drafting of that State's parole reform statute enacted in 1977.

He is a graduate of Harvard College and Harvard Law School. He is a member of the New York Bar, and is 43 years old.

Mr. VON HIRSCH. Let me just summarize some of the points that I try to make in the statement.

First of all, as to rehabilitation.

I think one of the things that is really quite extraordinary is the change in official or prevailing thinking on the subject of punishment over the last several years.

When I started writing "Doing Justice," which was in 1971, there was at that time a number of studies suggesting that perhaps rehabilitation didn't work as well as it should; but there was still a very, very strong belief that the ideal way to dispose of convicted criminals was to sentence them according to their needs for treatment.

It was still thought that if there were problems, they were problems of finding effective methods. And I think we've gone beyond that now.

I think that we are beginning to see that there are more problems to the traditional ideal of rehabilitation as it applies to punishment than simply the question of whether it works.

I note that Professor Wilkes will be testifying after I will. She has been involved in a number of studies on the effectiveness of programs.

The impressions I have of what they show—not that nothing works—but that not many programs are effective. Where they are effective, it is for small groups of offenders. Above all, the whole technology of rehabilitation is still at a primitive enough stage where it is very hard to use it as a guide in deciding how much somebody should be punished.

But there's another side of the rehabilitative ideology that interests and disturbs me. It is the question of fairness.

Is it fair, or just, to take somebody who has been convicted of a crime and decide whether he's going to be imprisoned, or how long he's going to be imprisoned, on the basis of what somebody thinks are his needs for treatment.

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[21] Federal Criminal Code bill, supra note 22, secs. 994, 2301, 3831. For my criticisms of an earlier version of the same bill, see my testimony before the Senate Criminal Laws and Procedures Subcommittee, June 9, 1977.

I submit that—even if you did know what his needs for treatment are—it would be unfair.

I remember one example, of a talk a prominent Federal judge gave at which I was present. He told a story where he had three young men before him who had been convicted of violating the kidnaping statute because they had robbed a gas station and taken the attendant across the State line in their car. They didn't injure him and let him go after a short ride. The judge sentenced two of these defendants to 5-year imprisonment and put the third on probation, although all three of them had been involved in the identical transaction and all three, I believe, were first offenders.

He explained that the reason he did so was that he could tell that two of them were hardened criminals while the third was somebody who had potential for rehabilitation. He explained to us that, in fact, that third young man was now working in a flower shop and had become a fine young man—and that showed it was an excellent decision.

I submit to you, Mr. Chairman, that it is not an excellent decision; that there is something fundamentally unfair about taking three people who have committed an act of roughly equal blameworthiness and subjecting them to punishment of very, very different severities.

I submit that would be unfair, even if we knew something about how to treat.

This doesn't mean that we should give up efforts for treatment, but it does mean two things.

Senator BIDEN. Excuse me. If I could interrupt you there.

Doesn't that imply that you do not believe that rehabilitation is the primary goal of the criminal justice system?

Mr. VON HIRSCH. That's right; I don't believe it's the primary goal.

Senator BIDEN. I'm not arguing that. I just want to make sure I understand it.

Mr. VON HIRSCH. And I can put it more specifically that I don't think that rehabilitation should be used as the criterion for deciding how much you punish—how severely you punish.

So my view is that if you are deciding, for example, whether somebody should be imprisoned, or how long he should be imprisoned, his need for treatment should not be considered for that decision.

It's only once you've decided that this person, say, should be imprisoned, for other reasons, for 6 months (or a year or whatever) then you can begin to think about treatment programs during the period of his confinement.

There are two kinds of programs—first of all, as Mr. Carlson mentioned before me, in any case you need programs of simple help. Not rehabilitation in the crime control sense of reducing his criminal propensities, but simply help to overcome some of the social disabilities that these people have and some of the problems that they have.

But beyond that, I think it's perfectly sensible to try rehabilitative programs, provided——

Senator BIDEN. I understand what you're saying, but the point that I'd like to make—because it is a departure from what has been considered to be—it is a basic philosophic difference that you have—and I'm not sure that I don't share it with you—that the criminal justice

system, even if you knew precisely how to rehabilitate someone, should still mete out punishment.

I'm not sure why you believe that.

Mr. VON HIRSCH. Let me try to explain.

I think the reason is that if you look at what the criminal sanction is and look at the way we understand it and the way the criminal understands it, what it is is a solemn act of condemnation. That is the whole way in which punishment is perceived.

You are indicted for a crime; if you are convicted, you are found guilty. There are all sorts of ways in which punishment is fraught with overtones of blame.

One of the interesting cases which I think we all followed, for example, was some time ago in the Watergate events when Mr. Nixon received a deficiency judgment from the IRS for a large amount of money.

He was very emphatic at that time, as you remember, that this deficiency was levied as a deficiency and not as a penalty.

The reason was because of it were a penalty, it would be an implication of wrongdoing—of misbehavior.

It seems to me that that is true. In other words, that any sort of criminal punishment is an indication of wrongdoing, and an indication of blame; and, therefore, it follows that the severity with which you punish is a way of suggesting how blameworthy or how much blame was imputed to you.

If you put somebody on a suspended sentence, it's a way of saying: We are not very morally indignant. If you give somebody a prison sentence of 5 years, it's a way of saying: We are severely condemnatory of your behavior.

If that's true, and I think it is true, and that's the way we understand punishment—that's why punishment stigmatizes the way it does—then it seems to me very important as a matter of fairness that the severity of punishment should be apportioned to how reprehensible—how serious—the conduct is.

The problem in my earlier illustration, is that these three individuals committed an act which was about of equal blameworthiness. There were three; they did it together; and they had about similar criminal records. And yet two of them were being subjected to the grave social condemnation of a substantial period of imprisonment and one of them was given a much more lenient sentence, which implied somehow "we are not nearly as disapproving of you." Yet the conduct was conduct which was equally reprehensible in all three cases.

So, that's I guess the most fundamental and simplest reason why I believe that you have to apportion punishment in accordance with the seriousness of the offense.

Because I happen to be a teacher there is one parallel I always think of. And that is the grading system.

I often as a teacher get some student who comes into me and says: "Why did you give me a C on my paper?" I say: "It wasn't a very good paper." Then they say: "Yes; but if I'm given an A on that paper, it would help me get further in my studies, and my career would benefit. There'd be all sorts of terrific things that would happen. I'd be rehabilitated or habilitated. My future would be a much brighter

future, and why, professor, do you want to darken my future by giving me the C?" I try to explain that I would very much like to help him in his career, but what a grade is, is a symbol of past performance. And if you give somebody an A for a C paper, that's saying that a poor performance is a good performance. Conversely, if you take high-quality work and give it a low grade, it's the other way around.

It seems to me that punishment has that sort of grading overtones, and that's why I would——

Senator BIDEN. I think it does have grading overtones; but, again, I think there are several schools of thought in this area, and I want to try to understand. If there is a distinction, to make the distinction clear among those schools of thought.

First of all, there are those who have, to date, traditionally been believed to be in the school or camp of the liberals—the humanitarians—those who believed, and our whole criminal code was geared to this concept, that the only justification for putting someone in prison was rehabilitation.

There wasn't any other reason.

If the person who was convicted was rehabilitated as a matter of the conviction, then there is no good reason to put them in. What we really want to do with the prison system is assure that the conduct is not repeated.

Now that school of thought, in my opinion, has been—if not totally—very much discredited.

There is a second school of thought that says the reason why rehabilitation shouldn't be the basic block upon which we build our criminal system is because we don't know how to. If we knew how, then the liberals would be right—we should. If we really could apply a machine to someone's arm to determine whether or not 2 years or 5 years or 10 years would do it, then that's what that person should get as to how much time is needed to rehabilitate that person and make him a whole, productive citizen again—at least attitudinally.

There is a third school of thought that seems to be represented by your point of view today.

Even if we came upon a magic formula to determine how each of those three boys was going to react to his or her incarceration or whatever punishment was meted out, that we should not apply it differently—even if that machine said that one boy needs 50 years in order to be rehabilitated, another boy needs 5, and another boy is already rehabilitated by the trauma of going through the trial. They all should get 15 years or 5 or whatever it is. They all should get the same. Because one of the essential elements of the criminal justice system in the building block should be a concept of just desserts and accountability, regardless of whether or not you're sorry after it's done. You broke the window, and you should be punished because society views that as grave.

I'm not arguing with that. But I want to make sure that it's not confused with other witnesses who will be testifying that the reason we should go to flat time sentencing or a different sentencing procedure or different types of rehabilitation programs is because the science of rehabilitation is not a science and we don't know.

Mr. VON HIRSCH. You are entirely right that I am in the third school.

But when you talk about what it would look like if something worked, I think we have to realize what that's like.

There is one parallel we have which is, in fact, an old historic parallel; namely, the use of the decision to incapacitate. Not to rehabilitate but to restrain people who are deemed dangerous.

One of the things I mentioned in testimony—the New York Times recently had an editorial in which they said: "We can't treat, but we can isolate the people who are dangerous."

Our technology for prediction is a little further ahead than our technology for rehabilitation.

What you can do is, with predictive instruments, say that certain groups of people are higher risk groups than other people. You can state that somebody who has had a history of prior crimes is statistically more likely to commit a further crime than somebody who has never committed a crime before.

But what you can't do is have a judgment that is uniquely right about the individual. For example, when you try to predict—say you have a group of people with an extensive history of prior crimes—it will still be true that some of the people whom you predict to be dangerous will, in fact, not do it again.

Now, effectiveness of treatment—if it happens—is going to look a little the same way. If you're lucky and if you really succeed, what you're going to be able to find is that there are a group of people who are, statistically speaking, more amenable to a certain kind of treatment than another group. Success will mean that if you take that group of people who you think are amenable, they will do better, if you treat them, than a random selection. In other words, the returns will be slightly better than if you leave them untreated.

But it will still be true that some of the people whom you treat and you think are safe are going to do it again and some of the people whom you have detained longer for treatment will be people who didn't need it at all.

So you will never have, in other words, a certain treatment where there is a green light that flashes on the person's forehead saying he needs cure or not, or he is cured or not.

So I think that also one of the problems is that effectiveness, when it's achieved, will never be something that will allow us to say: You are safe; and you are not. There will be lump judgments in which we make mistakes on both sides. And you will tend to make mistakes of overprediction.

That's the other reason I have nervousness with these future-oriented—either predictive or treatment—methods.

Senator BIDEN. Essentially, right now I have really a good deal.

I don't think that the parole system and the parole boards work. I don't think they know.

We went through a period from the 1960's—an extended period—where we used to say that what we need on parole boards are more sociologists, pyschologists, and psychiatrists, and they'll be able to know.

Effectively, what we're asking under the present parole system is for the parole board to determine whether or not the green light has gone on.

We're asking them to look and say—and they are saying—that we think John Doe's green light has gone on. We, therefore, believe that the sentence which he received he need not serve out because he is now rehabilitated.

I happen to think that's a bunch of malarky. I happen to think we can't measure that; we don't know how to measure that.

And, as a consequence, we should not go out and tell society as a whole—we officials—that we know and, therefore, what we want you to do, taxpayer, is spend more money to provide for more systems that are designed to put people on the street who will go back and vandalize and victimize you all over again.

What we end up having is a revolt which we're seeing right now.

Good-thinking people are saying: We know you don't know, but you continue to tell us you know. Therefore, we don't have any confidence in you anymore. We want to get tougher.

We have people talking about longer and more severe sentences, which I don't think is the answer either.

But the reason why I went back to those three categories is this. In terms of the justification for the ultimate position taken by a public official or as the basis for a law which we pass or don't pass that alters such things as the parole system and how probation functions and the sentencing system, it has to be founded upon at least one, if not several, philosophic premises.

The one which you're suggesting to us here today is one that would not even go through the charade of determining if we know or ever will know when the green light goes on. We do know when the red light goes on. The red light goes on when the conviction is had.

Mr. VON HIRSCH. That's right.

Senator BIDEN. And at that point we should be human but certain in the penalty that we—and it is a penalty—distribute.

Mr. VON HIRSCH. I agree with that. But let me make just a few comments on it.

First of all, the problem of sentences and trying to predict future conduct historically was not limited to the parole board. In fact, what happens is that judges try to do it all the time.

If you read the Model Penal Code, they talk about undue risk. In fact, in the Model Penal Code, the same criteria is set forth for judges and parole board decisions.

It also is possible, by the way, for parole boards to change their thinking.

For example, the Federal parole system is moving in this direction. It is possible to have parole decisions made on the basis of prior conduct.

For example, Oregon has just passed a statute which I referred to in my testimony in which the parole board makes release decisions based on the seriousness of the offense, and would be required to set standards for their release decisions.

In other words, I think that the problem of trying to find the green light is something that the whole system has been guilty of.

I think the problem that it has is that as long as we do that, there is an ever growing tendency to increase the severity of the punishment.

Senator BIDEN. Right.

Mr. VON HIRSCH. Because if an official supposedly is given the task of finding when you are safe, he will release people and some of the people he releases invariably are going to offend again. The lesson that's going to be drawn is that we need more people locked up longer.

One of the things that I think is very good about the existing system of Anglo-American justice is that before somebody offends, you can't lock him up on the grounds that he's dangerous. It is simply a rule; we can't do it. In other words, no matter how many indications there are that he is a risk, you can't intervene until he's done something.

The result is that there is no outcry whenever somebody commits a first offense. We don't say "Why didn't we lock them up sooner?" If we would have a system that would allow confinement on the basis of risk, we'd be finding that more and more people would be locked up before they committed any offense.

I think the same thing should apply afterwards.

In other words, if you commit an offense, you should get a period of confinement that you deserve. When you're let go, the system should be honest to say: Look, we hope you won't offend again; we are making no guarantees. What we'll do in the future we don't know that much.

What we have done is make him pay a certain price, and maybe that will have a deterrent effect and maybe it collectively will have some incapacitative effect. But we are making no promises about what we can do for this person.

Senator BIDEN. I think that's a very valid distinction to be made with regard to the schools of thought that are now in contention on this issue.

I really apologize for interrupting. I find this very helpful, and hopefully my colleagues reading the record will find it helpful.

I'd like to pursue one thing further by way of interruption and then let you proceed.

We should make a distinction shouldn't we between a judge at the time—many times—and I guess it says something for my ability as a defense lawyer—I have stood there when the judge said: Please rise. The attorney rises and stands next to the person about to be sentenced, which I always find somewhat ironic—that we both stand.

The judge says, based upon—because in almost every State there's a requirement for a presentence report—and he has the presentence report in front of him—based upon the following things, I'm giving you the following sentence.

To date, he has had to couch his decision in language of rehabilitation. In other words, he looks at whether there is a job or a family and how stable the man or woman was beforehand, what is the likelihood of incarceration and what effect it will have.

He is doing, what you accurately pointed out, what the parole board does. He's doing it in the first instance and setting the sentence.

I know you feel, and I think I feel, that that is something he's capable of doing, and we shouldn't put that responsibility on him because he's not capable of doing it. He doesn't know when that green light will go on.

But there is room, isn't there, for the judge when sentencing to take into consideration mitigating circumstances that produced the behavior that brought on that person acting out.

For example, if there are two defendants standing in front of a judge, one of whom had tremendous stress and pressure on him to steal the money for the following reasons and at the time was intoxicated when he did it, although that is not an excuse and is only mitigating, and the other one was cold, calculating, and enjoyed the thrill of doing it, there is a difference.

The judge should—and does already—should the judge have the right to impose sentences—not of great disparity—but be given some leeway to bring into consideration the circumstances which would mitigate?

The ridiculous example that's always used but does happen. The poor man's wife dying—that kind of circumstance.

I admit it doesn't happen very often, but it does happen.

That's a mitigating circumstance, as opposed to one that would lend itself for determining whether or not rehabilitation is possible.

Should mitigation be something a judge should be able to do?

Mr. VON HIRSCH. Absolutely. Let me comment on that.

One of the things I proposed in "Doing Justice"—and which the Twentieth Century Fund report also proposed—was the idea of what we call the presumptive sentence.

What the standards should do is prescribe what, say, a nighttime burglary of a home should ordinary receive on, say, the first offense. In other words, that would be the norm.

Then you should be able to depart from that norm in both directions when there are either aggravating or mitigating circumstances.

I think, Mr. Chairman, that you rightly describe them. They are circumstances that relate not to the personality or the needs of the individual but relate to the blameworthiness of the conduct at the time he did it.

One of the classic cases, for example, is provocation as a mitigating circumstance.

Also, if you have two people committing a robbery, the fact that one is the ringleader and the other is a peripheral participant could be a mitigating circumstance for the latter.

There are surrounding facts about the crime that affect the blameworthiness of the conduct at the time.

The one thing I hope that happens is that the standards should also include general instructions on what kinds of factors constitute aggravating or mitigating circumstances.

One of the problems in the existing system—and as you rightly say, the judge takes those into account—is that there are no uniform understandings of any kind of what should or shouldn't count.

For example, one thing that you just mentioned: Should it count, as a mitigating circumstance, that the defendant afterward said he was sorry to the judge. I happen to doubt that it should. That's something on which there could be legitimate dispute, even among people who have basically my kind of philosophy.

But there should be a principle about it. It shouldn't be the fact that one judge says: I never take into account that you say you're sorry. And the other one does.

I think if you began to develop a set of sentencing standards, the most complicated and the most interesting part of the standards would be precisely that—beginning to develop not criteria but principles of aggravation and mitigation where it would help the judge in making these kinds of things. Nobody has done that systematically yet.

Senator BIDEN. Let me speak to that for a moment.

I think that may be very difficult, if not impossible.

Let me give you an example of why I have concern about that.

I think we would all agree that the social acceptable mores in this country vary regionally.

Let's take a very outmoded idea.

It is wrong for me under the law, and it is a crime and one which I think should be a crime and should exist as a crime, for me to turn around and physically punch someone in the nose who would walk by and touch my wife on the rear end. There was no assault on her, and she was not put in danger. I did assault that other person—clearly an assault and battery—and it was not warranted under the law for me to hit that person.

Now in certain areas and certain sections of the country, attitudes—from small towns to large towns—vary considerably upon whether or not that conduct is required of a husband or a wife.

Although it does not excuse, in certain areas, it may very well be something which a judge could look to as mitigation because they're of the societal values of that area or town. It doesn't make it right. You still want to discourage me from punching that person, even though the conduct of the other person was outrageous.

In other areas of the country, that is not something that is thought to be.

I'll use my own State so I don't malign anyone else. If every time a man leered or made advances toward my wife in Philadelphia, I turned around and smacked him, I'd be walking around with boxing gloves on all day.

But if I'm in Dagsboro, Del.—a town of a couple thousand people—if it happened, it would be very unusual for that conduct to occur.

How do you write that kind of thing into a code, or is that the kind of thing that you're talking about?

Mr. VON HIRSCH. Senator, you raise one of the toughest and most interesting questions—the whole question of variation by region.

First of all, I think if you're talking about principles of aggravation and mitigation, they should be written differently than the Internal Revenue Service. They shouldn't be these and these circumstances count for this much reduction. There should be some broad principles on what counts and what doesn't.

One of the things that one has to do, for example—I've spent a lot of time debating precisely the issue that you talk about.

To what extent should one allow variations based on differences in regional mores.

I think one can take one position or the other that there should or shouldn't be differences.

But the one thing is that if we began to get principles of aggravation or mitigation it would force us to confront that issue directly rather than shove it under the table.

What happens, I think, in Dagsboro—and I'm not sure—is it may turn out that even there, of the three judges sitting, one judge has the view that assault is abominable and should never be condoned and doesn't consider mitigating circumstances and the other two look to the mores.

So one has to, I think—for example, one of the things that we can do is talk about, as a mitigating circumstance, the idea of provocation—and describe provocation a little bit—in such a way as to allow community differences about what constitutes a provocation or not. In other words, some way so that we address these principles rather than sweeping them under the rug.

Senator BIDEN. I see your point.

I thought maybe the way—and I have not reached a conclusion on this—to address them is to address them in terms of the leeway with regard to presumptive sentencing. In other words, do it through the back door.

I happen to believe that everyone from Kant through Pound was probably incorrect. And Frank probably was correct in his view of gastronomic jurisprudence.

Really there is no way, no matter how we write the law and no matter what happens, that what the judge ate the night before and his or her spouse treated them the night before, isn't going to impact upon what sentence is meted out the next day.

I firmly believe what has come to be essentially a treatise law in the modern mind. He's correct. I personally do not see——

As a defense attorney, I used to pray that I drew certain judges based upon certain things.

For example, if I knew there was a particular problem that a judge was having, I would go out of my way within the law to see to it that my client did not appear for sentencing that day and draw that judge.

I firmly believe that it made a difference on what happened.

So even when we do write it, we have to write it broadly—what are considered to be mitigating circumstances that could be considered.

Even within that, I don't know how we affect a judge's individual acts.

Mr. VON HIRSCH. I'm not sure I have an answer.

First of all, we all know, as lawyers, that even if you write any detailed code—and I'm talking about for aggravation and mitigation and something that wouldn't be terribly detailed—you and I could interpret it differently. In fact, we could interpret it differently on different days probably.

In other words, we aren't going to get rid of that.

I think Frank is right about his point on gastronomic jurisprudence, except that my suggestion is not that the stomach will never influence the decision but rather that it is unfortunate if it's the only organ of the body that's used. [Laughter.]

That, I think, is what happens in sentencing today. Because there are no principles, that's just about the way it works.

I think one of the things these kinds of principles would do is—though they wouldn't leave the stomach out—they might help route some things through the brain before a decision was made.

Senator BIDEN. The practical problem I have with that is actually the business of drawing those standards.

Again, I'm not suggesting that it can't be done, but knowing how difficult it is to get major changes in the code through a legislative body of 535 persons, just based upon the question of what constitutes the parameters of the presumptive sentence, leads me to be somewhat skeptical about the ability to legislatively do what you're suggesting.

Ideally, it's the best thing to do in my opinion. I don't know how we get at that.

Mr. VON HIRSCH. There is one suggestion I would make in connection with that, and I mentioned it in my prepared testimony.

That is the question of if you want standards, who should set them?

I think you're absolutely right that a legislative body cannot deal with these kinds of issues, because of the fact that it's enormously time-consuming. Any legislature has all sorts of other things on its plate. And because it's something which because of the politics, has been very difficult to debate in an open forum.

I think that one of the unfortunate things that happened in California was the fact that they tried to develop their standards through the legislature. They got a pretty good bill the first year, and then there were amendments which entirely wrecked the bill by raising the sentences and increasing the discretion.

I think the only hope is, if you want to begin to get standards, is to do what the Federal Government has done in other areas; namely, delegate that kind of function with certain general prescriptions to some other body.

There is a debate, and it's rather complicated, about whether there should be a sentencing commission or still the parole board.

I think as far as the question of how you write those guidelines——

By the way, I think you're entirely right. I think all we can do is begin to try.

For example, I am going to be involved personally in writing the guidelines for the new Oregon statute. I think what we'll have to do is a series of trial and error about how many presumptive sentences there are—in other words, how many categories—and about how broad and narrow. I think that's the only way to do it—try.

Probably we'll come up, at best, with something so-so. It is going to be crude. I think that you're right. And I think you're right also that one can't achieve ultimate sophistication in those sorts of things. But maybe one can do better than——

Senator BIDEN. Is it naive to think that we should look to the court to promulgate internally its own guidelines? As guidelines and not as statutory requirements.

It is usually very difficult for a Federal judge, or any judge—but less for a Federal judge—to go directly contrary or upstream to the accepted code of action by the remainder or his or her peers.

Is that a possibility for us to ask the Judicial Conference to suggest that they promulgate what constitutes mitigating circumstances?

Mr. VON HIRSCH. It's a possibility. Let me just describe the problems.

One of the problems is that in order to develop guidelines, the one thing you do need is that you can't do it on a case-by-case appellate way.

Senator BIDEN. I agree with that.

Mr. VON HIRSCH. For obvious reasons. So it's a matter then of having somebody within the judiciary prescribe the general standards. It could be done. For example, in my own State of New Jersey, the Chief Justice has very wide rulemaking powers.

The one problem has been that the judiciary historically has been fairly reluctant to develop standards in the area of sentencing because of an ideology that each case is unique or different.

So one of the serious problems that you encounter—and at least certainly it is true in State jurisdictions that I know—you will get a lot of judges saying no sort of standards are appropriate, but then in each case it's different.

For example, if you take the example of the parole board in Oregon, it was the parole board itself that led the way to the adoption of this new legislation which required the parole boards to set standards for when to release people.

If one of these bodies involved, can do it, the other would too. There is one example where it's been done by judges: namely, in Denver. Through Don Gottfredson's and Leslie Wilkins' leadership, they have been developing guidelines based on, in that case, prior decisionmaking patterns. So it is a possibility. I think you'll run into considerable resistance from judges, though.

Senator BIDEN. I think you're absolutely right. But I think that judges are in jeopardy now in terms of the attitude of a growing number of people—and I clearly am not one of them—to meddle with tenure and jurisdiction and discretion of judges.

Although I think in ordinary times we would find it impossible for the court to come up with guidelines, in balancing their own interest, they may find that they should move in that direction.

But that's just an editorial comment.

One last question I have.

Under the general mitigating circumstances or standards that we've been discussing here, can a judge or parole board justify as much of a disparity in the sentence that would be handed out as they can now under the rehabilitative jargon that is used in justification?

In other words, do we run the risk of ending up where we were?

Mr. VON HIRSCH. Obviously, when you're reforming anything, that is always a possibility.

I think it depends on the form of standards.

In other words, if you simply adopt a general principle that individuals should be punished as they deserve, instead of individuals being rehabilitated as they need, and didn't do any more, you would have great disparities because what was considered deserved would be very different.

So whether you're able to reduce disparity will depend very much on the willingness and ability of some standard-setting agency to say something specific. For example, if you read the Model Penal Code, nothing specific is said about how much punishment should be meted out. If you do have more specific standards you'll also need some sort of appellate process which makes it sure that when people depart from the norms, that something happens and the mistakes are corrected.

The other major problem which will be mentioned here in the hearings and I don't think anybody knows much about is how standards are going to be affected by a process of plea bargaining.

For example, Frank Zinring and Albert Alschuler put forth an hypothesis—which I call the hydraulic hypothesis—namely that if you develop standards in the sentencing area what will happen is that those discretionary decisions will switch back simply to the plea bargaining end.

I think we don't know that. I think that is one of the major areas which should be studied. In fact, the LEAA has just put out a request for proposal to study that kind of problem in the states that have adopted determinate sentences. I think you're going to have to worry about plea bargaining; and I think that one of the things that may be a possibility—Alaska, I understand, is moving towards a very substantial restriction of plea bargaining.

That is a problem. It's one area in which I don't think anybody knows enough about, because the only way you can learn about it is to try a system of standards and then see what happens.

My own opinion is that if you want to restrict discretion and disparity, that you have to start with standards on the sentencing and parole end and then move gradually backwards to see what you can do about plea bargaining.

Senator BIDEN. That logic of the plea bargaining process—being a fly in the ointment here—can be applied it seems to me to any stage of the criminal proceeding.

For example, when the police officer arrests John Doe for such and such a crime, there are many instances where a policeman in his or her individual discretion decides not to arrest the person, based upon the mitigating circumstances. I know of that personally.

We have the situation also where the U.S. attorney and the attorneys general of this country, even though as a consequence of a grand jury investigation determine that there has been a technical violation of the law, look at the circumstances behind that violation and decide not to ask for an indictment.

So I, for one, am not persuaded by the concern that the plea bargaining will all just keep moving a step back. We'll move from taking the discretion away from the parole boards, and then the judge will excercise it more at sentencing. We take that away, and then the attorneys general will exercise it more with plea bargaining. And on down the line.

Mr. VON HIRSCH. I agree with that.

Senator BIDEN. Because right now juries exercise that discretion, and they exercise it clearly.

I've tried cases where clearly there is little question of the person's guilt, but through the mitigating circumstance argument I have a finding of not guilty brought in, which is appealable. It seldom is, probably because that particular society—those mores—were applied in such a way as to say it technically violated a law and we don't like it. There are cases where someone goes in and disconnects the cord for a hookup to a lifeline. What jury is going to convict, and what court is going to follow through on that? How can we make that happen?

I think that's the beauty, quite frankly, of our English jurisprudential system—that there is not an attempt at analytical jurispru-

dence where we slot in every single solitary possible offense and a requirement that there be a certain course of action taken.

I think that's where the leeway needed within the system can be applied prior to the conviction.

But, again, that is a very long editorial comment which was not requested.

Mr. VON HIRSCH. I think you're absolutely right. You are never going to get an airtight system. You probably don't want an airtight system, because you want some slippage for the crazy cases—the cases that don't fit into anything.

Now when a person has been convicted of first-degree murder, it is clear to the judge and everybody else that he shouldn't have been convicted at all—those kinds of cases.

I think where we can make some progress in the chaos that now occurs in the normal case. For example, burglarly is not usually a very exciting crime. Once you've seen some burglaries, a lot of other burglaries resemble it. Somebody walks into somebody's house and takes a TV set and leaves a mess. It's all very predictable.

It seems to me where standards are useful is to set some kind of "tariff" for what that kind of unspectacular burglary will ordinarily get. I think that's where you can use the standards, and that's where I think you won't get a total slippage.

In the Patty Hearst, and the sort of bizarre cases, I think you always have slippage. And there may be nothing wrong with it.

I think the problem is not dealing with the unusual case. The problem is the chaos that occurs now in the normal case.

Senator BIDEN. I agree. And one thing that occurs now, because of the visibility of the chaos, is that it really destroys what I consider to be an important element of stability in this society; and that is, the judicial myth. That there is certainty and fairness and protection and that it does exist.

I think that's a very, very important loss that we have suffered in this society as a consequence of the average woman and man viewing time and again the system not functioning that they thought functioned and they put some faith in. It shakes that faith.

So I think that's one solid reason, quite frankly, to see to it that the normal case you refer to—the visible end to the criminal justice system—has attached to it a sense of certainty and fairness.

I have no further questions. If you would like to make a further comment.

Mr. VON HIRSCH. Let me just make some points.

First of all, one of the dilemmas and one of the reasons it's going to be politically difficult to introduce standards is there is a competition between certainty and severity.

In other words, there are two kinds of pressures that people in this business feel. One is the pressure to be certain and evenhanded; and the other pressure is to take people that we don't like and seem very nasty and lock them up for a long time. So you see the pressures, especially on legislatures, for example, to adopt long sentences to incapacitate and the like.

One of the facts of life which I think we have to face is that those two strivings of certainty and severity don't work together.

The more severe you are, the less likely it is that the purported penalties are going to be imposed.

The only way we're going to succeed in having more certain punishments is to make them more moderate.

The other issue is tied in to that, which is the question about what happens to parole; and it's just an illustration of the problems that we face in implementing these things. The Federal Parole Commission has done a rather fine job in developing its own standards. States though, still have parole systems that act in a fairly unpredictable fashion.

But despite all those weaknesses that traditional parole has had, parole has had an important function in reducing time. So that the purported 6- or 10-year sentence imposed is reduced to 2 years' actual confinement.

I think one of the things we have to worry about very much is, if we move to get rid of parole, we would have to get some alternative mechanism for reducing severity of sentences down to levels which would allow certainty to work.

That means, for example, that you cannot abolish parole without having clear limits or some other kind of clear directive on how actual time should be calculated.

As I mentioned in the testimony, that's only one of my reservations about the present version of the criminal code bill. It presumptively gets rid of parole and still calls for a quite high maximum sentence associated with the present system where the sentence doesn't mean real time.

But it seems to me that what we have to be very worried about and that's going to be the hardest part of this effort: to keep sentences down to a level where you can, in fact, be just and be predictable and be evenhanded.

The more we give rise to pressure to escalate the sentences, the more unpredictable the system will be.

Let me just say that it was a great pleasure to appear before this committee, and I think the review it is doing is a great service.

Senator BIDEN. I appreciate that.

I'm very delighted you brought up those two points.

I, for one, feel very strongly that many of my colleagues and counterparts in legislatures across this country are dead wrong in the way they read the American public.

Take the death sentence for example.

An overwhelming majority of the American people say they support the death penalty.

I do not believe they really support the death penalty. What they support is that person sentenced to life for a capital offense. They are very offended to find out, on the average, they serve only 12 years. That's what they're offended by.

So because most major, I think, public decisions are made on a generalized basis, they turn to the easiest thing. And that is: Let's put the death penalty to them.

My State overwhelmingly supports the death penalty. I do not support it; yet for the past 12 years, I have supported an idea that there be a minimum mandatory sentence of life with no probation and no parole for certain capital offenses.

A vast majority of my State continues to agree with me, as staying in office, even though we disagree on the death penalty. You could go on down the line on these things.

I am convinced that people want certainty. What they don't want is the obvious aberration that is contrary to what they were told was going to happen; that is, that a person sentenced to——

The idea that Speck may be paroled is absolutely incredible to the vast majority of Americans. And, quite frankly, to me.

It's not that everyone thinks that that person should be put to death, but they think the only alternative to the present system is the death penalty.

I am absolutely convinced that if the people knew that instead of robbery getting 0 to 25, it was going to get 12 to 18—and you had to get it—period—in that range, and there was no way you could get less—you wouldn't have any problem with that.

They just don't believe us when we say there's going to be certainty, because we've fed them a lot of pablum about how the system is certain now. And they don't believe it.

I agree with you completely that those hardliners who are talking about the need for more severe penalties—my term and not yours—are demagoging the issue because they know darn well that it will not result in certainty—that they are incompatible. They clearly are incompatible.

You are absolutely right. Unless we can bring the sentences into more realistic line at the top end, so that you don't get a requirement of 25 years——

People read the law, by the way. They say robbery, 25 years. They assume that means when you commit a robbery that you go to jail for 25 years. And they're surprised when people get paroled in 1 or 2 or 3 years.

If they knew that they were going to get 10 years for a crime that now says 25 years, and it was going to happen no matter what if you were convicted, I think you would find a totally different attitude on the part of the American public. But you're right. It is going to be difficult to get that done, but they both must be argued for—certainty and less severity. You can't have more severity and more certainty.

Mr. VON HIRSCH. Let me just add one thing on that.

It seems to me the difficulty is, for example, if we're talking about armed robbery which as you say now has a 25-year maximum, if you want to achieve the certainty, what you would have to talk about is the second time armed robbers get—not 25 years—but 25 months. That's the kind of quantity——

It seems to me, in fact, that's what prisoners serve now.

If you look at the capacity of the prison system and you look at the severities of punishment, we're going to have to think about those kinds of modest durations.

That's part of the problem. If you have a 25-year maximum and you say let's be reasonable and compromise and have them go in actually for 12 years, that would be a six-time increase over the amount of time prisoners now actually serve.

It seems to me you have to cut times down quite substantively.

Which brings me to this. It is one function that parole serves.

It would be fairly hard right now, for example, to introduce the idea to the public that people should be confined for the length of time that they actually do serve before they are released on parole; and yet that would probably be necessary, given especially our present prison capacity.

One of the things that you could do, if you kept parole, is to simply say that we could continue to parole people and continue to preserve our present policies as to average durations of confinement, but we will require that there be standards that cover when the parole board releases and what kind of decision it makes.

But this dilemma about how much time is a very difficult dilemma.

There's a rather fine article which David Rothman did in the New York Times some months ago in which he talks about the measurement and calculation of time, and we really do need a quite different conception of time.

Senator BIDEN. Thank you very much. I really appreciate your being here.

Our next witness, if she has continued to be tolerant enough to wait, is Judith Wilkes.

Judith Wilkes until recently was vice president of the Correctional Association of New York and is now an independent consultant on criminal justice problems.

Her experience includes work as a probation officer in Ohio, consultant to the Governor's Special Committee on Criminal Offenders in the State of New York, and a member of the planning staff of the Division of Criminal Justice Service in the State of New York.

Ms. Wilkes was formerly on the faculty of the department of sociology at New York University and was a consultant to the President's Commission on Law Enforcement Administration of Justice.

She's a graduate of the University of Washington. She is most noted for the exhaustive survey on rehabilitation and treatment programs conducted by her and Dr. Robert Martinson.

Ms. Wilkes, thank you very much for waiting.

STATEMENT OF JUDITH WILKES, FORMERLY VICE PRESIDENT, CORRECTIONAL ASSOCIATION OF NEW YORK, AND PRESENTLY AN INDEPENDENT CONSULTANT ON CRIMINAL JUSTICE PROBLEMS

Ms. WILKES. You are very welcome.

I think I would rather have you put most of my testimony in the record, and I will then make a few general comments on it.

Senator BIDEN. Surely.

Your entire statement will be included in the record.

[Material to be supplied follows:]

PREPARED STATEMENT OF JUDITH WILKES, ASSOCIATE DIRECTOR, CENTER FOR KNOWLEDGE IN CRIMINAL JUSTICE PLANNING

For the last two years, my colleague Robert Martinson and I have been engaged in a survey of research literature in an attempt to identify and describe the impact of postadjudicatory criminal justice activities on recidivism. I would like to describe to you this morning the research procedure employed in this research and a few of the findings derived from the survey. These will not be definitive

findings, but rather findings which provide some direction for our further research activities and hopefully for some correctional activities.

This survey has been funded for eighteen months by the National Institute of Law Enforcement and Criminal Justice under Grant No. 76NI-99-0023. Clearly the point of view expressed in this testimony is mine and does not represent the position of the National Institute, or even necessarily of my colleague. Any errors of judgment illustrated in this report are mine. Any of its strengths, I willingly share with Mr. Martinson.

I should also note at the outset that this survey was undertaken, at least in part, to expand upon and clarify the findings of earlier research conducted by Douglas Lipton, Robert Martinson and myself under the auspices of the State of New York. That research resulted in the publication of a work entitled *The Effectiveness of Correctional Treatment.*

This book has been much cited, but perhaps not much read. It is not very readable. Most frequently it is cited as a source pointing to the ineffectiveness of correctional treatment. In fact, some assume it claims that nothing works. I have never thought that the book said that. Because of the methodology employed, there is no way that I think a reasonable man or woman could derive such a conclusion from it. At best, it is a compendium of projects selected according to the most rigorous and probably the most arrogant academic standards. Thus, much valuable information is omitted from its contents. The research findings of each project reviewed were reported and attempts were made to summarize these findings. However, the findings were not adequately synthesized or accumulated in a manner which would allow future, systematic building of an information base of research findings which would be useful to administrators, legislators or citizens in making decisions about how to improve the effectiveness of the criminal justice system.

Martinson and I undertook our current research with the aim of developing such an information base. In order to accomplish this end we have engaged in a research methodology which is unorthodox. And, since even our friends and supporters refer to it as data analysis by brute force, it is necessary to describe briefly the procedures we have used.

We engaged in a year long search for research reporting recidivism rates. Using major bibliographical and reference sources such as the National Criminal Justice Reference Service, the Smithsonian Science Information Exchange, the National Technical Information Service, accessions listings of the National Clearinghouse of Criminal Justice Planning and Architecture, and the National Council of Crime and Delinquency abstract service, we solicited research reports. In addition, all State criminal justice planning agencies were contacted, as were Departments of Corrections and State probation and parole agencies. In sum, we tried to leave no stone unturned. This search produced on the order of 3,500 documents.

These documents were reviewed and winnowed. Approximately 600 documents were found to report recidivism rates for sets of individuals who could be clearly located in the postadjudicatory segment of the criminal justice system.

Each and every statistically independent set of individuals for whom a recidivism rate was computable was extracted from each document. (Only statistically independent sets were analyzed in order to avoid counting any one set of individuals more than once for any given definition of recidivism). A computable recidivism rate specifies precisely what proportion of a set of individuals are identified as recidivists according to some operational definition of recidivism, e.g., arrested, sent to prison for violation of probation, new conviction. Any set of individuals may have more than one recidivism rate. For example, a set of parolees may have a "prison on violation" rate, an arrest rate and a conviction rate. Approximately 10,000 recidivism rates for statistically independent sets of individuals were extracted from the 600 selected documents.

For each rate extracted from the documents as much information describing the set of individuals involved, the research methodology used in obtaining the rate, and the characteristics of the rate was coded. For example, information concerning age, sex, race, family status, class, education, employment, risk, previous criminal history. current offense, and personality characteristics of each set was coded if it was available. The research design employed, the size of the set, time in follow-up, research quality, type of population or sample used was coded. If the set had been subjected to standard or special treatment, such information was also coded. The State or nation in which the research

was conducted and the decade in which the research was done were also recorded, as was the funding source and any available cost data.

An effort was made to code approximately 100 pieces of information related to each recidivism rate extracted. One of the sad discoveries of this research is how infrequently descriptive and methodological data is reported. Thus the data base we have compiled contains a rather unfortunately high percentage of unknowns. Nonetheless, we do have limited information on all of the 10,000 rates we have coded, and relatively rich data describing twenty to thirty per cent of those rates.

This is a rather lengthy description of the methodology employed to compile the basic table I want to share with you today. Nonetheless, I want to diverge for another several moments to discuss the concept of recidivism.

Obviously, Martinson and I came to the conclusion that recidivism is a legitimate indicator of the effectiveness of the post-adjudicatory system. The legitimacy of this indicator has been subjected to increasingly severe challenges. For example, it is contended that since not all "recidivists" are detected in their recidivism, (just as not all offenders, recidivism or not, are not apprehended), recidivism underestimates the amount of crime perpetrated by those who have been processed by the original justice system. However, recidivism rates do accurately reflect the proportion of persons who are reprocessed—arrested again, convicted again, or sent to prison again. Such reprocessing costs taxpayer dollars—bundles of them. No administrator, legislator or citizen can dare or afford to overlook the level of reprocessing associated with the criminal justice system. Until some method is devised for apprehending all offenders or for estimating reasonably how many offenses are committed by recidivists rather than first offenders or previously unprocessed offenders, we will have to make do with what we have—a reprocessing rate.

I personally find this to be an unhappy compromise. However, I find it more reasonable than substituting for recidivism effectiveness criteria such as the number who found jobs, the number who learned to read, or the number who became more normal on the Minnesota Multiphasic Personality Inventory after processing by the criminal justice system.

I do not deny that all such criteria may represent fine and noble accomplishments. However, if they are not associated with low reprocessing rates, the taxpayer has a right to bellyache, especially if his or her unprocessed children cannot read, do not have jobs and are "normal" on the MMPI.

I have a suspicion that one of the reasons recidivism has fallen into disfavor as a measure of effectiveness is that we have not known either what the recidivism rate is or could be. We frequently hear it reported as 60 percent, 75 percent and even 95 percent. Martinson and I are convinced that these figures are gross overestimates. Frequently, the overestimate results from the method used for computing the rate. For example, the FBI computes recidivism by calculating the number of people arrested in a given period who have been arrested before. However, they do not report how many who had been arrested in some preceding period were not rearrested in a given period. Or, some Corrections Departments take as the recidivism rate the percentage of current residents who had been residents before. They apparently forget their "successes"; those who were residents in the past and never returned.

Table 1 indicates that whether we look at adults or juveniles, average recidivism rates simply do not come close to achieving 60 or 70 percent. In fact, of the 4,301 recidivism rates used to compute the means reported in table 1, 155 are in the 60 to 100 percent range. This is 3.6 percent of the total number of rates used.

Table 1 requires some explanation. Distributed in the table are the recidivism rates for sets of individuals who received custodial or non-custodial processing in any of the 50 States. Federal cases are not included. The rates have been distributed not only by "Custody", "No Custody"; but, by adult-juvenile and by "Reprocessing Definition"—that is, arrest, conviction, prison on a violation, prison on a new offense. For example, looking at the column headed arrest, it can be seen that 164 sets with computable recidivism rates could be classified as adults who received custody with no special treatment. The mean arrest rate of the rates for these 164 sets is 27.0. The N column specifies the number of rates used to compute the mean rate. It does not refer to individuals, but to the number of sets for which rates could be computed.

A word should also be said about the items on the left hand side of the table. Adults are those processed by the adult criminal justice system rather than by a family or juvenile court system. With limited exceptions (less than 1 percent,

adult sets in this table are composed of individuals 17 years of age or older. Juvenile sets are composed of those under 17, with limited exceptions (approximately 1.5 percent).

Sets are classified as having been assigned to custody if they are placed for any length of time in any physical setting which restricts their movement. The average length of incarceration for the adult sets represented in this table is approximately 20 months. For juveniles, the average period of physical custody is approximately 9 months.

The header "no special treatment" means that adults or juveniles in each set received custodial or non-custodial processing which was standard for the State in which it occurred. For example, all custody-no treatment programs involved some after-care. ("Max outs", those released from physical custody without after-care supervision are not included in this table. Data reported in an article by Martinson and Wilks which will appear in the September issue of Federal Probation entitled "Save Parole Supervision" has indicated that the "Max Out" rate for adults is consistently higher than the rates of those who receive custody and some after-care. The "Max Out" rate, averaged over all definitions, is 26.2 for adults and 61.6 for juveniles. This article can be made available if it is of interest.)

When additional programs are added to or modify standard treatment, they are designated "special treatment". For example, reduced probation caseloads would be viewed as special treatments as would the addition of group counseling to standard custodial care.

Now, what does Table 1 indicate? First of all, of course, it indicates that in general and on the average it is possible for the post-adjudicatory system to operate in such a fashion that 17.5 percent of the adults and 27.06 percent of the juveniles are reprocessed by the system. In general, in the case of adults, it indicates that for at least two definitions (conviction, prison on violation) and over all definitions (15:4 percent) custody with special treatment is "best" in maintaining a low reprocessing rate. On the definitions "arrest" and "prison on new offense" standard probation is effective in producing the low reprocessing rate.

The pattern is different among juveniles. Juvenile-Custody with no special treatment produces the lowest reprocessing rate over all definitions (23.8 percent), and on the "arrest" definition (33.2 percent). On two definitions, conviction (or adjudication in the case of juveniles—11.4 percent) and prison on violation (aka-training schools—18.9 percent) "No Custody with no special treatment is associated with the lowest reprocessing rate.

What does all this mean? I wish I knew for certain. To me it is clear that custodial and non-custodial responses to crime or delinquency have differing results. Custodial treatments appear to have the edge. To me, it is clear that special treatments when applied under conditions of custody and no custody have differing results in general and for adults and juveniles in particular.

This does not mean that custody with treatment always works best with adults, or that custodial-standard treatment always works best with juveniles. The fact that these procedures are not absolutely consistent is clearly indicated by Tables 2 and 3.

Over all definitions.—It is clear from table 2 that some treatments administered to adults under custody (e.g. benign custody —mean=21.88) are less effective than either standard custody (mean=16.81) or standard probation (mean=19.7).

In the case of juveniles, although in general special treatment appears to be less effective, whether administered in a custodial or non-custodial setting than standard non-custodial care or custodial processing, Table 3 indicates that, for example, job training programs in a non-custodial setting may be more effective than either standard custody or standard probation.

What is peculiarly interesting is comparing the position of treatments administered to juveniles and adults in similar settings. For example, special education administered to adults in a custodial setting are associated with low reprocessing rates (6.49 percent) whereas for juveniles such programs have unusually high rates (39.9 percent). Can it be that aging makes one appreciate the value of an educational program?

There are clearly some anomalies in these lists which need to be explored. Why, for example, do job training type programs "do better" than programs specifically designed and focused upon job placements (e.g. actually finding

jobs). Is this due to the incompetence of job finding programs in general? Is it due to the general condition of the economy? Is it due to the possibility that an offender who does or does not get a job on his own terms is better integrated into his social environment? We are planning to pursue an explanation.

Of course, I should place some caveats on these conclusions. I have not presented in this table separate rates for males and females, for property and non-property offenders, for whites and non-whites, for those with and without previous incarcerations, for experimental and for non-experimental research studies. Selectivity within the criminal justice system (e.g., "better" offenders ostensibly get probation as opposed to custodial sentences) has not been taken into account.

I personally think such separations are premature. Unless we have some sense of what the criminal justice system in general is doing, searches for subsets of offenders who do especially well under some special subset of treatments is rather like using a micrometer to measure a head of lettuce. We may end up finding a group of alligator farmers who do well in a non-custodial program designed to place offenders in jobs in the leather trade. The success of such a program would have little impact on the overall reprocessing rate of the post-adjudicatory criminal justice system because the number of offenders it would process is so small. Furthermore, there may well be pre-existing programs in which such a select set of people would do equally as well, if not better. The criminal justice system should not be a program in search for appropriate clients.

I prefer the approach of finding what in general works and then moving in the direction of discovering who is most "damaged" by that method of processing and finding a better way for those who are damaged.

In general, I think that one can conclude from our data that a custodial response to offenders, juvenile or adult, is not damaging in the sense of being associated with a high rate of return to the criminal justice system. In general, special treatments, when applied to adults in custody are associated with a low reprocessing rate. Standard treatment, on the other hand is associated with low rates for juveniles under custody and no custody situations, and adults under no custody situations. Nonetheless, special treatments can improve upon standard treatments and can also produce rates considerably worse than standard rates. We are attempting to study why this should be the case.

For example, it may be that "treatment" has already been institutionalized in the juvenie justice system and the non-custodial system for adults, and the addition of further treatments may simply be more than the systems or the "treatees" can bear. There can be too much of a good thing. On the other hand, it may be that those early in their experience of the criminal justice system (juveniles and adult probationers) should simply be left alone.

I have not mentioned the term rehabilitation in this presentation. In part this is because I do not fully comprehend the meaning of the term. I particularly do not understand the term as it relates to the concept of individual deterrence. Individual deterrence may be as effective as or more effective than "rehabilitation" in maintaining a relatively low reprocessing rate.

The fact that a custodial response to either adults or juveniles is associated with a relatively low reprocessing rate certainly does not deny the effectiveness of individual deterrence. Furthermore, since "benign" custody (e.g., coed institutions, permissive institutions) which may mitigate the deferrent effect of custody has a relatively high reprocessing rate for adults (21.88) and for juveniles (40.38), the notion of individual deterrence may be supported.

Certainly I am not advocating individual deterrence at any cost. Every custodial institution in the country must be forced to operate according to the Constitution of the United States and the Constitutions and statutes of the States within which they operate. But, meeting the law does not necessarily mean mitigating individual deterrence. Those treatments which work may be those which reinforce individual deterrence or at least which make it less difficult for individual deterrence to operate. I have a hunch that this is the case.

Clearly, the material I have presented today raises more questions than it answers. There is considerable room for speculation. But, I am convinced that we should neither try to eliminate treatment or custodial responses to offenders. Some treatments work. Frequently, custody is better in terms of reprocessing rates than any other response to offenders. Let us proceed from here.

TABLE 1.—REPROCESSING DEFINITION

	Arrest		Conviction		Prison on violation		Prison on new offense		Total	
	Mean	N	Mean	N	Mean	N	Mean	N	Mean	N
1. Adult—Custody: No special treatment	27.0	164	17.6	154	19.3	818	10.3	595	16.8	1,731
2. Adult—Custody: Treatment	22.0	158	16.9	80	12.6	198	11.8	181	15.4	617
3. Adult—No custody: No special treatment	21.3	176	27.7	141	16.7	234	8.9	68	19.7	619
4. Adult—No custody treatment	24.9	141	20.8	48	19.5	30	15.2	27	22.3	246
Total	23.7	639	21.2	423	17.8	1,280	10.7	871	17.5	3,213
5. Juvenile—Custody: No special treatment	33.2	114	34.5	10	24.5	422	7.3	87	23.8	633
6. Juvenile—Custody: Treatment	49.3	92	25.7	41	30.7	130	13.4	9	35.6	272
7. Juvenile—No custody: No special treatment	39.7	46	11.4	16	18.9	27	10.3	24	24.5	113
8. Juvenile—No custody: Treatment	33.9	34			21.4	35	4.5	1	27.2	70
Total	39.5	286	23.6	67	25.3	614	8.3	121	27.06	1,088

TABLE 2.—ADULTS: ALL DEFINITIONS

Description of treatment	Mean	Number of rates	Custody	Treatment
Education (e.g., education release programs, college programs, remedial education).	6.4	5	Yes	Yes.
Medical methods (e.g., methadone, plastic surgery)	7.8	3	No	Yes.
Job training (e.g., vocational training, prejob training, work release).	11.7	101	Yes	Yes.
Intensive supervision (e.g., reduced caseloads, special caseloads for addicts).	12.4	163	Yes	Yes.
Reduced supervision (e.g., reduction of time under supervision or number of contacts required).	13.1	7	No	Yes.
Increased custody (e.g., maximum security, nonpermissive institutions).	13.4	46	Yes	Yes.
Contract programing (e.g., contractual establishment of performance goals).	13.9	16	Yes	Yes.
Individual counseling (focus on immediate help)	14.8	38	Yes	Yes.
Standard custody	16.8	1,731	Yes	No.
Reduced supervision	17.0	96	Yes	Yes.
Overall mean for adults based on 3,213 cases	17.5			
Lay group counseling (e.g., group discussions led by nonprofessionals).	17.7	31	Yes	Yes.
Group therapy (e.g., group counseling conducted by professional therapist).	18.8	7	Yes	Yes.
Therapeutic counseling (e.g. focus on "personality problems" of offender).	19.5	4	Yes	Yes.
Standard probation	19.7	619	No	No.
Benign institutions (e.g., permissive institutions, coed institutions).	21.9	103	Yes	Yes.
Nonsupervisory help (e.g., volunteer one-to-one relationship).	22.0	4	No	Yes.
Intensive supervision	22.1	221	No	Yes.
Nonsupervisory help	24.5	2	Yes	Yes.
Max out	26.2	143	Yes	No.
Job placement (i.e., focus on securing job, not on training)	27.4	7	No	Yes.
Job placement	30.5	5	Yes	Yes.
Nonsupervisory—Punitive (e.g., fines, work orders)	34.5	1	No	Yes.
Lay group counseling	54.5	2	No	Yes.
Nonresidential therapeutic community (e.g., day care center.	64.5	1	No	Yes.

TABLE 3.—JUVENILES: ALL DEFINITIONS

Description of treatment	Mean	Number of rates	Custody	Treatment
Unspecified treatment	4.5	1	Yes	Yes.
Nonsupervisory—Punitive (e.g., fines, work orders)	4.5	1	No	Yes.
Individual counseling (focus on immediate help)	4.5	2	No	Yes
Nonsupervisory help (e.g., volunteer one-to-one relationship).	9.5	2	Yes	Yes.
Intensive supervision (e.g., reduced after-care caseloads, special caseloads).	9.5	6	Yes	Yes.
Reduced supervision (e.g., reduction of time under supervision or number of contacts required).	19.5	2	Yes	Yes.
Job training (e.g., vocational and prejob training, work release).	20.7	13	No	Yes.
Job training	20.8	19	Yes	Yes.
Standard custody	23.8	633	Yes	No.
Nonsupervisory help	24.5	2	No	Yes.
Standard probation	24.5	113	No	No.
Overall mean for juveniles based on 1,088 cases	27.1			
Intensive supervision	27.6	39	No	Yes.
Behavior modification (e.g., token economy, aversive therapy).	27.8	6	Yes	Yes.
Group therapy (e.g., group counseling conducted by professional therapist).	28.5	10	Yes	Yes.
Job placement (i.e., focus on securing job, not on training).	28.8	14	Yes	Yes.
Increased custody (e.g., maximum security, non-permissive institution).	30.8	8	Yes	Yes.
Therapeutic counseling (e.g., focus on "personality problems of offender).	31.2	3	Yes	Yes.
Lay group counseling (e.g., group discussions led by nonprofessionals).	31.2	6	Yes	Yes.
Education (e.g., education release programs, special remedial programs).	33.1	7	No	Yes.
Individual counseling (focus on immediate help)	34.5	3	Yes	Yes.
Nonresidential therapeutic community (e.g. day care centers).	34.5	1	Yes	Yes.
Therapeutic counseling	34.5	3	No	Yes.
Contract programming (e.g., contractual establishment of performance goals).	37.8	6	Yes	Yes.
Lay group counseling	39.5	2	No	Yes.
Education	39.9	78	Yes	Yes.
Benign institutions (e.g., permissive institutions, coed institutions).	40.4	107	Yes	Yes.
Max out	61.6	41	Yes	No.
Job placement	84.5	1	No	Yes.

Ms. WILKES. The original work of Robert Martinson, Douglas Goodman, and I, entitled "The Effectiveness of Correction Treatment," has been very frequently cited. I'm not sure it's been very frequently read.

It is usually taken as evidence showing that rehabilitation doesn't work—or treatment doesn't work.

I've never thought the book said that.

[Laughter.]

I don't see how anybody who could manage to read it could come to that conclusion either, because of the rather ponderous way in which the book was put together. It's very hard to draw any kind of conclusion as to what works and what doesn't work, other than on a project-by-project basis, which isn't very helpful in any kind of general decisionmaking about criminal justice.

So Martinson and I, for the last 2 years, have been undertaking some additional research, looking at the relationship between various kinds of postadjudicatory activities and recidivism.

Our approach, at best, can be called unorthodox. In fact, even our friends and supporters say that we are doing our data analysis by brute force. Because what we have done is tried to get our hands on any kind of report that contained any sort of recidivism tables; and

we have extracted all the recidivism rates that we could lay our hands on from these documents and have tried to collect as much information about the sets of those people that those groups are associated with we can and about the research methodologies used.

In general, we have collected approximately 100 pieces of data about any one recidivism rate that we could find in an attempt to say: What is related to our recidivism, and what's related to all recidivism?

Now the concept of recidivism, I think, has come into considerable disfavor lately. Some people say it's not a very valid way of assessing the effectiveness of the criminal justice system since, after all, there are many ex-offenders, if you will, who go out there and commit additional crimes and they're never apprehended and therefore you always underestimate the rate.

So we have taken the route of talking about reprocessing rates. In other words, how many people are getting rearrested and how many people are getting convicted again and how many people are going back to prison on violations of probation and parole and how many are going to prison on a new conviction. We don't make any assessment about how much recidivism contributes to the crime rate and how many recidivists are not really being caught.

Senator BIDEN. What do you call it?

Ms. WILKES. We just call it reprocessing. It's just a rose by any other name really.

It's the same thing as——

Senator BIDEN. Right. I understand your point.

Ms. WILKES. We're not making any claim as to who's catching everybody. Until we can apprehend all offenders, we'll never know how many of the offenses that are being committed are being committed by recidivists and how many are being committed by first offenders or previously nonprocessed offenders.

So we had been looking at these recidivism rates and reprocessing rates, and the most remarkable finding I think we have encountered is how very low, on the average, the reprocessing rates are when you use an arrest definition or a conviction definition or a return to prison needed for a violation or for a new event.

I had been brought up to believe——

Senator BIDEN. Low in what regard?

Ms. WILKES. Percentagewise.

In other words, I'd been brought up to believe, for example, that the return rate to prison or the rearrest rate ran anywhere from 75 to 95 percent—and those are frequently quoted figures.

Senator BIDEN. Right.

Ms. WILKES. When we ran our data, we found something like 3 percent perhaps were the sets of people that had rates that high.

The average rates we're getting are, for example, for adults, about 17 percent. For juveniles, it's about 27 percent.

Senator BIDEN. Seventeen percent end up back—I want to be sure I understand.

Ms. WILKES. I can give it to you even more specifically. For adults, the mean recidivism rate, using the arrest definition, is like 23.7 percent for conviction. The mean overall of these recidivism rates we've looked at is 21.2 percent. For prison on a violation, so many sets of peo-

ple who have violated parole or probation, 17.8 percent. Prison on a new offense is 10.7 percent.

Senator BIDEN. Wow.

Ms. WILKES. These are averages overall of the recidivism rates that we have looked at. So the total number of rates that we looked at to produce those results are like 3,200 recidivism rates. It just is impossible for that rate to be 75 to 85 percent.

I think one of the reasons why it is often overestimated is the way in which it is usually computed.

The FBI, for example, when they report a recidivism figure, is reporting the number of people arrested this year who had been arrested previously. They forget that there may be a lot of people who were arrested previously who haven't been arrested this year.

The same thing holds true in another example.

The Correction Department will take the number of people who are currently incarcerated and ask the question of how many of them had been in their institution or been incarcerated before.

They may, indeed, get a 75-percent figure. But they haven't counted the people whom they have released previously who have never come back. Therefore, there are a lot of people who have been, say, to Attica and who are still on the streets of New York City without committing crimes and getting back into Attica.

So I think there has been a tendency to overestimate, because we have not found out how you count this exactly of many of the activities in the postadjudicatory system, such as probation or parole or prison.

So if you are also counting the number who don't come back, this is how you get these lower kinds of rates.

Senator BIDEN. Has this finding of yours been widely published?

Ms. WILKES. It has been circulated in a number of documents; for example, the National Council on Crime and Delinquencies newsletter which carried quite an extensive coverage of it.

Senator BIDEN. How long ago was that?

Ms. WILKES. It was probably last October.

In other words, we came to the conclusion about the low rate that long ago. Interestingly enough, it has not been overly challenged by anyone.

In other words, there is now apparently some agreement among people who know that this is the rate we have found that this is probably the case. In other words, they have not been able to show any evidence to the contrary.

Senator BIDEN. Let me see if I understand it, and I'm going to oversimplify it but try to get the idea.

What you have found from taking reports and studies that have been done by diverse groups of people and individuals across the Nation is that of those persons who were at any one time put behind bars, about 80 percent of those people never end up behind bars again.

Ms. WILKES. Yes.

In fact, I can even give you that more specifically.

As you'll see in the testimony, there is a table in here where we have looked at adults, for example, who have had some custodial sentence. In other words, the particular treatment we were looking at would have been custody.

When we look at that specific group, for example, the move for arrest is 27 percent; for conviction it's 17 percent; for prison on violation it's 19 percent; for prison on new offense it's 10 percent.

So, in actuality, it is——

Senator BIDEN. What is the distinction between prison on a new offense and prison on violation?

Ms. WILKES. A parole——

Senator BIDEN. I see.

But the prison on a new offense is 10 percent?

Ms. WILKES. That's right.

Senator BIDEN. Can it be said the other way—that your studies indicate that 90 percent of those persons who were sent to prison and later released never went back to prison?

Ms. WILKES. I would hate to carry it quite as far as individuals, because we're dealing with grades. That would be the conclusion that one could draw; I think we will be able to draw it in the future.

Senator BIDEN. Which is completely contrary to the belief that is drawn now that 90 percent of those who end up behind bars at any one time are going to be back behind bars.

Ms. WILKES. That's right.

This is really kind of overwhelming, but the interesting thing is—and the thing that I really don't understand—is that there has been a publication known as the Uniform Parole Report which has been in existence for at least 6 or 7 years which has consistently reported extraordinarily low return rates for parolees across the United States.

Somehow that kind of information has never sunk in—that indeed those rates are fairly low.

I think one of the reasons why the recidivism rate has been overestimated is that we oftentimes have worked on this project-by-project basis. So we look at, say, a transactional analysis project and see that they have a 50-percent return rate. Well, they've not had anything to compare it against to know whether it's good, bad, or indifferent.

I think a lot of things have been thought to work which in the past didn't work really, because they are being matched off against the miscalculation of the recidivism rate.

In otherwords, we thought it was higher; therefore, something that produces a 50-percent rate was thought to be good.

But I would say that anything that has a 50-percent return rate you ought to chuck out immediately, because you're not doing nearly as well as the average, which is 20 percent or 10 percent, or whatever.

Senator BIDEN. It has been pointed out to me by my staff, as we understand your testimony, that 80 percent—and these are rough figures—of the crimes committed in America are committed by people who have been repeat offenders.

Ms. WILKES. I have no idea.

In other words, that's not what our data shows. Our data doesn't deal really with that issue.

Senator BIDEN. Even though only 25 percent of the people—or 20 or 10 precent of the people—who were once imprisoned come back to prison——

Ms. WILKES. Right.

Senator BIDEN. It's that 25 percent or 10 percent that commit 80 percent of the crimes in America.

Ms. WILKES. It could be. I really don't know what that figure is in terms of how many or what proportion of the crimes now committed are committed by recidivists.

I really don't have knowledge of what that figure is.

I'm not sure if that knowledge is even available.

What we are talking about is that of those who are processed, how many get reprocessed.

Clearly, those people have to commit some offense in order to be reprocessed. So it's clear that recidivists are contributing something to the crime rate.

What that actual percentage is that they are contributing I really couldn't even hazard a guess.

I think that there may be more new people, however, coming into the system than we would like to see coming into the system.

In other words, if the recidivism rate is as low as I think it is—and knowing what the prison population is and how it's increasing and knowing how there are all kinds of backups in the courts and so on—I have a sinking suspicion that there are a lot of new faces going through the courts.

Senator BIDEN. Wouldn't that figure be easier to get than the figure that you have finally gotten?

That is, couldn't we find out of all the crimes and all the convictions that are had in the United States how many are people who have been convicted one prior time?

Ms. WILKES. It would seem to be an easy step to take.

Senator BIDEN. Can you get it for us by 2 o'clock?

Ms. WILKES. I wish I could. I would love to have that figure.

But I have tried in a number of instances, for example, to get these kinds of matches between somebody here who has been convicted and trying to backtrack to find out if he had been convicted before. It's an extraordinarily difficult chore, because of the recordkeeping, for the most part, is so bad.

But what we have done is to take the evidence presented by other people. They will report on a cohort of people, say, going through a prison system. And they'll say of those people who were released during this particular period so many of them had returned by another period.

What we have done is to take that kind of research and put it together. These are the results that are produced from that kind of research.

I would very much like to see somebody do a very solid study on how many convicted persons have been convicted previously.

I've not really seen one that's very good.

Now, in addition to finding that the recidivism rate is much lower than certainly I had anticipated, and I think most other people had anticipated, the studies we have looked at—and we looked at over 3,000 documents to find the 600 that reported recidivism rates—the research we had compiled seems to indicate not only that the rate is low but that it is perhaps lowest for adults who are given custodial

sentences and are given some kinds of treatment, which goes against everything I'd like to believe perhaps.

In other words, if you look at different groups of people—here's a set that has gotten probation, and here's a set that has gone into a prison setting—if those people are given certain kinds of treatment, they have lower recidivism rates than the probationers. And particularly probationers with treatment.

The chances are they are more hard-core, bad-guy groups than the probationers.

So something is being done right in some of the prisons.

This is not to say that some of the kinds of treatments that are administered in prisons don't do absolute damage.

For example, if you put an offender in with what I would euphemistically call benign institutions, they do much worse. And you're getting a recidivism rate on the order of 30 percent or so.

With juveniles, it's even more damaging. In other words, if you put people in pastel, permissive prisons, they simply don't do very well. In fact, they do far worse.

In the case of adults on probation, they tend to do a little better with no specialized treatment added—no group counseling, nothing other than perhaps standard probation supervision.

Juveniles behave somewhat differently. They tend to do a little better in custody with no special treatment. They do better under no custody with no treatment as well.

It may very well be that we already have built in the treatments that, in a sense, work into the juvenile system.

We have come close to probably accomplishing that with the adult system. It's usually the things like job training and not job placement, education, and those kinds of things, and the rather standard, common, ordinary, run-of-the-mill sorts of treatment programs which seem to be associated with the lower rates for adults.

They don't work quite as well with the juveniles, although job training programs tend to work well with both adults and juveniles, particularly in the custodial setting.

Perhaps one of the more anomalous things that we found is that job placement programs, on the other hand, don't work. Whether that's because the programs are incompetently run, or whether it's because of the economy, we haven't been able to sort out yet.

But if you train a person for a job, whether adult or youth, he does fairly well when he's released apparently from the institution, whether you find him a job or not.

The strictly job-placement programs just simply aren't doing very well and, in fact, may be doing some damage relative to what you would anticipate for that set of people.

Senator BIDEN. You paint—I was going to say a picture, but I guess mosaic would be a better analogy. But the thing that really is fascinating, and may be correct because I'm not sure it has all sunk in, but the one thing that sticks in my mind is this.

If your recidivism rates are correct, and over 75 percent of the crimes for which people are caught and convicted—the ones that we tabulate—are committed by first offenders——

Ms. WILKES. Not necessarily.

I think we're talking about two slightly different things.

What I'm saying is that of every 100 people who have been in some program—let's say, in custody—25 of them approximately, or 17 percent actually, are convicted a second time—at least a second time.

In other words, of people whom we know have already been processed that are convicted, 17 out of 100 would be convicted.

Now I don't know what percentage of all those convicted those 17 make up. In other words, out of people who have not been in such a program before and had never been processed before, I don't think the difference is going to be 73 or 83 percent.

In other words, this 17 percent of the ex-cons, for example, who were already convicted, may have accounted for a much greater proportion of all the offenses that are committed than that 17 percent. They may have committed two or three crimes.

Senator BIDEN. But you don't believe it could be bumped up to 75 percent of the crimes committed?

Ms. WILKES. No way could it be bumped up that high.

What we're talking about is the percentage of people who had certain experiences in the criminal justice system and are put back through that criminal justice system after they're first released.

I think what you're trying to see is what percentage of all convictions are recidivisms. I don't have the answer to that question.

Senator BIDEN. You understand why that figure is more important to us than the others?

Ms. WILKES. Certainly.

But it may be more important and again it may not be if, for instance, there are any legislative recommendations to change the system to any great extent.

You may be greatly affecting that proportional relationship so you have to know, I would think, both figures.

Senator BIDEN. I agree.

Do you have any recommendations as to what changes, if any, should be made in the system?

Ms. WILKES. I think I would certainly agree with the notion of a surety of action being taken. In other words, I think that an offender should know that something is going to happen to him when he offends; and that the general public should know that.

I think that any of the treatments that are given to offenders should be things which help reinforce, or at least do not detract from, the individual deterrent effect of the custodial setting or of probation or parole.

I think we have a tendency to mitigate what it is that we are doing to offenders by reducing any kind of punitive impact or individual deterring effect that a system has.

For example, you may find youngsters who want to play basketball with Walt Fraser in New York City, but they can't play basketball with him unless they get picked up for a delinquency charge because he is part of a program of playing basketball or baseball with the delinquents. So it becomes, in a sense, sometimes attractive to kids to become delinquent. To say nothing of the fact that that kind of treatment to the offender doesn't do him much good anyway.

So you may actually be attracting people into the system and maintaining people in the system by some of the things you do.

I think some of the kinds of treatments we're engaged in may actually have this kind of an effect.

Senator BIDEN. You're confusing things for us you know. You're not allowed to do that. You're supposed to come with pat answers.

Ms. WILKES. I realize that. It is a very confusing sort of situation. What we have is a situation where there is a great deal of interaction between what is going on and what the results are. In other words, it's clear to me that custody and no custody, for example, as sentences work differently. They produce very different kinds of results.

It gets more confusing when you say how do those things work with adults and with kids. What happens when you add treatment to those things? And it continually gets more and more complex.

The kind of conclusion that we draw is that perhaps the best thing you can do with adults is to place them in a custodial setting and give them certain kinds of treatments. Those treatments should not be the kinds of treatments that tend to mitigate the individual deterrent effect.

For example, you put a guy in prison because it is not a nice place to be. It's a very punitive, bad place. Right? Well, you don't turn it into a country club. You don't make the prison a country club and send the guy to a country club is what I'm suggesting.

Yes; you send him to the prison; and you give him treatment, such as education or job training and so on, which oftentimes is not very pleasant either.

But you give him those kinds of services so that at least when he gets out he has some job skills that he can peddle himself. And that he can go live his life, but he's not going to want to come back to prison.

Senator BIDEN. But not put him in prison and put him on a work release program immediately upon him getting to prison and put him back out?

Ms. WILKES. That's right.

Senator BIDEN. That kind of thing.

Ms. WILKES. That's right.

I'm talking about anything that is more rewarding than it is punishing.

It is, in effect, pretty easy to do time.

Of course, I'm not going back to horsewhips and this kind of thing. I really think that every prison in the United States ought to operate constitutionally and according to the statutes of the States. And many of them do not.

But, on the other hand, I don't think it's necessary to go the other way, where every prison becomes more like a hospital—a very modern and well-staffed hospital with modern equipment and so on.

It just simply is not the idea of a prison, and it's not the kind of thing that is going to be sufficiently frightening, perhaps, to the offender to make him not really mind too much about coming back.

Senator BIDEN. I have one last question.

Again, going back to your recidivism rate. How long—of the 3,000 studies you've looked at—do you follow the released prisoner to determine whether or not he's pumped back into the system?

Ms. WILKES. Whether he's a recidivist or not.

One of the studies that we looked at had a followup period of something like 55 years, but that was clearly the exception rather than the rule.

The usual followup period is around 24 to 36 months.

I would say the majority of the rates that we have looked at probably fall into that category.

Senator BIDEN. Even under your system and your calculations, you have come up with the lowest possible figure and not the highest possible figure.

I'm not suggesting that there's a difference, and that by factoring in and following it longer you could jump from 17 to 75, but it is the lowest.

Ms. WILKES. The figure I gave you today averages over that. In other words, I am in a position to give you at some date—if you would like it—the average for the various periods we follow up. And they certainly do not go up as high as 77 or 75 percent, even if you're followed up for 72 months, let's say.

Senator BIDEN. But they're the low side and not the high side.

Ms. WILKES. Ours are in the middle.

Senator BIDEN. I see.

Ms. WILKES. And there is not all that much variation around that middle.

Senator BIDEN. I don't have any further questions. If you have any further points to make, please do so.

Ms. WILKES. I think probably I've made as many confusing statements——

Senator BIDEN. One of the things that I think we have to get out of our minds here—in this committee and in this Congress—in discussing this topic is that there are simple solutions. And that there are clearcut answers to these questions.

So I was kidding, obviously, when I said to you that you're confusing us here.

But I think that Disraeli once said that there are three kinds of lies: Lies, damn lies, and statistics. And we are going to get an overabundance of the third kind of lie here—not because people intend to mislead us, but because you can read things 100 different ways.

As much disparity as we can get from the scientific data base, such as you have provided us, for example, the better off we are in coming to a conclusion. Because whatever conclusion we come to, in terms of what form it takes in legislation, it's going to be a bit of a wing and a prayer. We're not going to be certain, and we're going to have to continually experiment with this.

I suspect if my son or grandson ever followed me in this seat, they'll be having the same kinds of hearings 30, 40, or 50 years from now—hopefully, with less urgency. Hopefully, we will have done something to deal with the problem better.

Ms. WILKES. I think that the only thing I might add is that I have a grave fear that there are some actions and serious kinds of activities going on which I feel may be more disruptive than they are helpful.

For example, if the issue on abolition on parole boards is expanded to include abolition of parole supervision, which even in some States they are now giving some very serious thought to, I would object

strenuously because I think the possibility of increasing the return rate would go way up.

Senator BIDEN. Without supervision?

Ms. WILKES. Yes.

In other words, I think that we must be aware that the system really isn't as bad perhaps as it has been cracked up to be; and that we have to take into account that certain segments of that system are working apparently quite well. So the adult custodial programs seem to be having a fairly positive impact on the recidivism rate.

I would hate to see some of the fadish sorts of things that tend to go on in this criminal justice area implemented without taking into account that you may very gravely affect, and in the wrong direction, the very thing you may be trying to stamp out.

Senator BIDEN. But some of the things that you think would not be counterproductive, even in light of your findings, which have been different than we have been led to believe the situation is, and some of the things you think should be carried forward are a greater sense of certainty in the system and some relationship between sentence and deprivation—that is not be something that would put someone in better stead than they were, or equal to that which were, prior to the finding of guilt.

Ms. WILKES. Correct.

Senator BIDEN. Both those things do argue against what have been the prevailing schools of thought for the past 15 years that I'm aware of and maybe longer. That has been that we should move toward the Swedish system which is not to make things worse in the prison setting but make them better than they were, in many instances, in the settings from which the persons came.

Couple that with the fact that it wasn't too long ago that the civil libertarians were arguing for indeterminate sentences.

Ms. WILKES. That's right.

Senator BIDEN. And that was the prevailing school of academic thought anyway at that time.

So at least on those two changing issues, you are in agreement with those who argue that the recidivism rate is much higher.

Ms. WILKES. Yes; I guess we're on the same side of the fence.

Senator BIDEN. Not for the same reason necessarily but for the——

Ms. WILKES. I'm arguing that perhaps the reason the recidivism rate is low is because we have had a penal system that is not——

Senator BIDEN. All right.

I really appreciate your testimony. I am going to ask your permission, if I may, after reading the text of your testimony and having the time to digest it and balance it off against the remaining testimony in the hearings to either ask you to respond to questions in writing or at a future date to maybe even have you back as part of a panel.

One of the things I like to do is to have experts with competing and differing points of view in front of me so they can help me in questioning also.

Ms. WILKES. I'll be glad to.

Senator BIDEN. I realize I would have to accommodate your schedule, but your work in this area has been extensive and your findings

are, if for no other reason, novel in light of what else has been coming forward and warrant our thorough investigation.

Again, I apologize for the hour.

Ms. WILKES. That's quite all right.

Senator BIDEN. Thank you.

Ms. WILKES. Thank you for the opportunity to present these funny figures.

Senator BIDEN. Thank you.

The hearing will be recessed until tomorrow at 10 a.m. at which time the witnesses will be Professor Fogel of the University of Chicago, Dr. Miller, chairman of the Pennsylvania Department of Corrections, Dr. Robert Coates, Harvard University, and Mr. William Nagel, executive director of the American Foundation, Inc.

Thank you all.

The hearing is recessed until tomorrow morning.

[Whereupon, at 1:40 p.m., the hearing recessed to reconvene at 10 a.m. tomorrow morning.]

THE ROLE OF PRISONS IN SOCIETY

THURSDAY, OCTOBER 6, 1977

U.S. SENATE,
SUBCOMMITTEE ON PENITENTIARIES AND CORRECTIONS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, in room 1114, Dirksen Senate Office Building, at 10:25 a.m., Hon. Joseph R. Biden, chairman, presiding.

Staff present: Gerry Doherty, staff director; Mike Gelasak, chief counsel; Dennis Langley, counsel; Katrina Lantos, counsel; and Edna Panaccione, chief clerk.

Senator BIDEN. The hearing will come to order.

I'd like to begin by apologizing for being late. I took the Metroliner from Wilmington, Del., today. It was due in at 9:18 and arrived at about 10:15. I've decided I'm not going to vote for any more appropriations for Amtrak. [Laughter.]

But I do apologize, and I'm sorry.

Our first witness this morning is Prof. David Fogel in the Criminal Justice Department of the University of Illinois. He is possessed with a vast experience in the area of corrections and criminal justice.

Aside from his outstanding academic credentials, he has published numerous articles in professional papers in the field and has served as a consultant for many Federal, State, and local governmental bodies. He is a member of numerous professional associations and is a recipient of a number of distinguished awards based upon his service in the field of corrections.

Mr. Fogel has been a program director of social group agencies, superintendent of juvenile facilities, director of institutions, commissioner of the Minnesota Department of Corrections, adviser to the Governor of Illinois on criminal justice, and executive director of Illinois Law Enforcement Commission.

Mr. Fogel has recently published his latest volume, entitled: "We are Living Proof of the Justice Model for Corrections."

He is a graduate of Brooklyn College with a masters degree in social work from the University of Minnesota. He received his doctorate in criminology from the University of California at Berkeley.

Professor, again, thank you for your indulgence; and I apologize for being late. Please proceed in any way that you feel most comfortable.

STATEMENT OF DR. DAVID FOGEL, PROFESSOR OF CRIMINAL JUSTICE, UNIVERSITY OF ILLINOIS, CHICAGO CIRCLE, CHICAGO, ILL.

Mr. FOGEL. Thank you, Senator.

First, I want to thank you for the opportunity to be heard on an issue of such importance before this distinguished committee.

I have given the staff a prepared statement. If it is all right with you, I would like to proceed from notes and keep it informal. The notes would be a summary of the more formal statement.

Senator BIDEN. Your entire statement will be put in the record.

[Material follows:]

PREPARED STATEMENT OF DR. DAVID FOGEL

THE JUSTICE PERSPECTIVE IN CORRECTIONS

There are few enthusiasts left in prisons. The preachers and teachers and treaters have not produced a pay-off to equal their rhetoric. The prisoner-as-plaintiff now looks increasingly to the courts. But not much may be expected in the way of enduring correctional change through the drama of litigation where the central actors are reluctant judges and resistant prison administrators. In any case ". . . prison reform cannot be made acceptable just by ensuring rights or the comfort of the inmates."(*1*)

On the dim horizon one sees a group of the newest enthusiasts clamoring for their place in the torturously convoluted history of prisons. They are called behavior modifiers. Though not new, their language isn't well-known yet because they are just now emerging from animal laboratories and back wards of hospitals for defectives. Their therapeutic arsenal is equipped with positive and negative reinforcements, pills, chemicals, electrodes and neurosurgical instruments. With corrections experiencing an "end of ideology" and its weary leadership floating in a vacuum this new wave of enthusiasm based upon behavior manipulation may become attractive to them. What follows here is an alternative less enthusiastic perhaps but even less manipulative.

Corrections is much too important an issue to be left in the hands of wardens, Clemenceau might have said. But unfortunately that is a fair picture of current American correctional practice which is still insulated and isolated. As a result it remains uninformed by a theory of human behavior hence it may be found to be using several simultaneously. It remains uninformed by a theory of the purpose of the criminal law hence it passively watches itself become an explosive warehouse in response to legislative whim and caprice. Correctional objectives, such as they are, developed aimlessly. Tappan observed (1951).

"* * * In different periods of social evolution certain ones have emerged out of society's particular climate of values and have been more highly prized than others. Yet each, as it has been crystallized in law, custom, and correctional practice, has impressed a persisting influence upon subsequent policy. Moreover, each objective has become encrusted with layers of rationalization to justify and perpetuate the established treatment methods. The ultimate consequence is a melange of purposes, some deeply bedded in the channels of history * * * it is not unusual to find correction exerting, in turn, vindictive, deterrent, and rehabilitative measures in relation to the same offender."(*2*)

As a result of aimlessness and public neglect the prison never acquired a specific correctional purpose, rather it inherited vestiges of the Puritan Ethic and added middle-class values of mobility through work and education to it. Packer (1968) called this a "leap of faith."

"We can use our prisons to educate the illiterate, to teach men a useful trade, and to accomplish similar benevolent purposes. The plain disheartening fact is that we have very little reason to suppose that there is a general connection between these measures and the prevention of future criminal behavior. What is involved primarily is a leap of faith, by which we suppose that people who have certain social advantages will be less likely to commit certain kinds of crimes. It is hard to make a good argument for restraining a man of his liberty on the assumption that this connection will be operative in his case. It is harder still if he already possesses the advantages that we assume will make people less likely to offend."(*3*)

We will propose a limited set of objectives for prisons devolved from a series of propositions concerning our view of man and law in the context of justice. Meaningful prison objectives cannot be successfully divorced from a conception of human behavior and the criminal law.

Much of criminologic theory development has taken us down a primrose path searching for a "unified theory" of criminality. It has been in the tradition of early demonology, albeit seeking more "scientific" unifying themes such as physique, mental aberrations, glandular dysfunction, genetic disabilities, atavistic behavior, social ecology, cyclic variation in the economy or weather, and associational patterns. Theories have tried "* * * to explain criminal behavior itself, but they do not concern themselves with *why* certain acts are defined as crimes" sometimes oblivious to the interconnectedness of "the acts [themselves] defined in the law as crimes and the forces that impel some people to commit these acts," (*4*) In either case the notion of responsibility is frequently downgraded. Corrections, if not criminology must come to terms with this problem. We can no longer await the refinement of theories before acting to modernize the field. Theorists unlike convicts are not quite so desperate but like them have plenty of time. Correctional administrators are not at such leisure.

We are not sure whether the sentence of imprisonment or any other penal sanction really deters (generally or specifically) but we are in agreement with Norval Morris and Gordon Hawkins when they observed of this endless debate, that it seems to have deteriorated since the days of Beccaria "* * * Discussions of this ancient antinomy which have consumed gallons of jurisprudential ink turn out on examination to resemble nothing so much as boxing matches between blindfolded contestants." (*5*) However, we do have a substantial guide for future correctional action from work of Walker and Wilkins (cited in Chapter II).

We propose the following propositions based upon a perspective suggested by Stephen Schafer:

1. Criminal Law is the "command of the sovereign." [1]

2. The threat of punishment is necessary to implement the law.

3. The powerful manipulate the chief motivators of human behavior—fear and hope—through rewards and punishments to retain power.

4. Socialization (the manipulation of fear and hope through rewards and punishments) of individuals, however imperfect, occurs in response to the commands and expectations of the ruling social-political power.

5. Criminal law protects the dominant prescribed morality (a system of rules said to be in the common and best interest of all) reflecting the enforcement aspect "of the failure of socialization." [2]

6. In the absence of an absolute system of justice or a "natural law," no accurate etiological theory of crime is possible nor is the definition of crime itself stable.

7. Although free will may not exist perfectly the criminal law is largely based upon its presumed vitality and forms the only foundation for penal sanctions.

8. A prison sentence represents a punishment sanctioned by a legislature and meted out through the official legal system within a process of justice, against a person adjudged responsible for his behavior although the purpose of punishment may be deterrence it is specifically the deprivation of liberty for a fixed period of time.[3]

9. The entire process of the criminal law must be played out in a milieu of justice. Justice-as-fairness represents the superordinate goal of all agencies of the criminal law.

10. When corrections become mired in the dismal swamp of preaching, exhorting, and treating ("resocialization") it becomes dysfunctional as an agency of justice. Correctional agencies should engage prisoners as the law otherwise dictates—as responsible, volitional and aspiring human beings.

11. Justice-as-fairness is not a program; it is a process which insists that the prisons (and all agencies of the criminal law) perform their assigned tasks

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[1] And as Schafer reminds this "may be a gloomy truth whether the origin of the law is traditional or revolutionary". (Stephen Schafer *The Political Criminal*, p. 47).

[2] Schafer states "Morality is not the product of law; the law exists to enforce morality" (p. 104) and ". . . criminal law is a kind of back-up instrument in the socialization process, and it comes into operation whenever the state of any moral issue so warrants." (Stephen Schafer *The Political Criminal* p. 84)

[3] "* * * if punishment is to be considered as aim of imprisonment, it must be what the Germans termed "Zweckstrafe," or punishment for a purpose, rather than "Vergeltungsstrafe," or punishment as retribution." A.C.A. "Manual of Correctional Standards" as cited in Killinger and Cromwell *Penology*, p. 76).

with non law-abiders lawfully and with an even hand. No more should be expected, no less should be tolerated by correctional administrators.

12. William Pitt said: "where the law ends tyranny begins"—so does the exercise of discretion. Discretion "may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness." (6) Discretion cannot be eliminated but the justice perspective seeks to narrow, control, and make it reviewable. (7).

Having stated the propositions we now use them as a springboard for examining their rational implementation in correction institutions. Of the major areas in correctional administration which most vitally affect the operation of prisons three will be discussed; sentencing and parole boards taken together and prison administration. We are interested in how the prison stay is determined, organized, and for most prisoners, ended. Following this analysis we will propose some alternatives. But in preface some thoughts on justice are offered.

On Justice—A Perspective

Philosopher John Rawls identifies justice as "the first virtue of social institutions, as truth is of systems of thought" and he continues, "A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust." (8) In order to develop an operational model of justice in corrections we must move from the philosopher's chair to cell block. Speaking about the student of ethics Han Reichenback suggested "* * * [he] should not go to the philosopher, he should go where the moral issues are fought out." (9)

A concept of justice is useful to the scholar but it does not contain the urgency felt by those who must daily test its utility in practice. Great ideas are played out by average men not, as Edmund Cahn reminds us, by the legally constructed "reasonable man" who is usually too dull to get into trouble with officials. (10)

Justice in the Consumer Perspective

We are not interested in "utopian diagrams about abstract justice . . . justice fill mean . . . the active process of remedying or preventing what would arouse the 'sense of injustice' (11) so wrote Edmund Cahn.

The correctional model of justice we arrive at is an adaptation of Cahn's "consumer perspective." It focuses the official processor of justice on the consumer—on the people caught in the machinery of the agencies of justice—the offender, the guard, the victim, the witness and the taxpayer. Tappan (1951) had long ago called this to our attention when he called for the protection of the innocent against injustice; "Three groups require some special consideration. In order of their numbers, they are the taxpayer who bears the costs, the actual or potential victim of the criminal who is most directly injured, and the innocent suspect who may be unjustly convicted and punished." (12) In relation to the "War on Poverty" Cahn's son Edgar and his wife Jean called our approach the "civilian perspective" rather than the "military perspective." (13) Jonathan Caspar in criminal justice identifies it as the "consumers perspective" (14) similarly it is what Philip Selznick refers to when he speaks of the imprisoned in need of "justice as therapy." (15) It is a concern for the micro-world of the participants in action not in abstraction.[4]

The "consumer perspective" or "justice perspective" as we shall now refer to it can be distinguished from the "imperial" or "official" perspective. (Cahn, 1963)

"The official perspective has a typical rhetoric which, when expertly manipulated, can seem very persuasive. . . . Some of the familiar phrases are: the public interest in getting things finally settled; the duty to abide by established principles and precedents; the necessity of showing respect for expert judgment and administrative convenience; the dominant need for certainty in the law; the obligation to preserve the law's predictability so that men will know how to order their affairs; the danger of opening the floodgates of litigation; the danger of opening the gates of penitentiaries; the danger of inviting collusion, fraud,

[4] There is a parallel stream of thought encompassed in Lawrence Kohlberg's *Just Community* (two volumes Harvard University School of Education) but in the last analysis it turns out to be a form of group therapy using morality as its rationale rather than the psyche. At times the two are indistinguishable. Niantic Women's Prison in Connecticut is the current setting for Kohlberg's (et al) correctional demonstration project.

and perjury; the deference due to other organs of government; the absurdity of heeding mere speculations; the necessity of leaving certain wrongs, however grievous they may be, to the province of morals; the paramount need to maintain strict procedural regularity; and (by way of solace to a man on his way to the electric chair) the undeniable right to petition for executive clemency." (*16*)

The justice perspective involves a shift of focus from the processor to the consumer.

"* * * but among the various consumers and their diverse interests, it offers no simplistic formula, no a priori preference, no lazy hierarchy of values. Some consumers need bread; others need Shakespeare; others need their rightful place in the national society—what they all need is processors of law who will consider the people's needs more significant than administrative convenience. . . .

"In the consumer perspective, there is something repulsive about the complacent grin with which we are assured that not many judges have been caught taking bribes, that the third degree is not so common as it used to be, and that not many prosecutors suppress evidence favorable to the defense or, if they do, it is seldom proved. [or that uncovering convicts' corpses embarrasses legislators and thereby retards correctional reform.]

"How can one expect to solace them by promising that some day the law will awake to the needs like theirs? Unless a litigant happens to be an Olympian philosopher or a legal historian, he probably desires justice here and now * * * What he cannot understand is inertia and smug indifference." (*17*)

Corrections has long been cut off from ties with the general field of public administration. Speaking of the courts but with equal validity in corrections, Judge Marvin Frankel states: "One need not be a revolutionist or an enemy of the judiciary to predict that untrained, untested, unsupervised men armed with great power will perpetuate abuse." (*18*) Low visibility and high discretion eventually corrupts. An unhealthy wall of absolute power has kept correctional administrators cut off from; the mainstream of the history of ideas, the spirit of open political conflict (other than those of parochial localisms), their constituencies and from general involvement in the public arena. Wardens have long resisted public accountability (Kadish, 1962)

"* * * [t]he common demand twenty-five years ago for freedom of the administrator to get on with his job free of the harassment of legal imperatives is the same demand made today by those who administer the new penology. A beginning in the correctional area awaits a general recognition that the correctional agency is not *sui generis*, but another administrative agency which requires its own administrative law if it is to make its maximum contributions harmoniously with the values of the general social order in which it functions." (*19*)

The usual correctional response has been that large dosages of discretion are necessary if correctional administrators are expected to treat (rehabilitate) criminals. But we have also been warned by Justice Brandeis: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient." (*20*) George Bernard Shaw, speaking of the ruthlessness of the pure heart said: "Malice and fear are narrow things, and carry with them a thousand inhibitions and terrors and scruples. A heart and brain purified of them gain an enormous freedom * * * "presumably to do anything in the name of benevolence. (*21*)

"There is growing recognition that correctional agencies exercise a very significant form of governmental power, even more important to the lives of individuals than most governmental agencies * * * there is also need to do so in ways that are just and that inspire in the offender, as far as possible, and in the community a confidence in the justice of the correctional process * * * But the most important question is whether corrections should actively be concerned with the fairness of its processes beyond conforming to legal standards and participating in the creation of new ones. Legislative and judicial standards for the conduct of administrative agencies are necessarily minimum standards * * * Reliance must be placed upon the administrative agency itself to achieve that goal." (*22*) (Dawson, 1969)

As a matter of plain fact, correctional administrators have for too long operated with practical immunity in the backwashes of administrative law adjudication, must not stop when the convicted person is sentenced. (*23*) The police and courts in relation to rights due the accused before and through unmindful that the processes of justice, more strictly observed by the visible justice perspective demands accountability from all processors even the "pure of

heart." Properly understood, the justice perspective is not so much concerned with administration of justice as it is with the justice of administration. (24)

We now turn, using the justice perspective to inform our probes into sentencing, parole and life in the prison.

On Sentencing and Parole Granting

Judge Marvin Frankel wrote a book entitled "Criminal Sentences" (1973) which after reading, one can very clearly understand the double entendre intended. It might have been entitled "The Crime of Sentencing" or more charitably "The Lawlessness of Sentencing." It was not, nor is this analysis intended as an attack on judges, rather on a sentencing system which is anomic. With few guidelines and many judges we are effectively, in the area of sentencing, a government of men, not laws. (25)

"Experience, and wisdom flowing out of that experience, long ago led to the belief that agents of government should not be vested with power and discretion to define and punish as criminal past conduct which had not been clearly defined as a crime in advance. To this end, at least in part, written laws came into being, marking the boundaries of conduct for which public agents could thereafter impose punishment upon people. In contrast, bad governments either wrote no general rules of conduct at all, leaving that highly important task to the unbridled discretion of government agents at the moment of trial, or sometimes, history tells us, wrote their laws in an unknown tongue so that people could not understand them or else placed their written laws at such inaccessible spots that people could not read them." *Ginzburg* v. *United States*. 383 U.S. 463, 477 (1966) (26)

It is of vital interest to administrators of correctional agencies that the people committed to them, because of the usual bitterness they have upon arrival, also have the feeling that the judicial process immediately undergone was fair, just, and that the sentence received was offense-related and appropriate. (27) This is largely not the case at present.

Sentencing Patterns. The nation has several different adult sentencing schemes; (1) a system of both maximum (MA) and minimum (MI) terms fixed by the court (each offense has its own upper and lower limits set by law) (2) Both MA and MI (within limits) fixed by court with the MI not to exceed a portion of the MA. (3) MA (within limits set by law) fixed by court and the MI fixed by law (4) MA fixed by law and MI by court (5) MA and MI fixed by law for each offense (6) MA fixed by law but no MA in law rather the MA is fixed by the parole board (7) MA fixed by court, no MI (8) MI is fixed by law and MA by parole board. (28)

In addition to this crazy-quilt system in the nation, there are sentencing disparities within the same jurisdiction. It is too facile to permit the disparities to be explained as individualized justice being meted out by different judges.[5] Absent sentencing criteria, the individual judge's attitude surfaces as the controlling force. Like others, judges have strong attitudes about sex, mugging, narcotics and other crimes. The difference in the case of judges is that their attitudes, translated into unbridled action produce the longest prison terms in the western world. Blacks are treated more severely [6] by prison sentences than their white counterparts for similar crimes. (29) But race is not the only problem as James Bennett has observed—

"In one of our institutions, a middle-aged credit union treasurer is serving 117 days for embezzling $24,000 in order to cover his gambling debts. On the other hand, another middle-aged embezzler with a fine family is serving 20 years, with 5 years probation to follow. At the same institution is a war veteran, a 39-year-old attorney who has never been in trouble before, serving 11 years for illegally importing parrots into this country. Another who is destined for the same institution is a middle-aged tax accountant who on tax fraud charges received 31 years and 31 days in consecutive sentences. In stark contrast, at the same institution last year, an unstable young man served out his 98-day sentence for armed robbery." (30)

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[5] Richard McGee calls our attention to the fact that the "hanging judge" and "soft-headed judge" (disparities within a jurisdiction) is largely the same product of ruleless-ness sentencing systems ("A New Look at Sentencing—Part II" *Federal Probation*, September 1974, unpublished manuscript, p. 7.)

[6] Blacks, in the Federal system in 1969 and 1970 were averaging 88.5 months compared to whites at 75.1 months. *Federal Bureau of Prison Statistical Report* 1969 and 1970 (table A–8A).

Indeterminate sentences, said to be a treatment tool, have without exception produced more severe prisons terms. (*31*)

"70 percent of definite sentence prisoners actually serve two years or less; whereas only 57 percent of the indeterminate sentence prisoners actually serve two years or less * * * Clearly, therefore, in practice the indeterminate sentence system serves to keep a substantially greater proportion of men in prison for long terms than the definite sentence system." (*32*) (Robin, 1973)

The sentencing procedure itself, which presumably represents the apex of the adjudication process (up to this point justice was largely procedural) where the sovereign now "restores the balance" by meting out justice, is largely lawless. Legislatively prescribed procedures are practically non-existent. Regardless of what the judge finally selects as a sentence, the process itself, with rare exception, is inscrutable. We don't know, because we do not require an explication of sentence selection norms what a judge considers in his selection. "We do not allow each judge to make up the law for himself on other questions. We should not allow it with respect to sentencing," said Judge Frankel. (*33*) Continuing he points out:

"In deciding where to fix any particular sentence, he will presumably consider a host of factors in the case: the relative seriousness of the particular offense—the degree of danger threatened, cruelty, premeditation; the prior record of the defendant; situational factors—health, family disturbance, drug use; the defendant's work history, skills, potential; etc. In the existing mode * * * the judge is under no pressure—and is without guidelines—toward systematic, exhaustive, detailed appraisal of such things one by one. He probably does not list them even for himself." (*34*)

Even if he did list them it would be unknowable since he have not developed a procedure mandating judges to do so. Even when judges are thoughtful, the information they have before them, upon which to gase a consideration, is frequently inadequate, of a bland generalized nature and * * * "is not mitigated by the appending diagnostic courts and summaries that are sometimes legible, and less often intelligible, to the sentencing judge. (*35*) Finally, whatever the sentencing process is, it is not adversary and is rarely reviewable.

One would think that with such unbridled and unassailable power the judge's sentence would indeed be carried out to the letter. That used to be true but no longer is.

"The correlation between courtroom pronouncement and actual outcome has virtually disappeared. The history of penal policy during this interval is in no small measure one of erosion of judicial power and the evolution of a highly complex process of administrative punishment-fixing that directly involves prosecutors, parole boards and the disciplinary committees * * * From this functional perspective, judges are doing less and less of the real decision-making, their role being merely one step in a process in which law enforcement, prosecutors, probation officers, parole boards, parole agents or correctional staff may play major roles." (*36*) (Caleb Foote, 1972)

In the process of erosion, district attorneys at the front end of the criminal justice system, using their bargaining power make more decisions concerning the sentence than do judges. And at the other end of the system, the parole board governs the outside length of the sentence.[7] The prisoner * * * "Kept in the dark about how to behave" in order to minimize his sentence finds his life in the prison cast in a "pattern of cryptic taciturnity." (*37*)

Parole boards, without a legal mandate to sentence continue to play a larger role than judges in sentencing. Caleb Foote (1972) comments on parole board decision making:

"The same basic criteria are usually employed whether the arena is a courtroom or some prison parole hearing room, e.g.: (1) a determination of how much time is right for the kind of crime at issue, with the decision-maker's own sense of values and expectations usually (but not always) heavily influenced by the pressures of his environment and what he perceives to be the norms of his colleagues; (2) classification within that crime category of the offender's particular act as mitigated, average or aggravated; (3) his past criminal record (slight, average or aggravated): (4) the extent of his repentence, his attitude

[7] When you think about it, parole boards really have more to say about how long a person's liberty must be taken away from him than the courts do." (Maurice Sigler, Chairman of the U.S. Parole Board *The Courts and Corrections* Speech 8/17/73, Kirksville, Mo.).

towards available 'treatment', and the official prognosis of his reformability; or (5) the anticipated public (usually meaning law enforcement) reaction to a proposed disposition." (*38*)

Parole boards, through legislation, have inherited much of the sentencing power normally associated with the judiciary. (*39*)

The parole board decisions too are unreviewable and are not hammered out in an adversary clash, rather they are five to fifteen minute sessions frequently with members using a combination of whim, caprice and arbitrariness. And as if to say amen, Maurice Sigler of the U. S. Parole Board, following *Morressey* v. *Brewer* said in a speech (1973) "* * * perhaps it should have been foreseen that eventually parole actions would have to be governed by considerations of due process." [8] (*40*)

Compared to the courtroom which is open, the parole board hearing is secret. Only recently have reasons for denial been given to convicts in a systematic manner, but decisions, short of a finding of abuse of discretion, are not successfully appealed. (*41*)

We find vague the rhetoric of the imperial or official perspective guiding judges and parole boards in their decisions. The justice perspective challenges the lack of clarity and degree of certainty of such expressions as: "the sound exercise of judicial discretion," "the consideration of the crime and the criminal," "the gravity of the deed," "the guilt of perpetrator." (*42*) They are, Caleb Foote points out, no more than slogans, none are law. (*43*) In the quest for fairness using the justice perspective we seek a justification in the law for the decisions of those who exercise wide discretion. "The largely unbridled power of judges and prison officials stir questions under the clauses promising that life and liberty will not be denied except by 'due process of law'." (*44*) Justice Stewart once described some sentencing practices as discriminatory, capricious and freakish. (*45*)

We have made this brief excursion in the realm of ruleless sentencing and parole granting not for the purpose of extensive analysis rather to better understand the prisoner as he enters and tries to legally leave the prison. Prison life is largely a product of the anomia of sentencing and paroling. Like both, it too is effectively ruleless. How could it be otherwise with 95% of its prisoners unable to calculate when they will be released or even what, with a degree of certainty, is demanded of them for release candidacy by parole authorities. These two processes, uncontrollable by prison officials, have crucial impact on life inside the walls, to which we now turn.

A Restatement of the Purpose of Prison

At one level the problem with prisons is that they have never bitten off a digestable bite. A narrowing of the rhetoric and purpose is necessary. A prisoner who entered with feelings of despair, after having received a sentence he felt improper but unreviewable, now has to settle down to life in a cage. First he must turn his attention to problems of protecting his internal integrity from another sequence of largely lawless events—prison life. This would be a herculean task for most but additionally he learns that still another lawless (in the sense of ruleless) process needs to be undertaken—his preparation for parole. As a stranger in a zoo-like world he begins to seek out significant others who can speed his process of release. But who can make such judgments in a prison? What appears to be a rational, even tightly drawn military-like prison staff organization is, upon closer examination, chaotic. [9] Again the question turns on discretion.

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[8] "The U.S. Board of Parole is opening five regional offices to expedite parole actions and insure that decisions are considered in a manner that provides greater fairness to inmates and to the public. Prisoners will be told why paroles are denied and may appeal the decision to the full Board in Washington, D.C. Regional offices are being opened in Philadelphia, Atlanta, Kansas City, Mo.; Dallas, Tex.; and Burlingame, California." (LEAA Newsletter, August & September, 1974, p. 26.)

[9] Seen from outside, the criminal justice and correctional system presents the appearance of a virtually omnipotent conspiracy for the organization of human misery. But once having won his way in, the outsider—now a participant—discovers a shocking fact. Except for the universal penchant of bureaucrats to cover their own trails, there is no conspiracy. Indeed, there is hardly any 'organization'. What appeared at a distance to be a monolithic system turns out to be no system at all—but rather a concatination of several interest groups, frequently operating at cross purposes or, worse, without reference to each other at all. In the chaos thus propagated, accident, apathy, non-accountability and sheer inertia are fully capable of producing fortuitously what the most efficient, concerted malice might have achieved by design: the almost total debasement of human aspiration." (Richard R. Korn, "The Prisoners of Affirmation: Correctional Administrators as Penal Reformers" in *Prisoner's Rights* by Michele Hermann and Marilyn Haft (editors), p. 44f.)

Theoretically, the staff of the prison regularly furnishes the parole board with information pointing to prisoner progress, its pace, or absence. Of the myriad events which take place how can discriminating information be sensibly selected, collected, distilled and reported to the board? After the board "studies" it, it now has to make a decision concerning the convict's future crime-free behavior basing it upon his behavior in prison—no small task. Unaided by rules, reviewable findings or precedents the board usually makes its decision using a melange of whim, time served, caprice, the amount of "noise" created by law enforcement agencies, arbitrariness, and authoritative testaments from clinical and other prison staff concerning the convicts reformative progress. It is in this process that prison staff decision making fades into unbridled, low visibility discretion. If at first blush, discretion looks like power, in prison it also produces an arena in which indecisiveness, favoritism, racism, suppression and lawlessness are daily played out. The system calls forth such responses from staff and convicts because it gives no direction, has no accountable mission and in the absence of accountability, claims much more than it can produce.

We have to conceive of the period of incarceration and its place in criminal justice in a new way. Consider the problem facing Thomas Edison when he was thinking about a new technology for developing artificial light. The imagery he labored under at the time was "candle power" and how to increase its potency. Staring at the candle and acting upon that model he would have simply produced larger and larger candles. Edison needed and produced a flight in imagination to arrive to the electric light bulb. In corrections we are still toying with the candle. The suggestions to follow are based upon a two-pronged strategy (1) the immediate and short range and (2) the middle range. No long range is offered because the critical urgency to move rapidly and "progress" in corrections is usually counted in decades. The distinguishing characterstics between the two strategies is that the short range requires no legislation or new appropriations while the middle range requires both.

Immediate and Short Range

We need to conceptualize imprisonment differently and narrow our rhetorical claims. A penal sanction should *only* mean a temporary deprivation of liberty. It is the legal cost for the violation of some laws. The prison is responsible for executing the sentence not rehabilitating the convict.

"In seeking to make criminal justice more redemptive and less punitive, we may have asked too much of institutions that can barely hold their own, let alone develop the competence to be curers of souls. A retreat from rosy hopes may well be inevitable, if only because rehabilitation entails supervision, and ineffective rehabilitation coupled with open-ended control has little to commend it." Selznick (1968) (*46*)

The sentence must be seen as a part of the continuum of justice—it must be experienced justly, reasonably, and constitutionally. It is in the context of justice that a mission arises for the prison and its staff. The mission is fairness. Until sentencing and parole problems can be resolved, discretion must be harnessed by as much voluntary administrative explication of norms as is necessary to produce a sense of fairness for both the keeper and the kept.

The prison sentence should merely represent a deprivation of liberty. All the rights accorded free citizens but consistent with mass living and the execution of a sentence restricting the freedom of movement, should follow a prisoner into prison. The prisoner is volitional and may therefore choose programs for his benefit. The state cannot with any degree of confidence hire one person to rehabilitate another unless the other senses an inadequacy in himself which he wishes to modify through services he himself seeks. This should be evident from historical experience. Volition is subversive of the foundation of the clinical model for the offender exercising independence of choice, may not select the clinician as his choice of treatment. The person troubled or in trouble has to want something to happen. The best way to engage him is to treat him with dignity. Administrators should immediately begin to zero-base budget all such program services not voluntarily chosen by inmates.

"*The postulate of normality, competence, and worth.* If offenders are to be dealt with as human beings, it must be assumed that they are basically like everyone else, only their circumstances are special. Every administrative device that negates this principle, and any therapy that ignores it, must be questioned and, if possible, set aside." (*47*) (Selznick, 1968)

We will shortly elaborate a prison mission of justice for our current fortress prison environment—but the fortress prison system must be ended if we are to expect further rationality in correctional development.

Middle Range

There are three elements which should govern the middle range strategy which will be elaborated later: (1) a return to flat time sentences with procedural rules governing sentence selection. (2) the elimination of both parole boards and parole agencies; (3) the transformation of the fortress prison into institutions for no more than 300 persons, further divisible into sub-units of 30. The institutions will contain people sentenced to similar terms. Release will be determined by a narrow and reviewable system of fixed good-time rules. We turn first to those elements of a short range which can be immediately implemented by administrators.

A Justice Model for the Fortress Prison

The period of incarceration can be conceptualized as a time in which we try to reorient a prisoner to the lawful use of power. One of the more fruitful ways the prison can teach non-law abiders to be law-abiding is to treat them in a lawful manner. The entire effort of the prison should be seen as an influence attempt based upon operationalizing justice. This is called the "justice model."

It begins by recognizing—not by moralizing what the prison stay is about. Simply stated, it is an enforced deprivation of liberty. It is a taking of some or all of the days of a person's life and his confinement within an area. When men are confined against their will in this country, the bottom line of the arrangement of life for both the keeper and kept should be justice-as-fairness. Opportunities for self-improvement should be offered but not made a condition of freedom.

Confinement and compression of large numbers of men, in a human zoo, who in the past have frequently resorted to the use of force, fraud and violence is at best a precarious venture. James Q. Wilson said, "We have imposed the rehabilitative philosophy in a way that offends simple justice . . . when it is possible for one person, by manipulating the system, to go free while another, convicted of the same crime, remains in prison for a long term." (48) Prison administrators should not now further confuse their staff with a mission either claiming moral or psychologic redemption nor with one which leans on brutality to create orderliness.

Justice-as-fairness provides the keeper and the kept with a rationale and morality for their shared fates in a correctional agency. Considering the failure of most treatment methods within our current operating structure—the fortress prison—the justice model holds some promise, if not to cut recidivism, then to more decisively preclude Atticas. This model purports to turn a prison experience into one which provides opportunities for men to learn to be agents in their own lives, to use legal processes to change their condition, and to wield lawful power. Men who can negotiate their fates do not have to turn to violence as a method of achieving change.

It is a sad irony in our system of criminal justice that we insist on the full majesty of due process for the accused until he is sentenced to a prison and then justice is said to have been served. Consider that our criminal code makes it mandatory that before a criminal sanction may be imposed, there be a finding beyond stringent levels of doubt that the accused's behavior was a union of *act* and *intent*—it was volitional. We will reduce degrees of responsibility for the alleged crimes if the behavior was adjudged non-volitional. We are tough in standards of arrest, most stringent in the finding of guilt. The defendant is protected under the mantle of the presumption of innocence. The state must prove its allegations "beyond a reasonable doubt." The defendant can stand mute in court and is protected from conviction out of his own mouth. Anything brought before the court to support a prosecutor's claim may be challenged. We believe that this system is civilized and protects us from star-chamber injustices. We strain to protect the lowliest from the capriciousness of the legally constituted authority. The great irony occurs after a conviction when the judge commits a guilty offender to prison. It takes a great flight of imagination or studied neglect to include the current prison experience in a system of justice. The entire case for a justice model rests upon the need to continue to engage the person in the quest for justice as he moves on the continum from defendant-to-convict-to-free citizen.

The justice model seeks to engage both the keeper and the kept in a joint venture which insists that the agencies of justice shall operate in a lawful and just manner. It simply means that we believe that the prisoners did not use lawful means to guide themselves outside the prison and should therefore be provided greater (not lesser) opportunities to learn lawful behavior while in the institution. The staff effort should be turned to teaching a prisoner how to use lawful processes to achieve his ends. This also implies that the convict accepts the legal responsibility for the consequences of his behavior. In the absence of a continuum of justice in the prison, most ends are reached unlawfully. When unlawful behavior is detected, it is itself frequently dealt with absent the very standards of due process we insist upon outside the prison. The result is a further indication to the convict that lawful behavior has little pay-off. He can be dealt with arbitrarily and usually responds by treating others in the same manner.

The justice model insists that, at least during the period of incarceration, the prisoner and the staff, as society's agents, will deal with problems in strict fairness—something we expect of each other outside of prison. Further, it points to a way of engaging both the keeper and kept in a rhetoric-free manageable prison experience.

OPERATIONALIZING JUSTICE IN THE PRISON

The model of justice we propose affects several aspects of prison life. It attempts to create a lawful and rational arena for dealing with problems arising from an artificial environment which charges one group of men to restrain the mobility of another against their wills. While this can probably never be voluntarily achieved there are some immediate short range goals which we believe are realizeable; (1) a mitigation of harshness, (2) peaceful conflict resolution, (3) and a safer staff work environment that will emerge from the operationalization of fairness in prison life.

The days of hiding behind the wall are effectively over. Correctional administrators can undergo the turmoil of being forced to go public or can take the initiative and voluntarily begin programs of playing a more open hand. By this we mean a checks and balance system of scrutiny not another torrent of slick publications. For those who believe that such a course of action is a new or radical departure in thinking we cite John Howard in his "State of Prisons," 1777.

"Finally, the care of a prison is too important to be left wholly to a gaoler, paid indeed for his attendance, but often tempted by his passions, or interest, to fail in his duty. For every prison there should be an inspector appointed; either by his colleagues in the magistracy or by Parliament * * * He should speak with every prisoner, hear all complaints, and immediately correct what he finds manifestly wrong." (*49*)

Discretion is the central problem of corrections affecting its entire structure from the administrator to the convict. Its successful harnessing could go a long way toward giving the feeling of fairness to all concerned. More significantly perhaps it would free the administrator from bondage in the rhetoric of the imperial perspective and permit him to take a position more suitably appropriate for an agent of justice. In this sense freedom for the correctional administrator lies in the direction of voluntarily adopting a simple justice mode for administering his official affairs. How may this be done? Professor Kenneth Culp Davis suggests several ways of structuring discretion.

"The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair informal procedure. The reason for repeating the word 'open' is a powerful one; Openness is the natural enemy of arbitrariness and a natural ally in the fight against injustice." (*50*)

Properly understood this discussion is limited to the elimination of unnecessary discretion and the structuring of arbitrary discretion. It does not imply the total elimination of discretion rather a lifting of the veil so that fairness can creep in to protect those affected. We all respond more positively to fair treatment and even to a punitive action when it is accompanied by a precise explanation of a violated norm.

In the context of prison, justice-as-fairness means having clear rules, insuring their promulgation, and a procedure for determining and punishing rule infractions rooted in due process safeguards (for example: statement of the allegation, notice, counsel substitute, a hearing, the chance to rebut, written findings, appeal).

Further, it means giving up the foot dragging which the litigation so vividly bares. Correctional administrators should not have to be brought to court to provide adequate law libraries and access to them, for more than ten sheets of paper or for punishing by segregation, those who use their right to access the court, the press or the public. A justice perspective assures that expressions of racism will be fought. We should be in the forefront of exposing the indignities of poor medical care, inadequate diets, servile labor, the absence of recreational programs and inhumane segregative facilities. The case materials show that in court we appear to be alibiing for the existence of such conditions instead of agreeing to seek remediation. The public and court will permit us reasonable precautions about what may freely enter prisons, but they look askance at the overbroad prison regulations surrounding mail, publication, and visitors. Administrators need to make a dramatic break with the vestiges of the nineteenth century "buried-from-the-world" philosophy. Courts should not have to force modern administrators to adopt any of the above procedures—it embarrasses our claims to professionalism.

Specifically, but not exhaustively, the following program elements would provide minimal levels for a justice perspective in prison operation.

1. Elements of self-governance.
2. A system-wide ombudsman independent of the Department of Corrections.
3. A law library.
4. Civil legal assistance for inmates.
5. A prevailing-rate wage system in the prison industries.
6. Opportunity to provide community service (a form of more restitution).
7. Recognition of, and opportunity for programing for different ethnic groups.
8. Due procedural safeguards built into internal behavior management systems.
9. No mail censorship.
10. An extensive furlough program.
11. A greater degree of certainty about the length of the prison stay.
12. Open access of the correctional system to the press.
13. A system of victim compensation and offender restitution.
14. Conflict resolution machinery built into the prison operation.

An agenda for fairness for guards should include: clearly drawn work assignments, employment standards and salary on par with the state police, hazardous duty and malpractice liability insurance, a dignified but mandatory earlier (age 55) retirement, special benefits from duty-related death, the right to organize and bargain collectively, involvement in program planning, a grievance procedure, freedom from partisan political pressures, merit[10] procedures for promotion, and mandatory training which is unambiguous about the guards' work role and focuses on procedures of justice-as-fairness in addition to traditional custodial concerns.

In the micro-world of the prison the justice perspective calls upon the maker of rules to share legitimate power with the enforcers and consumers of the rules. It also urges that all rules and rulings be required to stand the test of being the least onerous way of reaching a lawful end.

Sentencing and Parole—Some Alternatives

We have already examined the maze of sentencing patterns which exist in the nation. We have an idea of the disparities which arise as a result of lawlessness in sentencing procedures. In the area of sentencing we are a government of men not law. Prisoners entering our institutions burdened with a sense of injustice, living in its compressed tension, with rulesless procedures for parole, make the entire prison venture unsafe for all. Yet we will need some form of separation of the dangerous for the foreseeable future. But sentencing can be accomplished sensibly and equitably.

The indeterminate sentence is now experiencing the beginning of its end. Recently a group of informed leaders have begun sounding the death knell for the rehabilitation model and its powerful tool the indeterminate sentence.[11]

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[10] At Menard prison in 1973 guards talked freely about purchasing and retaining their jobs, and being promoted as a function of routine payments to county party chairmen, ranging from $50.00 to $300.

[11] "Now both the public and the correctional staff expect prisoners to be, at least, no worse for the correctional experience and, at most, prepared to take their places in society without further involvement with the law." (National Advisory Commission on Criminal Justice Standards and Goals, 1973.)

Judge Laurence W. Pierce (U.S. District Court) states in relation to the rehabilitation model: "I join the chorus of those who are suggesting that this commitment be reassessed. (*51*) Judge Frankel finds the indeterminate sentence is frequently "evil and unwarranted." (*52*) Judge Constance Baker Motley has suggested a system of graduated sentences of a mandatory nature for the repetitive offender but no prison for most first offenders. (*53*) Dr. William E. Amos Chairman of the Youth Corrections Division of the U.S. Board of Parole took the following position:

(1) We should confine fewer people.

(2) The philosophy of confinement should be deterrence, accountability, and the protection of society—not rehabilitation.

(3) Adequate training or rehabilitation centers should be operated by other agencies to service those offenders whose offenses are directly related to educational, physical, or psychological deficiencies. These agencies may be vocational rehabilitation, welfare, educational, or even private agencies.

(4) Whenever a person is confined he should be provided the protection, services, and opportunities that would reflect our belief in the dignity and nature of man. I would further propose that a National Inmate Bill of Rights be prepared, and all states be urged to adopt and implement it. (*54*)

Allen Breed, Director of the California Youth Authority has come to the position that our "goal may (have) to be to make rehabilitation fit the crime." (*55*)

"But we should not confuse the public or ourselves on what we are doing. If we send offenders to prison we do so to punish them, not to rehabilitate them. Hopefully, we can carry out our punishment in humane and sensible ways—and long sentences for offenders who are not dangerous can hardly be called sensible.

"The method would vary with the offender. Dangerous offenders must be kept in secure institutions—for the protection of society—for this must remain our primary consideration. The vast bulk of offenders need not be incarcerated at all, or for as short a time as possible, and always for periods that are specified in advance." (*56*)

The AFSC Task Force also called for the reduction of discretion in sentencing and an end to reliance on rehabilitation as a goal in corrections. (*57*) Richard A. McGee, president of the American Justice Institute, and perhaps the nation's most prestigious correctional figure, has after over 40 years of practice concluded:

"The divergence of views with respect to the purposes of criminal justice administration on the part of police, courts, corrections, legislature, significant citizen groups, politicians and the communication media give rise to a total picture of confusion, capriciousness, and injustice, if not irrationality. A system needs to be devised and put into operation which will (a) protect the public, (b) preserve the rights of individuals, and (c) satisfy reasonable men that it is fair, consistent, intelligent, and incorruptible. Such a system must be capable of adapting to the advancement of human knowledge and to the changing social and economic needs of the total society. That such a system of criminal justice does not exist in America today except as unrealized ideal is scarcely open to argument. This void is more apparent in sentence determination than in most other phases of our present 'non-system.' . . . The time for change has come. The question in most jurisdictions now is not do we need change but change to what and how to bring it about. Whether to muddle along responding to unsystematic political sharpshooting or to make fresh plans for orderly legislative enactment—that is the choice. Simple logic dictates the latter course. As a point of departure, this writer after years of frustrating experience and informal consultation with numerous practitioners and students of the problem has devised an alternative sentencing system * * * (*58*)

McGee urges *inter alia* the (1) end of indeterminate sentencing (2) a return to flat time sentencing (3) procedural criteria for sentencing (4) sentencing review procedures (5) and an end for both parole boards and parole[12] itself as a separate entity. (*59*)

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[12] Milton Rector, Executive Director of the NCCD, looking to "Corrections In 1993" also advances the elimination of parole boards and parole. He also suggests the periodic mandatory release of prisoners with assessments of how the prisoners fares on these furloughs as determinative of readiness-for-release decisions (Harleigh B. Trecker, editor Goals for Social Welfare 1973–1993: *An Overview of the Next Two Decades, 1973*)

It is indeed an important chorus, as Judge Pierce noted, but at least eight additional widely respected reports must be added to the chorus seeking sensible sentencing: (1) The National Council on Crime and Delinquency's *Model Sentencing* Act (1972) (2) The American Law Institutes' *Model Penal Code* (1963) (3) The ABA's *Standards Relating to Sentencing Alternatives and Procedures* (1969) and their *Standard Relating to Appellate Review of Sentences* (4) *The National Advisory Commission on Criminal Justice Standards and Goals' Report* (5) *The President's Commission on Law Enforcement and Administration of Justice*, (6) *The New York State Citizens Inquiry on Parole and Criminal Justice* (7) *The Committee for the Study of Incarceration and* (8) *The Group for the Advancement of Corrections', Toward a New Corrections Policy.*[13] All have a common thrust in relation to sentencing best described by the ABA in a commentary "Perhaps no single process or series of processes in the criminal justice system is more chaotic than the act of sentencing." (*60*) Although each report represents a variation on a similar theme—the emergent consensus seems to be:

1. Sentencing criteria should be statutorily required.
2. Sentencing should be based upon classification of offenders into risk categories.
3. Sentences should be more definite, (there are fairly broad variations but indeterminancy is substantially rejected) or fixed and graduated by seriousness of the offense.
4. Sentences should be reviewable.
5. Sentences of imprisonment should be substantially reduced.
6. Sentences of imprisonment should be justified by the state after an exhaustive review fails to yield a satisfactory community-based sanction.

Others have urged Commissions on Sentencing, (*61*) sentencing review councils, (*62*) separate sentencing hearings, (*63*) an end to plea bargaining (because it limits all other sentencing alternatives), (*64*) statutory atuhority for noncarcerative sentences, (*65*) an end to the capriciously excessive "emergency laws" which periodically panic legislatures, (*66*) for sentencing decisions to be weighted in favor of promoting a concept of individual liberty (*67*) and sentence equalization courts (automatic review). Thorsten Sellin speaking to the historical struggle between the egalitarians and the behavioral scientists observes (1970):

"With the increase of the number and variety of possible dispositions available to the courts the arbitrary power of courts which the egalitarians were desirous of destroying because of their mistrust of these agencies, has been increased, and more and more discretionary power has been transferred to agencies of correctional administration . . . The treatment philosophy has constantly made more inroads, but has not reached the point of diminishing returns." (*68*)

The current and persistent thrust may be fairly characterized as a neo-classical consolidation of penal sanctions. We add the perspective of justice-as-fairness which insists upon tight procedural regularity, hence a narrowing of discretion, for the agencies of the criminal law.

A RETURN TO FLAT TIME

"All this leaves the problem just where it was. The irresponsible humanitarian citizen may indulge his pity and sympathy to his heart's content, knowing that whenever a criminal passes to his doom there, but for the grace of God, goes he; but those who have to govern find that they must either abdicate, and that promptly, or else take on themselves as best they can many of the attributes of God. They must decide what is good and what evil; they must force men to do certain things and refrain from doing certain other things whether individual consciences approve or not; they must resist evil resolutely and continually, possibly and preferably without malice or revenge, but certainly with the effect of disarming it, preventing it, stamping it out and creating public opinion against it. It short, they must do all sorts of things which they are manifestly not ideally fit to do, and, let us hope, do with becoming misgiving, but which must be done, all the same, well or ill, somehow and by somebody.

"If I were to ignore this, everyone who has had any experience of government would throw these pages aside as those of an inexperienced sentimentalist or an Impossibilist Anarchist." (George Bernard Shaw 1922) (*69*)

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[13] Consisting of "Two Declarations of Principles": one by correctional administrators, and a second by the Ex-Prisoners Advisory Group (sponsored and published by The Academy for Contemporary Problems, 1501 Neil Avenue, Columbus, Ohio, 1974).

Richard McGee's alternative for California returns to flat time sentences in a five degree felony plan ranging from a minimum of three months to three years in the 5th degree to seven years to life (and death, if lawful) for 1st degree felonies. Considerable discretion is left to judges (with a built-in appellate review council) and state parole is collapsed into the existing probation system in the county that the released convict is expected to dwell. The prison therefore receives no discretion other than through the residual good time law which is not eliminated. Our suggestion, although closely paralleling McGee's, calls for a total flat sentence for three types of felonies mitigated by substantial good time credit. Both plans return power to the judiciary, within statutory guidelines and eliminate parole boards entirely. McGee observes:

"The judicial system is uniquely equipped to manage the decision making process in accordance with law, if an appropriate system were established to control capriciousness in subjective sentencing judgments. If judges are not social scientists, we must submit that most parole board members are not either and even where some of them are, there is no evidence that their decisions on balance are more wise and appropriate than those of judges." (70)

We call for a system based upon a finding of clear and present danger to be necessary for the imposition of a term of imprisonment. Imprisonment should be the court's last available sanction following an affirmative action by authorities seeking other alternatives. When a finding of clear and present danger is made it should require incarceration. At this point we part with McGee, who we believe, leaves too much discretion to the courts (even with the appellate review council, which we support). If we can accomplish procedural regularity in sentencing we believe a system based upon categories of demonstrated risk will bring more certainty and fairness to the prisoner.

But the prison needs one other tool to make prison life more rational. We propose that the limit on the flat time sentence be mitigated only by good time credit. This puts the discretion closer to the source which can most usefully employ it. It simply says to the prisoner (in category B for example):

"Your stay has been determined to be four years, no more, you can get out in two years but that's up to you. We reduce your sentence one day for every day of lawful behavior. You can't get out any faster by making progress in any other aspect of prison life. Lawful behavior is the pay-off. We trade you a day on the streets for every good one inside. For rule infractions, which may lead to a loss of good time, you will be able to defend yourself at a hearing, safeguarded by due process. We publish and issue a list of rules and the penalties for their violation. Our internal court does not deal with any actual crimes you may commit. If we have probable cause to suspect you committed a felony during your term with us it becomes a matter for the local district attorney. This may lead to another prison sentence. The law is such that lost good time, over six months, can be restored by a judge and a thorough appellate court procedure."

The basic idea behind each of the leading sentencing revision plans is a search for the classification of dangerous felons. They presuppose tight sentencing procedures and they propose a variety of ways of accounting for the more dangerous.

Consistent with the neo-classic approach taken in this paper the organization of the justice-for-fairness prison is based upon the principle of maintaining that spark we all seek as validation of manhood (and womanhood)—responsibility. The prison sentence is punishment but its execution is not vengeful. His conviction was based upon his volition and now forms the basis for his treatment as a prisoner. The new prison program can offer a reasonable array of services beyond the food-clothing-medical-shelter needs. We see the need for educational, recreation, conjugal visitation, work and vocational programs.

Education (academic and vocational) in our new prison program is akin to labor. There is no need for a full spectrum of remedial grade, high school and college programs. Prisons rarely have them anyhow. Education should be offered on a contractual basis after a prisoner (or group of prisoners) has selected a program he believes necessary for his own self-improvement. Counseling can also be accomplished in this manner. New programs are simply added and old ones discarded in response to need, not for the purpose of keeping dozens of civil service academicians busy without reference to needs of the prospective student body.

All clinical programs can be dismantled as well. The spectacle of organizing inmates into therapy groups or caseloads is embarrassingly tragic. It is best described as a psychic lock-step. When the indomitability of the human spirit could not be crushed by our "break the spirit" forefathers we relinquished the task to the technology of psychiatry. It is our belief that a conception of the prisoner as volitional and his assumption of responsibility for his behavior provide the best chemistry for mental hygiene. "To punish a man is to treat him as an equal. To be punished *for an offence against rules* is a sane man's right" said W.F.R. Macartney, an English exprisoner. (*71*) If he feels he has an emotional problem for requiring professional assistance the prison should make a timely response by providing a delivery system whereby private therapists are contracted for from the free world. J. D. Mabbott believed that:

"* * * it would be best if all such (clinical) arrangements were made optional for the prisoner, so as to leave him in these cases a freedom of choice which would make it clear that they are not part of his punishment. If it is said that every such reform lessens a man's punishment, I think that is simply muddled thinking which, if it were clear, would be mere brutality." (*72*)

The central point to be made is that the prisoner chooses and his release is not a function of clinical progress. We wonder, in an atmosphere of real choice, (in the sense of "free enterprise") how many prison clinical programs would survive?

As the Twentieth Century comes to an end the prison must act on the universally accepted axiom that the human animal is basically bisexual and that deprivation of opportunities for its expression, in the best of circumstances, leads to distorted behavior. Dignified, private and extended visitation is a minimal standard in our new scheme. It is not a reward. Like medical and food services it is minimally required for those from whom we expect responsible behavior.

Type B and C custodial facilities are distinguished by degrees of security. Secure custodial architectural treatment can now be accomplished mainly by perimeter defense. When a 300 person facility is sub-divisible into living units of thirty, other advantages arise (1) the oppressive features of large congregate living (counts, group movements, routinization, etc. . .) are eliminated (2) further refinements of classification (by work, education, even treatment groups voluntarily devised) for residence selection are available (3) staff can be assigned to manageable units and have their skills matched to the needs of the prisoners they supervise (4) finally the guard as we have known him historically may find new roles for himself. In the last analysis it may provide a safer work environment.

We offer no single scheme for the course of transition from the fortress prison to a new environment. It will take a state-by-state struggle for each to find their particular way.[14] Some states, not yet committed to the rehabilitation approach, might leap over the next two decades by moving to a justice model now. Others, having already become disillusioned with treatment approaches but trapped into strict custody can begin a process of detent between the keeper and kept based on an agenda of fairness rather than one of increasing clinical services. And for the majority of states located somewhere in between it will take searing self analysis and hard-nosed administrative decisions to redirect their efforts toward justice in prisons.

Transformation of the fortress prison will be expensive but not as expensive as building and operating new fortress prisons. There will be offsetting savings in locking fewer people up (in our accompanying plan for rationalizing sentencing) and further savings are realizable by the dismantling of archaic clinical, industrial and educational programs. Our conception of the prison stay as reasonable and certain (if austere) is based upon the premise that the pay-off will be an increase in the probability of safer streets.

Finally, we suggest a perspective that assumes crime and the criminal are not aberrations, that incarceration for some will be necessary, that in a democratic society the prison administrator's first priority is to accomplish it justly and that we stop seeking messianic "treatments" as a way of "changing" people. David Rothman has some timely advice along these lines:

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[14] Richard McGee suggests a rational sentencing transition plan for California. With a history of strong commitments to county probation California can reasonably collapse its state parole services into county operations. But there are too many variations in the U.S. to suggest (McGee does not) adoption of one transition plan for all or even many cases.

"Such millenial goals and the true-believer syndrome they engender have helped generate and exacerbate our present plight. But pursuing a strategy of decarceration might introduce some reality and sanity in a field prone to illusion and hysteria. Americans will not escape the tradition of reform without change by continually striving to discover the perfect solution. Rather, we must learn to think in tough-minded ways about the costs, social and fiscal, of a system that has flourished for so very long on the basis of fanciful thinking. If we can talk openly and honestly about what we can and cannot accomplish, if we demolish the myths of incarceration, regardless of how convenient or attractive they appear to be, if we put adequate funds and support behind the pilot programs that, when evaluated carefully, should lead us to fund large-scale measures, then we may begin to reverse a 150-year history of failure." (73)

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(66) *Op. cit.*, Rubin, p. 769.
(67) *Op. cit.*, Palmer, p. 18.
(68) Thorsten Sellin, The Origins of the Pennsylvania System of Prison Discipline, *Prison Journal*, Vol. L. No. 2, Spring-Summer 1970, p. 16.
(69) *Op. cit.*, Shaw, p. 61–62.
(70) *Op. cit.*, McGee, p. 8.
(71) J. D. Mabbott, "Punishment," in Olafson, Frederick A., *Justice and Social Policy*, New York: Prentice Hall, 1961, p. 46.
(72) *Ibid.*, p. 52–53.
(73) *David Rothman, "Decarcerating Prisoners and Patients,"* (pp. 8–30) *The Civil Liberties Review* Vol. I. No. 1, (Fall 1973), p. 29.

Mr. FOGEL. My perspective and interest may be slightly different from that of other witnesses. I am particularly interested in the

hazards of prison life as a work and living environment and the question of why we have continued violence in these institutions—almost from the day that they went up.

My experience and my study tells me that there are a number of reasons, and I'd like to give a few peripheral ones first related to the subject of inquiry before this committee and then get to what I think is the central issue.

Correctional administrators, as a group and not individuals, are notoriously ahistorical.

We've had a terrible history and lots of folks simply don't know about it. And so we keep repeating mistakes.

The field is generally in a demoralized state. And I think that's a function of its continued isolation. It suffers from a terrible mix that is dangerous in a democracy, and low visibility and high discretion.

It doesn't make any difference what kind of agency one is dealing with in a democracy—whether White House or a prison—the same problem leads to distortion.

The role of confusion in the field is rampant. I've done one of the few studies of guards, and I know very few lower-esteemed positions. It should not be that way, but I dare say that nobody could imagine that new parents, when looking at their baby, might have the aspiration of that child growing up to be a prison guard.

That is a sorry state, because if I just extended that a bit to any other helping profession, it might not be so remote. For example, working with children even in corrections has a higher status.

Guards are one problem. They have been given double, triple, quadruple message over the years—join treatment teams or lead group therapy or whatever—no one has taken the whip or a gun out of their hands.

That's the inside part of corrections. The outside part of corrections is parole and probation.

Senator BIDEN. Excuse me. Before you leave the guards.

What is your view of their self-esteem?

Mr. FOGEL. I think it's very low.

These days they are radicalized to the right. This is really the result of terrible work conditions, inadequate responses by legislatures, and the hazards of work.

Senator BIDEN. Thank you.

Mr. FOGEL. But the parole officers are not in much better shape. The mission there is very, very difficult.

In Chicago, our parole officers go out on daily appointed rounds with Freud in one hand and a .38 pistol in the other. And they're not quite sure which is more useful.

Freud doesn't help them much in their appointed rounds.

The field has bounced aimlessly from panacea to panacea, always biting off indigestible chunks—making greater promises than they can ever pay off on.

It seems that whenever the profession has trouble it passes some sort of resolution.

When some of us called for the abolition of parole, the response by the Association of Paroling Authorities was to pass a resolution saying we should keep it. When we suggested that the data shows that

treatment and rehabilitation doesn't work, another resolution came out that said treatment does work.

It is simply "business as usual," and people close ranks in the profession. That may not be unusual for any profession that's under attack.

The fortress prison is the other peripheral reason. I don't care what you put into a fortress prison in the way of extra caseworkers and some psychiatrists, it's the whole notion of men living against their will in steel cages embedded in concrete with gun towers, that will destroy any humaneness you try to introduce by way of programs.

Right now, as you well know, as a result of a study I think initiated by you, Senator, the overcrowding is at a very critical stage in this country, and in almost all of the States.

Several States' correctional systems have already been declared by the Federal courts to be unconstitutional. Ceilings have gone on populations; prisons have been closed. A score or other States—aside from Arkansas, Alabama, Mississippi, and Rhode Island, where the whole systems have been declared unconstitutional—are under various kinds of court orders, either limiting the population or to change the unconstitutional practice.

The only thing I can surmise out of this is that nobody seems to care much about a prison population, although we should because practically all of them are going to be living close to us at some date.

The central issue, as I see it, which is most important as it affects prison life—in addition to overcrowding, inhumane practices, and unconstitutionality, and so forth—is simply how you get in and how you get out.

A bit more elegantly put it's the problem of sentencing and the problem of parole. Both of them though grounded on a philosophy of the purpose of the criminal law. I think that's the great debate that's taking place in the country at the moment.

We start with sentencing.

Inside the prison, the first sense of injustice that mounts is as people compare notes and make invidious comparisons between the sentence A received as compared to B.

In my own State, if you want to make it into prison from Chicago, you have to overcome several difficulties. You have to get caught first. That's hard. Then you have to go to a county jail where it's going to take you 450 days to get through court if you can't make bail. And then you're probably going to get sentenced for the time you already did. Four hundred and fifty days in a county jail is worth about 5 years in Stateville Prison in terms of what it takes out of the human being.

But if you come from Murphysboro, down south, you have no problem. You stick out like a sore thumb. There are no alternatives to prison to speak of. You're going to go bouncing right into Stateville.

These two are going to be cellmates. The person that really needs to be in prison out of Cook County and the fellow who for the lack of services, a pressured judge, are going to be cellmates.

That's the first sense of injustice.

Discrepancies abound throughout the Nation.

Judge Marvin Frankel—you are probably already aware of and his book, "Criminal Sentences"—calls sentencing perhaps the most

lawless part of criminal justice procedures. Judges don't even have to put on a record, in most States, why they are sentencing.

I might note the Pennsylvania Supreme Court in August ruled that judges hereafter will have to put on the record why they sentence.

Sentences, except for a few States, are largely nonreviewable. You can get almost anything else reviewed in this country, but when someone takes the days of your life you cannot get it reviewed—in most States.

Sentences in the United States are draconian in length if you compare them to other countries of similar social and economic development in Western Europe.

In conferences with Western colleagues, after they look at our data, they say go home and cut all your sentences by two-thirds and see if you can't start over in America. We tell them we have a few problems with that. Incidentally, they have never heard of local government. In many of those countries they have Federal-type operations.

Senator BIDEN. We're beginning to hear about local government in France and Italy now with the rise of the Communist Party. They are becoming very educated.

Mr. FOGEL. But everything reaches the prison late as you know.

Also, we incarcerate at a much heavier rate than most countries. Sometimes it is 10 times what other countries do. Here for jails and prisons it is over 200 per 100,000.

We're seen, with indeterminate sentencing, an erosion of judicial power.

If you ask somebody on the street who sentences an inmate, they might simply say the judge. But if you study it a bit, you will see under the indeterminate sentence that hasn't been true for years.

The district attorney through plea bargaining does a lot of sentencing. And at the other end, the parole board by setting the release date really does all of the sentencing after these folks are finished. The parole board has the most decisive say in the actual time a person is going to stay in prison.

Senator BIDEN. Presentence offices have a significant impact on that where there's been a plea don't they?

Mr. FOGEL. Presentence investigations?

Senator BIDEN. Yes.

Mr. FOGEL. I wish that were true.

In Cook County, we have a mandatory presentence investigation. But consider, for example, that 87 percent of the cases are pled out so there are no presentence investigations in those cases. With the ones that do go to court 92 percent are waived.

Senator BIDEN. The reason I ask that is that in my State even where there is a plea there is a plea bargain made. There is a requirement of a presentence report.

In the vast majority of the cases before a judge for sentencing, are cases where there has been a plea. Consequently, the only information the judge has is that presentence report. By and large, that's followed.

And your experience is an exception rather than the rule.

Mr. FOGEL. It may not be such an exception in large States.

Presentence investigations, of course—I'm going to sugg later on that we make them mandatory and nonwaivable. We have that

in a provision of a bill before the Illinois State Legislature at the moment.

But also, if you peel away the first layer of skin on the process of how a presentence investigation is put together, you might find 30 people sitting in an anteroom and a probation officer typing his presentence investigation with the offender sitting next to him. A line on the presentence investigation might call for: "Personality Development." And he'll ask the fellow how he is. And he says "normal." Normal gets typed in.

Senator BIDEN. I'm not arguing with that. I was just curious as to what——

Mr. FOGEL. The question is the quality of information before a court.

Judges try to second-guess others. Conservative judges will try to second-guess "liberal" parole boards by upping the minimum. But you get the reverse of that too.

The system lends itself to such practices. There is a book, "Partial Justice," in which there are long psychoanalytic interviews done with judges along the political spectrum.

The findings of Dr. Gaylin, the author, was that judges march to a different drumbeat when they have a lot of discretion. It depends on how they feel about black people, women, pot, gambling, and so forth. It all has very little to do with the law.

It is unpredictable and it raises questions of basic fairness and justice.

I know, for example, that a lot of the 280,000 people in prison and 250,000 people in jails would like to trade in one-half their minimum sentences for a tape recording saying they're sorry. But it's not going to work for them.

But when they read that in the papers, it intensifies their feelings of injustice. All that has an effect on the daily life of a prison and the first recipients of hostility—the first recipients—are the guards. They are responsible for holding the line and are subject to the violence.

Senator BIDEN. I'm glad someone brought that point up. I hope that is well taken by those who follow.

Mr. FOGEL. If you look around at sentencing in the country, there are very odd plans. In some States, you can catch 5,000 years, 1,800 years, life plus 1 day, 494 years for a person who killed five other people.

In my own State, last month somebody got 200 to 600 years. Presumably, if they show progress after 200 years, they could be let out earlier than 600 years. But they're eligible for parole in 11-plus, by statute anyhow.

Senator BIDEN. They're eligible for parole how soon?

Mr. FOGEL. Eleven years and 3 months by statute.

Do you remember Speck, the fellow who killed the eight nurses?

Senator BIDEN. Yes.

Mr. FOGEL. When the Supreme Court knocked out capital punishment, he was resentenced and got 1,200 years.

At his first parole hearing, because he was a model citizen, he came up in about 10½ years.

It brought out the worst in everybody. Nobody was going to parole him. Even the NBC show, "Saturday Night," picked it up and joked

about it, saying: "The parole board gave him 1,100 years off for good behavior today. He has only 100 more years to go."

But that's laughing through tears. That's our system of justice.

Senator BIDEN. Just the mere fact that he was able to be considered for parole, even though everyone knew he wouldn't be paroled——

Mr. FOGEL. It's a mockery.

Senator BIDEN [continuing]. Caused a significant, in my opinion, stir in the body politic and called for capital punishment.

Mr. FOGEL. That's right.

But many people that came to testify at that parole hearing—It just brings out the worst in the human animal.

One person said "If you let him out, we'll cut him up into little pieces. We'll slice him up".

That's the sort of testimony that was given. They say we're good Christian folk, but we don't want him on the streets and that's what we'll do to him.

Well, if the first problem of the cellmate is invidious comparisons in relation to sentences, the next question—usually the first one—is how you get out of this place?

You learn that there's a parole board that sits at the apex of a large triangle, getting reports from everybody below—guards, ministers, music therapists, shop foremen, psychologists, etc. And somehow they try to make a sequential impactful statement blended with wisdom and a guess at how one is going to make it on the streets as a result of his prison experience.

Most parole board members are political appointees. They are unable to predict. At best they make informed guesses. Parole turns out to be more of a custody tool—that is, behavior management—to keep the prison quiet than it does a rehabilitative tool.

You see you can't have parole and can't let anybody out early unless the sentence is spread 1 to 10, 2 to 20. Then you let them out when they're "parolable," if they show clinical progress inside.

In the early days, an indeterminate sentence has been laid at the doorstep of the reformers, the progressives and the humanitarians.

If you read the testimony in the early days, they promised—legislative groups—that the indeterminate sentence would lengthen sentences not shorten them. And they were right. That's what has happened.

Almost uniformly, throughout the history of the inderminate sentence, it has lengthened the time a person spent in prison without necessarily improving him.

It was only 5 years ago, in New Jersey, that the supreme court there, in the *Monks* case, when a prisoner asked the parole board: Can I have a reason for being denied? The parole board said: We don't publish reasons. The supreme court said: From now on you will publish reasons. At least tell them why not.

That same supreme court decided when women found themselves spending more time in prison than men, that it was alright because they were better subjects for rehabilitation. That had never occurred to the women before.

Senator BIDEN. In your research, how much opportunity have you had to question and deal with the inmates themselves? Have you been into that very much?

Mr. FOGEL. Yes, I have.

There are at least three surveys of how inmates feel about determinate sentences.

I have read most of the important inmate literature—either books, articles, or newspapers printed in prisons, and I've worked in the prisons. In 1971 I booked myself in a prison for 5 days before I took over the office of commissioner of corrections in Minnesota.

Part of the coalition trying to enact the determinate sentence in Illinois is the National Prisoners' Union.

Senator BIDEN. Right.

The reason I asked that is to ask this question.

In your experience and your research with prisoners' attitudes, have you found—let me tell you what I've found in my very limited experience and then tell we whether you think that this can be generally applied.

I found when I was defending someone—especially if they had been up against it before, which were many of the people that I found as a public defender that I was again defending, they were much more concerned about getting a firm sentence than they were about almost anything else.

The one thing they didn't want to do—they would plead out for a longer sentence if they were certain that they thought they'd get it or a particular judge who was going to give it to them.

What they didn't want was to take a shot on maybe getting out earlier but also maybe staying longer. It was really very unsettling psychologically for them. They didn't want to face that prospect.

They'd take a longer shot rather than take a chance at the shorter one.

Mr. FOGEL. That is substantiated by some data from inmates asked in San Quentin, I believe—and I have it as an appendix in my book on the subject—what they though they should get for these types of crimes, as compared to what the actual time served was.

Inmates chose longer but certain sentences.

I know of people who don't want to get paroled. They would rather do the extra 6 months than be on "paper."

That is one of my most important points. It is uncertainty that causes tension inside, as it would with any of us.

If I had the keys to this room and just sat here and wouldn't let anybody out, you look like a Quaker right now but 2, 3, or 4 hours or 2 days later you're going to start asking me questions. And if I don't respond or have nothing to say to you, you can see that violence is going to be a probable outcome.

Now in the Federal Bureau of Prisons——

Senator BIDEN. One last question on that point.

Is there documentary evidence or research that contradicts what you and I have just said?

Mr. FOGEL. You mean that inmates prefer to have determinate sentences?

Senator BIDEN. Yes. Is there anyone arguing that today?

Mr. FOGEL. Individual inmates will say that. Usually the ones that have life sentences but with no possibility of parole.

You will find that in the three surveys—the State of Minnesota, I think, did the best methodological piece. Inmates came in about 3 to 1

in favor of determinate sentences. They would just like to know when they're getting out.

Six months extra doesn't seem to bother them much. As long as they know what that date is, so a family or a future can be planned around it.

Senator BIDEN. Thank you for letting me interrupt.

Mr. FOGEL. The problem is uncertainty. In the Federal Bureau of Prisons, which I take to be our best by the way, it takes blacks 13.5 months longer than whites to "get well," that is, they stay in longer.

What all of this has meant, as a colleague of mine in Illinois has said, is that parole—the whole parole procedure—has turned our prisons into great centers for drama, where the convicts are actors and the parole board are drama critics handing out Oscars, Emmys, and paroles.

When I once said this at a corrections conference, a Catholic priest from a southern prison came over and identified himself with his collar turned around as a drama coach. I asked him what he meant, and he said: Anybody that goes up to the parole board hearing room passes my office first, and they play the line they're going to use on the parole board on me first and I help them with it—showing the proper amount of remorse, abjectness, and so forth.

But the man was honest. At least he talks about it.

The clinicians do the same thing, but they do not talk about it as openly.

In Minnesota you had to join AA groups to be taken seriously before the parole board because the chairman, who was a former warden, liked AA.

At Attica, it had to be religious classes. That's what the Attica commission found.

In Nevada, it was Sunday school attendance.

There's another way to understand parole in this country, and I have some data on it in the formal presentation which is in the record now.

If you were to look at California the second year of Governor Reagan's first term his parole board released—over a 4-year period—some 7,500 prisoners through a liberal parole board policy and community corrections.

In his last 2 years, when he began running for president the first time around, his board increased the population by 4,500.

When Governor Brown came in, he reduced it by 2,000 in less than a year.

In Georgia, they found that they were too crowded so the parole board simply released more than 1,000. The chairman of the parole board announced: "This is not good parole practice but we're crowded."

If you want to understand how parole works, don't look to inmate behavior look to parole board member behavior and to policies of Governors.

In the prison population study that we've just completed for Congress, we also found that policy changes rather than inmate behavior governed sharp population peaks and valleys. Somebody had to intervene and say: release them or keep them. Get tough or don't.

Whatever else you might call such a process you can't call it justice.

The recidivism statistics are loaded too. You'll hear people saying that parolees do better than others. It should not be a big surprise to you, because they are only comparing parole releases. They never give you the data on who goes into the prison in the first place. Parolees generally do better than those on mandatory release or people who max out. But they were obviously better risks.

If you put a group of boy scouts in through weak sentencing laws, it should not be terribly surprising that they act like boy scouts—8 out of 10—when they get out.

The parole folks though are not sure of who to credit for their 80 percent success rate—the prison, the parole board, or the parole supervision.

The ex-con himself doesn't seem to matter much. Somebody has to take credit. Whether he's older, wiser, or more frightened we're not sure; or even if he's a better crook and just not caught again.

But in the absence of clarity, the American Corrections Association in a recent resolution on the subject simply declared that correctional treatment works.

My objection to parole is as a release mechanism. It is not so much to supervision. It is the arbitrariness, whim, and caprice that is involved in it.

Even with supervision in the community, being a cop and a counselor is hard, if not impossible, to carry off.

There is some evidence now that shows that ex-convicts with assistance, do better than ex-convicts without assistance. Some data that shows, in selected cases, that if you would simply pay ex-cons a certain amount, they'll stay out of trouble—certain kinds of ex-felons.

Although previous studies in Federal probation and parole, duplicated elsewhere, show that whether you have heavy, light, or no supervision it is not significantly related to success on parole.

The prison stay is my next item.

We have always had the same kind of folks in prison—ever since the beginning. They are poor; they are urban; they are male; and they are young. In this century, they have been overrepresented with minorities.

There is no viable political constituency for people in prison. So we've let prison officials, behind those big walls, get away with murder. And sometimes that's been literally true.

Historically, the prison has provided a peculiar mixture of religious and clinical programs and permitted itself to be used as a professional playground. We've had preaching and teaching and whips and chains and hoses and people dunked in ice vats—which the medical people used to write articles about in the twenties calling it hydrotherapy. During the war, we have given prisoners malaria, put them on suicide missions, and used them in experiments with poison gas. Drug companies, universities, and the U.S. Department of Defense have left scars on many experimental prisoner subjects throughout the system over the years.

The indeterminate sentence has also given rise to a slew of other prison therapies—individual therapy, group therapy, therapeutic communities—in a cellblock by the way—transactional analysis and of late: social work, psychology, psychiatry and transcendental mediatation.

The research on outcomes is weak and the successful outcomes are even weaker.

All the literature produced by ex-convicts makes the same point: That all the rahab programs are seen as collective farces when participation in them is linked to an early release date.

That's the key thing. If I'm in prison and somebody says go to group therapy and you'll get out 2 years earlier, I'll go to group therapy. I'll do anything you want me to in order to get out earlier.

Imagine, for example, a tape recording of Lucky Luciano and his caseworker. Or a price fixer from GE in his therapeutic community. What are they going to talk about? Or a Chicago hit man and his psychologist.

I also had a note on John Mitchell and a tape recording of his therapy group, but now that has became real. He sent Judge Sirica a tape recording expressing remorse and got half his minimum sentence cut.

We have a group of new enthusiasts on horizon, and the Federal Government is beginning to do something about it. These are generally under the rubric of behavior modifiers. That's not a fully descriptive term.

Aversive therapy, chemotherapy, stereotactic psychosurgery—some were already in the system and some who got into the system are already under court order to cease and desist.

But they work with a population with no political constituency and so only a few care about what they do.

We seem to be at the end of ideology with rehabilitation.

My point is that if we can't treat, we can be just and fair and even-handed. Not only can we, but we must operate constitutionally.

The way I see us proceeding is to reduce the rhetoric, the claims, and the purpose of both the criminal law and the correctional mission.

The rhetoric is important.

When I say that I think that we have to call a prison sentence punishment, I mean that with a small "p". Not to executed retributively. But that no matter what you call it, when you lock someone up against their will, it's seen by that person as punishment.

Then we should provide opportunities for prisoners, and make sure through all sorts of oversight that the prison is operating constitutionally. But I think it's fair to call a prison sentence punishment—and to simply say it right out. That doesn't mean we're giving up rehabilitation.

I want to explain that. I think we ought to give up the fruitless search for a unified theory of crime or the criminal as if there were a stable group of criminals outside this room, an enemy that we can wage a war on. And we seem to wage wars about every 30 years on something—either poverty or the pollution or crime.

Criminal law should simply be seen as an expression of the community's collective outrage for a certain kind of behavior. Then a sentence is simple punishment and when it's a prison sentence, it should be executed reasonably, fairly, constitutionally, humanely, and as you said with certainty.

The sentencing process needs to have procedural regularity, greatly narrowed discretion, reviewability, and be of a certain length.

We need to develop much greater degrees of certainty throughout the system.

My choice of measures to accomplish this is not the only one—and I'm sure not the best—but it's offered as a method, and it's meant to advance the debate. It is not a panacea.

I want to begin and go through very quickly now to wind up.

Senator BIDEN. Take your time. I want to hear what you have to say.

Mr. FOGEL. I want to begin with a philosophic point.

As a lawyer you know that you can't convict anybody unless two things are present—the act and the intent. And beyond a reasonable doubt we have to make sure that that person was responsible for what they did.

Having then, in the courtroom, demanded volition and responsibility of the defendant, we then convict him on that basis and send him to a prison where volition is gone. We treat him either as a brute or as a patient. But in either case, the notion of responsibility—his own—and his own involvement in his future is gone.

I'm suggesting that we carry that notion of responsibility into the prison. In other words, we put the prison on the continuum of justice. And we unhook treatment—that is, clinical progress—from the prison release date. That has nothing to do with it.

If we go for that—that is, flat time on a prison sentence—then we no longer need parole boards, they should be abolished on their own right and permit prisoners max out. But we also have to give them a stake in lawful behavior.

So if a judge were given 3 or 4 years' leeway for any single offense, whatever sentence he gave the person it would be flat. The person would go to prison, with a 4-year sentence; and we'd allow him with good time, to reduce that by 50 percent as his stake. But not clinical good time. It would be vested good time. This is the presumption of lawful behavior unless otherwise found in a hearing, protected by due process procedures. It could be taken away from him up to 30, 60, or 90 days.

But not the old style where you are vulnerable for the loss of good time based on someone else's judgment about your behavior in the case where a clinical report finds that you are not "ready" to be released.

I have a lot of war stories with that which I won't bother you with.

Senator BIDEN. Bother us for the record with a war story please.

Mr. FOGEL. One inmate at Menard Prison in Illinois sent me a letter. He got a good stiff sentence—and should have got it—there was no doubt about that. He is now in his 10th year.

In his sixth year, he went up for parole. The parole board told him that he didn't have a marketable skill. So he went back, for a year and he learned whatever skill they had there—shoemaking or farming. He came back to the parole board in his seventh year. They told him that he didn't have a high school education. So he went back and got a GED. Now he was in his eighth year. He went back a third time, and they said you don't have good insight into your problems. So he went back and got involved in pastoral psychology with somebody. He came back in his 9th or 10th year, and the parole board said: You haven't done enough time in for your crime.

That can be devastating to a person, to say the least. He has to live in a cellblock with other inmates and other guards.

The effect of parole decisionmaking on quality of life in a prison is one of the central points here.

I want us to give up involuntary, or coercive treatment and make this a function of choice by inmates.

We ought to have, in any kind of a well-rounded program, statewide mandatory supervision—probation—and there ought to be major funding at the front end for diversion from the system.

We also ought to have probation as a presumption in any sentencing scheme. And I'm talking about for any offense. The presumption ought to remain.

I also believe that probation has to be probation plus something—not unsupervised probation.

Vice President Agnew got that one—or probation without supervision as constructively occurs in Cook County perforce where we have about 150 probation officers and for the 30,000 people on probation. It's not a safe outcome as it works right now.

That part of the system has always been inadequately funded. It's simply unsafe the way it is.

I think probation plus a fine, probation plus jail, probation plus restitution to the victim is necessary.

And that's what we talked about before—the mandatory presentence investigation which becomes nonwaivable and must be a part of a sentencing hearing in my proposed legislation.

The imposition of a sentence should rely upon the PSI and statutory criteria for aggravating and mitigating circumstances, as I see in the successor bill to Senate bill 1.

But changes in the physical environment are going to be necessary, too. The fortress prison—we still have one prison that can house 6,000 people in it in Michigan. That really has to go if we're ever going to have a safe program inside.

I invite your attention to Vienna in southern Illinois, which is probably the best program in the country. They have shown that it is possible to have an open program, keys to your own room—and these are not Boy Scouts—and of 20 courses given on campus with 300 students, half of the students are free people from the town who take the courses side by side with the inmates. It is an extraordinary situation but something that provides an imagery to replace the cellblock or fortress prison.

It is possible to operate differently. There are other good programs around the country, but they are very hard to come by.

Inside the prison, we are not abandoning rehabilitation with what I call the justice model. We call a sentence of imprisonment punishment, but we expand voluntary rehabilitation and opportunities for the convict's involvement in his own future.

Prison should be required to provide humane standards of living space. Our population study demonstrates the need we have for minimal standards of nutrition, health services, private space, and program opportunities.

Other possibilities are oversight by an ombudsman or similar type oversight, some semblance of self-governance inside, strict adherence to access to the courts and law libraries, due process procedures, the right to refuse treatment with impunity, civil legal assistance for inmates where they simply can't keep families together or deal with liens

on homes or loss of property or custody battles or problems with Bureau of Indian Affairs or welfare; liberalized visiting, and in this part of the 20th century, we should write into the legislation the right of the confined to have conjugal visits.

The guards also need a program, one element of which is with mandatory training. Nobody would ever think of sending a person to work in a zoo with a seal unless they were trained. But we send them right into prisons without a day's training—just throw a uniform on them—and say take care of these men, is possible in corrections.

I suggest that we put guards on a par with State police, along with the educational and training requirements that we require of State police.

It's at least as important an occupational responsibility to have to live with people the rest of their lives in confinement as it is to hand out a parking or a speeding ticket.

They should have mandatory and dignified early retirement. I know that runs counter to congressional thinking right now, but guarding is hazardous duty by definition.

We should also have standards of safe working conditions which rely on staff coverage. You should simply not send two people into a cellblock to guard several hundred and think that you're going to get any kind of human relationship operating.

There should be special death and hazardous duty benefits.

As far as the public is concerned, this notion of a justice model, victim compensation is the first order of business. With regard to possibilities of offender restitution, there are a few models around now. Jury and witness payment and protection is a great need, and care for the victim——

Senator BIDEN. Excuse me. Jury what?

Mr. FOGEL. Jury and witness payment and protection.

Senatod BIDEN. Do you mean increasing the jury fee?

Mr. FOGEL. Yes. Some pay them $3. Some pay them if it's a long distance——

Senator BIDEN. What evidence do you have of the need for protection? Do you mean protection for witnesses?

Mr. FOGEL. I mean protection for witnesses.

Having been the head of the Illinois State Planning Agency for 4 years, I can tell you that law enforcement agencies and States are not well budgeted for that. They had to rely a lot on LEAA funds to make cases.

But I mean the ordinary witness. Protection of that person with a small "p."

In Cook County, if you come from a great distance and sit in a hallway waiting for a criminal court case, you may find out the fellow next to you is the one you're going to testify against.

There should be a waiting room, a cup of coffee—we have that now—to take care of people. After all, who's the system put together for if not for those folks?

But the problem of the victim proximate to the crime is just beginning to be thought about.

Senator BIDEN. You're being too practical and sensible. You don't expect anybody to listen to this; do you?

Mr. FOGEL. They're doing it in Chicago.

Somebody burglarizes somebody else and breaks a window and it's 20 below zero, the Department of Human Resources shows up and does something for the victim--even if it's fixing the window so they're not freezing that night. Because the felon, if he's caught, is going to have a warm bunk at the jail.

The victim is going to be in all sorts of difficulty.

If the husband or the wife are out of it or have to go downtown to file a complaint, be a witness, or serve on a jury, who's going to take care of the kids?

Unfortunately, only the police are awake after 5 p.m. All the social service agencies are closed on holidays and weekends and after 9 to 5. The police can't handle it all. They have their hands full as it is.

And so we need a little turnaround of the social agencies to be responsive to the victim.

Senator BIDEN. Have you done anything about court scheduling times? I've sat literally hundreds of times and people take full days off and never get there or get continuances to accommadate we lawyers and judges. After awhile, they just say the hell with it.

Mr. FOGEL. The best program that I know of and the most forceful one is New York City now. Judge Ross has moved that one right along.

There's a report in the September 27 issue of New Yorker by Richard Harris on speeding up the system in New York. And apparently they were successful, running day and night, and substantially curtailing continuances. A lot of good management.

But you're right. It's still a terrible problem.

I'll summarize this now and just say that I believe that prisoners are volitional. Programs in a prison should emerge as a result of being freely chosen by the folk that we want to influence into lawful behavior.

All that any of us have going on this Earth is the days of our lives. And imprisonment represents a taking of a part or all of it.

When Government gets involved in this kind of a venture in a democracy, it has a corresponding responsibility to ensure that those are lived with some semblance of dignity.

It has no obligation to attempt coercive cure on the promise of an early release; but it does have a constitutional imperative to ensure that the minimum levels of humane care are shown.

Prisons will better serve a democratic society if they operate under a lawful regiment of constitutional standards and humaneness and prisoner involvement, rather than seeking guidance from the latest religious, psychologic, and/or medical fads which rely on self-proclaimed expertise.

The rule of law, in my mind, is simply safer.

That concludes my formal remarks.

Senator BIDEN. I have a number of questions, but there is a vote and I am going to have to leave to vote.

Do you have any particular time constraints? I know we're taking a lot of your time.

Mr. FOGEL. I'm here for the whole day.

Senator BIDEN. Do any of our following witnesses have any particular time constraints?

If you do, please tell me.

[No response.]

Senator BIDEN. It will take me 10 to 12 minutes to go over and vote and come back, and I have at least 15 minutes' worth of questions.

Mr. FOGEL. If anybody following me, Senator, has a time problem, I don't mind waiting around until later if you want to talk to me again.

Senator BIDEN. What I would like to do that would speed things up—it's a bit unorthodox—but when we get back, if the next two witnesses each will come forward and give their testimony at the same time, and then I can ask all of you questions at the same time.

I will hear everyones' testimony, and then ask you all to respond to questions and maybe have some interchange.

I will hold questions, Dr. Fogel, for you. Then Dr. Miller and Dr. Coates will give their testimony, and then I'll ask Mr. Nagel to come forward and give his testimony and have a chance to question you all, if I may.

Is that alright?

I'll be back in about 10 to 12 minutes.

[Recess taken.]

Senator BIDEN. The hearing will come back to order please.

Dr. Miller and Dr. Coates, will you please come forward.

Dr. Miller, I am going to ask you to testify first if I may.

You are presently the commissioner of the Office of Children and Youth for the Commonwealth of Pennsylvania; is that correct?

Mr. MILLER. That's correct, Senator.

Senator BIDEN. Dr. Miller has an extensive professional academic background in the field of corrections, particularly as it relates to juvenile offenders.

He served as special assistant to the Governor of Pennsylvania for a community-based program; consultant to the Governor of Illinois on juvenile justice programs; commissioner of youth services for the Commonwealth of Massachusetts; director of the Department of Children and Family Services; assistant director for training, Maryland Department of Juvenile Services; and a social work consultant in a boys' home; and in other related positions.

Dr. Miller's academic credentials are extensive as are the list of papers he has published in the field and a list of distinguished awards he has received for his services.

He is perhaps best known for his work in juvenile detention centers in Massachusetts and Pennsylvania.

Dr. Miller is a graduate of Maryknoll College, with a masters degree in social work from Loyola University in Chicago.

He received his doctorate in social work from Catholic University.

Dr. Miller?

STATEMENT OF JEROME G. MILLER, COMMISSIONER, OFFICE OF CHILDREN AND YOUTH, COMMONWEALTH OF PENNSYLVANIA

Mr. MILLER. Thank you, Senator Biden.

I would like to just summarize my written testimony if I may.

Senator BIDEN. Surely.

Mr. MILLER. I appreciate being asked to testify before the committee. I wanted to outline for the committee some issues that I feel should set the parameters of the debate around the controversy of sentences versus indeterminate sentences and issues of rehabilitation.

I think for the first time we're seeing the field questioned in terms of its very basic underpinnings, rather than around specific issues with reference to specific treatment methods or approaches to crime and punishment.

Jessica Mitford's indictment of the American prison system was a devastating attack upon the misuses of the so-called rehabilitative model.

David Fogel, who testified here today, developed the so-called "justice model" as a means of replacing present indeterminate sentencing with set time models.

It was developed out of a frustration with the unfairness, the injustice, and the capriciousness of the rehabilitative model as applied in prisons.

The original impulse for reform in this direction toward determinate sentencing therefore was strongly supported by inmate groups and developed really out of those who wished to redress some of the injustice within the prison system and the capriciousness of that misuse of the rehabilitative model within the prison system.

At the same time that one has the attacks upon the present correctional system by Jessica Mitford and David Fogel, one sees a concomitant, and unfortunately at times a more effective, attack upon the rehabilitative model by the right of the political spectrum, perhaps as represented by Ernest Van den Haag and James Q. Wilson.

Those who espouse the general direction of these views point to the failure of the rehabilitative model as a rationale for getting back to simple punishment, incarceration, and immobilization or incapacitation of the offender.

It's the same end point, I guess, with perhaps a different motivation.

They do not, unlike Jessica Mitford and David Fogel, focus upon the irrationality of the correctional system as it affects the inmates and ultimately the larger society but rather they point to the failure to rehabilitate in our prisons as the reason for set sentences which would, in most cases, be significantly longer than those envisioned in the indeterminate sentencing laws presently on the books—and certainly than those envisioned by Dr. Fogel.

Indeed, Dr. Van den Haag is on record as suggesting that most second- or third-time offenders should be kept incarcerated until their midthirties or midforties. I don't think he's ever done an actuarial breakdown as to what that would mean in terms of the hundreds of thousands of incarcerated people in this country.

As a result of the coming together of the justice model——

Senator BIDEN. What that would mean in terms of how many?

Mr. MILLER. How many people would have to be locked up? At least triple the number presently incarcerated.

As a result of the coming together of Dr. Fogel's "justice model," with the apparent rationality of Professor Wilson, one sees a curious phenomenon developing whereby prison abolitionists seeking to redress the injustices of the rehabilitative model as misused in prisons, find

their alternative models, such as set sentences, misused in current political contexts as a means of justifying keeping prisoners in jail longer than the present unjust indeterminate model.

Perhaps Dr. Fogel would wish to speak to the issue, but I know him well and I know his model well and have a great deal of admiration for it. But I know that as it was presented publicly by the former Governor of Illinois, as I saw him on the Today show for instance, he presented Dr. Fogel's model which in Dr. Fogel's mind really, I think, would ultimately lessen the number of people in prison by getting the less serious offenders into alternative programs.

The former Governor of Illinois indicated on public television that it would double the number of prisoners in Illinois prisons.

The present Governor of Illinois, Governor Thompson, has carried it to a much more extreme level, which would necessitate as a recent Chicago Sun Times article indicated, the outlay of perhaps over $800 million in capital funds for prisons alone in Illinois were they to follow through on some of the recommendations in the sentencing proposals proposed by Governor Thompson.

In a sense, then, those of liberal persuasion with reference to this issue have been in some ways "had." Their arguments are being used against the very goals that they had set. There are reasons for this.

The public, concerned as it is with the crime, is looking for answers; and, if possible, for a simple answer.

Into the breach marched those who point to simple answers, recommending that we put more people in jail for a longer time. There is some logic in the approach; and, in the short run, it might even affect the crime rate, though that is questionable.

Undoubtedly, however, if one locked enough people up, one could conceivably lower the crime rate.

To rely upon this as the major, or indeed the most crucial, approach to the crime problem, however, leads to trade-offs which a democratic society perhaps should not be willing to make.

In its ultimate expression, one could point to the fact that domestic crime was probably not a major factor in Nazi Germany or Stalinist Russia or Maoist China.

The question which remains unresolved is exactly how much percentage of the general population must be incarcerated before the rest get the message that results in the lowering of the crime rate.

I would surmise that the percentages involved would be so high as to threaten the foundations of the democracy, were we to engage in an incarcerative program as the major weapon in our anti-crime armamentaria.

One must question why we should propose sentencing laws which would result in more persons in prison when we presently, as Dr. Fogel mentioned, have more persons in prison than virtually every other industrialized Western nation—more persons per hundered thousand.

This is of particular relevance in view of Mr. Nagels' research which sees the incarceration rates of a number of States as virtually irrelevant to the crime rates.

It would be my hope that this subcommittee would begin to look at our corrections system and the problems of sentencing, probation,

and parole in somewhat wider terms and in some more open contexts than most current discussions fostered.

We should not be caught up in an either/or approach to the problem or to single solutions.

If there is anything to characterize the current debate on corrections, for instance, it's the lack of options, innovativeness, and openness to new ideas. This has resulted in a rehash of past ideologies, very often culminating in recommendations for more lockup for more persons.

It is as though we had not looked at other countries in the world, and as though we had little to learn from them.

This arid approach is compounded by our own corrections experts who have been socialized well to their own systems.

As Dr. Fogel, I think, outlined very well, those speaking of reforms—the need for less reliance upon incarceration, and so forth—are not about to take the bureaucratic or political risks that a significant reform or change would require.

As a result, those who are able to legislate change, such as members of the subcommittee, for instance, see about them few correctional bureaucrats who could effectively implement those changes—and fewer who would make the strong legislative recommendations needed.

In a sense, reform of the system is caught up in the same dilemma that the rehabilitation model presented when introduced into the correctional system. That system—the correctional system—has a way of gradually devouring whatever reform is introduced into it. And whatever new programs or sources of funding are made available are devoured really in the same way.

Legislators find themselves too often caught up in the vicious cycle that characterizes many of the human services that are given primarily in institutional settings—and certainly corrections is the culmination of that approach.

The pattern goes something like this.

There is first an incident of some kind or a public outcry related to the failure of a particular institutional program or correctional program, such as a riot, a suicide, escapes, assaults, and so forth, calling for legislative action. This is followed by hearings—and perhaps an investigation—culminating in things such as some new legislation, generally new leadership in the institution, and most probably new funding for the new programs.

The matter is then closed. Usually about 3 to 5 years later within the cycle, it's redone again. There is a new incident, new hearings, new investigations, new money, and it's redone. It's a cyclical problem which never appears to be solved in any definitive way.

For instance, I believe the first conference of the American Correctional Association, or its namesake, in 1870—If you were to read the recommendations of that conference, they could have been written last year.

However, the recommendations have never been followed through adequately by the correctional bureaucrats.

Reform of the correction system is caught up in something of the same pattern. The tragedy is that whatever reforms, ideas, and funding are funneled into this system, they never seem to affect or change

the system; and what appears as reform is usually stopgap; and what is meant as basic change is somehow sabotaged in its implementation.

I feel that this is what happened to the so-called rehabilitative model when it was adopted by the correctional system. Sadly, it is probably what would happen again if it were to be reintroduced under other auspices, even with firm civil liberties protections.

It may be that there is something so basic to the keeper-kept relationship which characterizes prison society that it makes it impossible to do much of anything productive other than attempt to mitigate as much as possible the debilitating effects of the prison system.

In this context, it's irrational to even consider the possibility of rehabilitation.

I strongly agree with Dr. Fogel's comments in this regard.

Certainly, the research of Philip Zimbardo in California points to the almost natural process of imprisonment, whereby the keepers begin to manipulate and ultimately misuse the kept, and the captives develop the symptoms we regularly associate with prisoners.

If you were to take the finest New England prep school—say, Philips Exeter Academy—and give them nothing but captive students, the very finest of administrative staff and faculty would, at best, stagnate over a 4- or 5-year period, and it would at worst become repressive. Because it's a nonconsumerist system. It's a system where the clientele have to rely on the altruism of the person giving the service. No one's altruism is that dependable.

In that kind of a system, they always know that in the crunch, there is a ward or a unit or a goon squad or lock or handcuffs or restraints—or whatever—available.

Those things tend to be used perhaps and escalated and to be used prematurely. There tends to be less questioning on the part of those responsible than would be appropriate in a democratic society.

I'm not suggesting that one could run a prison as a prep school, but I am suggesting that it makes it almost impossible to think that one can have rehabilitation within a prison setting.

There are those who suggest that the problem in moving toward set sentencing is that we haven't given rehabilitation a chance. There is some truth to this argument.

However, given the present prison system, at both State and Federal levels, perhaps one of the measures of human resiliency and reasons for hope is that the rehabilitative models which these systems have used and misused have not, for the most part, worked.

We might have greater problems if our prisons worked as measured by their criteria.

Those who claim that we haven't given rehabilitation a chance, accuse those who espouse set sentences of throwing the baby out with the bath water. I'd suggest the problem is neither the baby nor the bath water but the bathtub—the prison—in which the baby and the bath water comingle. Unless we begin to get rid of the bathtub as the basic medium, we're not going to make much progress.

No matter how difficult or dirty the baby and no matter how many new detergents we put in the bath water, if the tub leaks it isn't going to work.

Senator BIDEN. I've never heard that put that way. You are to be complimented.

[Laughter.]

Mr. MILLER. Similarly, rehabilitation in prison settings is probably not going to work—short, of course, of brain-washing techniques, which I don't think we can allow in a democracy.

We must, therefore, find other vehicles through which to effect change and alter criminal behavior and at the same time to dispense justice and restitution.

Prisons have failed at all of these tasks; no matter how many new ones we build and no matter how modern and pastel and carpeted, they will remain basically ineffective as rehabilitative settings.

I imagine those who would agree with James Q. Wilson would say here that "even though we might agree with you on this, at least prisons can incapacitate certain dangerous individuals and make them less likely to victimize others."

I can't quarrel with that perception, but even with the dangerous and violent offender, there are a host of alternative programs which stand opposite the monolithic, bureaucratic, large, single sex institution which we call the prison and which by definition leads to further depersonalization of the inmate.

To rely upon the large prison as the only viable incapacitative mechanism available, betrays a phenomenal lack of thought and originality.

Paradoxically, the person who set in motion much of the current discussion which has resulted in new slogans such as "Nothing Works," or "Let's Get Back to Punishment," and so forth—Dr. Martinson—was recently quoted in the Philadelphia Bulletin as saying that he would shut down 9 of every 10 prisons in the United States and provide every released criminal offender with his own personal officer.

By his own admission, this idea was based on a discussion he and I had had a number of months back on the so-called cop a con program, which I viewed as a gross distortion and what I had suggested as an alternative that we had used successfully in Massachusetts with juvenile offenders.

Still it's something at least to stimulate some thought regarding our mind set on prisons as the only option. There are many more options. And I'd like to suggest a few to the committee, as plans are brought here and pressures mount to build more and more prisons and to do more and more of the same.

The cost per capita of day-to-day imprisonment continues to mount. The costs of constructing new cells is presently in the $30,000 to $50,000 range, exclusive of operating expenses, once constructed.

Although figures vary from State to State, it would certainly not be an exaggeration to give a figure of $10,000 to $12,000 per annum in the average State system. In the Federal system, it is probably considerably higher and in excess of $16,000.

The question which must be asked is basically a consumerist question: If I had $10,000 to $15,000 to keep an offender who is a relative or a friend out of trouble would I give the offender and the $10,000 or $15,000 over to the local, State, or Federal prison as a treatment of choice? Both in terms of public safety or in terms of decent care.

I mention the offender who is a relative or a friend not to be facetious, because this is precisely the measure that we must follow when we set up and fund programs for offenders.

We generally reserve a different approach for dangerous strangers and aliens than we would for dangerous acquaintances. Not that we would treat a dangerous acquaintance with any less caution or concern for the public safety, but the quality of our concern would be generally of a higher nature than that we reserve for the dangerous stranger.

No program should be legislated here that would not apply to an offender from any legislator's family who sits on this committee. If we would want something better for our own, there is no reason it could not be better for others as well.

Senator BIDEN. I'm not sure that I understand that. Are you suggesting that if people had a choice—If your brother was a rapist and it cost $15,000 a year to keep him in prison, and we told you here's the $15,000, you would treat him differently than he would be treated in prison; is that correct?

Mr. MILLER. That's correct, although I wouldn't use the example of the rapist. The vast majority, as you know, are not of that serious a nature.

Senator BIDEN. All right a burglar.

Mr. MILLER. Yes; that's right.

Senator BIDEN. What about if I said to you that if he burglarized again, your rear end goes to jail? I'll lay you 8 to 5 you'd hand over that $12,000 and tell the State to take care of him real quickly.

Mr. MILLER. That's very possible.

Senator BIDEN. How does that follow with what you're saying?

Mr. MILLER. What I'm suggesting, Senator, is not that that suggestion be implemented as such.

Senator BIDEN. I know. But just to make sure that I understand.

Mr. MILLER. My point is that if we were——

Let me use an example from the juvenile area.

For instance, in Pennsylvania, it's approaching $32,000 per juvenile for a State training school.

If I, as a State taxpayer and consumer, were given that $32,000 and that juvenile and given the same task as the State institution to keep that youngster out of trouble for a year and to insure he isn't getting in further trouble, would I give that $32,000 and the youngster to a State institution as the best way of doing that?

I don't think I would. I think I would get rather creative around other kinds of options if I had $32,000 in hand and were given that task.

I think there are other ways of doing that. Certainly in the juvenile area, there has always been an alternative system for even rather serious juvenile offenders of the upper middle class. They are generally found on the back pages of the New York Times magazine or in annexes at Menninger's Hospital in Kansas or Chestnut Lodge in Maryland or the Institute for Living in Connecticut or McLean Hospital in Massachusetts, where, in fact, if one has $30,000 to $40,000, one can buy public safety as well as decent care.

All I'm suggesting is that with that amount of money being spent in the present system, we could become very creative on the open market of developing both programs that would guarantee security as well as care. I'm not even talking about residential programs in a lot of cases.

For what it costs, for instance, to keep the average prisoner in prison, you could literally hire one person per prisoner to keep each person out of trouble as a full-time job, just in terms of the irrationality of the present system.

But what can one do with, for instance, in the adult area, with $10,000 to $15,000? The bottom line is that we are spending more to incarcerate offenders—most of them nonviolent—and a vast majority in the Federal prison are nonviolent—than the average upper middle class family could afford to spend on one of its own. And this with little indication its either rehabilitating or lessening the general crime rate.

What could one do with financial resources to reach some of the goals of crime reduction?

There are a number of things.

Let me say, first, that slogans to the contrary, I don't believe that it's true that nothing works in corrections. Certain things do work better than others. However, the problem in the measurement of comparative programs is often less related to the stated objectives and methods and results of the program than to the bureaucratic arrangements which surround all of those factors and which make valid measurement chancy, if not impossible.

So many labels, diagnoses, treatment methods, and criteria for success are so manipulated, misnamed, and skewed by the correctional bureaucracy which engender them as to make research in this field almost an impossible task. What masquerades as a scientific study in this field is more often than not an ideological exercise culminating in a bureaucratic process.

I'm sure that the current studies being completed by the National Academy of Sciences will speak to some of the problems of research in the correctional field.

I feel that that's the Achilles heel of some of the suggestions prepared, I'm sure, in good faith by solid academics, such as Professor Wilson.

If I were to use an analogy, I would say that his approach is similar to the approach of Robert McNamara with reference to the Vietnam war—you cannot build on the basis of reports appearing on your desk and what you're reading in the research studies. Because, in fact, they bear often little resemblance to what is happening in the field.

So-called rehabilitative studies in corrections and so-called community-based programs are very often not community based; they are institutions.

Much of the research in this field is so skewed by those who fund it and set it up that it's very difficult to rely upon it.

I think one exception to this, I hope, is the research done in Massachusetts that Dr. Coates will speak to which was done by the Center for Criminal Justice at Harvard.

Some of their findings which I'm sure he will state in much greater detail than I, I think have some relevance as regards new correctional models, as well as for adult offenders.

To place the matter in perspective, may I state that the last boys' training school was closed in Massachusetts in January 1972.

Since that time, with a population of over 6 million, Massachusetts has never had on any given day more than 75. That's my understand-

ing. I think Dr. Coates would say it would be as many as 110 in any kind of locked setting on a given day.

I think it would depend on how one defines locked setting.

This includes sentenced juveniles, as well as all juveniles awaiting trial.

In 1969, approximately 10 to 12 times that number would be in locked or institutional settings.

With reference, for instance, to the deterrence argument—that even though locked institutions may not rehabilitate those who are in them, the others outside will heed the message and thereby the institutions keep the crime rate down—there is no evidence of a growing crime rate in Massachusetts among juveniles since the institutions were closed.

Violent crime has progressively declined over the past 3 years, as it has in most other jurisdictions. At most, one could say that the use of incarceration for large numbers of juvenile offenders was not related to the lowering of crime, and perhaps it was irrelevant.

Since the pattern of sending young offenders into the adult system was greater before the deinstitutionalization than it is now, one cannot suggest that the adult institutions became the deterrent for juvenile crime in Massachusetts, in lieu of the now nonexistent juvenile institutions.

With reference to recidivism, there is a message in the Massachusetts experience for both the law and order and the bleeding heart ends of the political spectrum.

Recidivism statewide is about the same as it was when Massachusetts incarcerated large numbers of juveniles. It's up in some regions and it's down in others.

Therefore, statewide there is no evidence that the move from institutions to community-based programs cut recidivism rates.

However, when the recidivism rates are broken down by region of the State and by program, I think there are some very interesting results, which I think Dr. Coates will speak to.

A disproportionate share of the recidivism statewide is contributed by a small minority of offenders who are products of the locked secure, more incarcerative settings.

Similar offenders with similar offense histories who were assigned to alternative programs with close supervision appear to recidivate at a substantially lesser rate.

For example, in one of the so-called advocate tracking programs, a young advocate, usually of college age, is assigned 30 to 50 hours a week with an individual offender, having to account for his charge at least 5 times every 24 hours in a face-to-face meeting, usually in the offender's community.

That's one alternative system of control.

The most successful program, as I understand the Harvard research, in terms of lower recidivism, is a program in which a person is paid something close to a full salary, if not a full salary, to watch after, supervise, and advocate for one juvenile offender.

This costs less than traditional institutionalization.

For the majority of juvenile offenders, there would be a variety of other less-supervisory programs, including——

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Senator BIDEN. I think you're outlining a very successful unemployment program for us here.

[Laughter.]

Mr. MILLER. There is some truth to that, too.

Senator BIDEN. Has Hubert heard about this?

[Laughter.]

Mr. MILLER. There would be a variety of other less-supervisory programs, including traditional and nontraditional rehabilitative, training, and educational programs given in the community. There would also be a variety of group homes or so-called halfway houses, which operate with varying degrees of success.

The Harvard studies, I think, have pointed to the naivete of simply dichtomizing institutional versus community-based programs.

Many so-called community-based alternatives operate like mini-institutions and are as manipulative of their clientele as are the larger bureaucracies with captives.

Again, I think they point to a relationship between program success and the ways in which the program is perceived by the client, as well as the number and the quality of community linkages in the particular program.

In summary, I think that the Massachusetts experience shows that a variety of programs do work, while others don't work.

It says further, and I think this is most important, because the Massachusetts experience has been subject to so much rumor and misunderstanding within the correctional establishment, that my understanding of the Harvard research is that their major criticism of our so-called radical reform is not that we went too far imposing the training schools and putting virtually all of the kids in the community, but that we did not go far enough in terms of developing non-institutional programs for the small numbers, particularly of the serious repeat or dangerous offenders.

The import of their research is not that the institutions were better or that we should return to them, but that we did not develop enough community-based options; and that many of our community based options were too institutional.

The program, as is, is a success when compared to most other States. I think that can hardly be argued. We, in Pennsylvania, for instance, continue to incarcerate juvenile offenders in a large number of State, county, and private institutions while continuing to have a growing juvenile court docket.

Meanwhile, Massachusetts experienced a substantial drop in their court docket last year for the first time.

Much of that may have been related to legislation which took status offenders out of the jurisdiction of the Department of Youth Services.

Although this is an experience with juvenile offenders, I do not feel it's entirely irrelevant to the adult system. Perhaps the example, very briefly, from Pennsylvania with older juveniles—most of them approaching adult age—would be germane here.

With the help of the Justice Department funds, we removed from an adult prison in Pennsylvania approximately 400 juveniles sentenced to adult facilities by juvenile courts.

In Pennsylvania, through local custom, this illegal procedure continued until 1975, where juvenile courts could try juveniles as juve-

niles—not juveniles who had been waived to be tried as adults—but tried as juveniles and sentenced to an adult prison in addition to the dozen or so sentenced as adults.

These juveniles were considered the most difficult and dangerous in the State by the juvenile courts. Indeed, this was the rationale of sending them to the adult prison, rather than a juvenile State training school or detention facility.

With court approval in each case, the majority of these offenders were placed in a variety of nonincarcerative options, including many of the models described in the Massachusetts experience.

It is our impression that this so-called hard core of older juveniles has not recidivated at higher rates from the community-based settings. Violent crime among juveniles in the State of Pennsylvania has continued to decline, as have gang killings in the city of Philadelphia.

This is not to attribute these specific phenomena to the deinstitutionalization of the 400-plus most serious offenders.

Actually, we handled over 1,000 in the 2-year period—400 were those removed from the prison—we handled an additional 600-plus who would have gone to the prison.

It is not to suggest that violence is down because of that; it's rather to suggest that the jailing of the juveniles was probably irrelevant to the crime rates.

Although the juvenile court docket rose in Pennsylvania, I don't think it could be attributable to the juveniles removed from the adult prison, since most of them were near or of adult age when removed—and most would have shown up not in juvenile court again but as adults.

In summary, I wish to request this committee consider reform in something other than an either/or dichotomy of set sentences versus indeterminate sentences. Although I certainly would lean in the direction of the set sentence in that debate, I think the solutions to the problems in this field are generally much more determined by other factors.

The diagnosis of the problem is almost entirely constructed by the few alternatives and options that are present and that are proposed.

So-called set sentences in prison may offer a respite, or even a sense of uniformity and fairness and justice, if not excessive.

However, they are really a rehash of the past and a capitulation to the myth that imprisonment somehow or other guarantees public safety and insures justice.

If one could talk about set sentences to community programs, in my mind, that maybe would make more sense.

There are better ways, however, to guarantee both public safety and justice.

One can have control without imprisonment in most cases; and even in secure or locked facilities, one can have control without institutionalization—to the degree, at least, that we've had it—by designing them to be small and by offering some elements of choice, by constantly redoing them in an effort to guarantee humane and decent security, none of which can our present prison system do.

When I say small, I mean small. The Harvard research indicates that even our move from training schools to 10- or-12 bed units was not

enough. The 10-bed units were often too large. It's an abnormal family that would have 10 adolescent delinquents living in the same house. By far the most successful programs were those with a one-to-one, or three-to-one staff ratio. We're talking small. We're not talking about the kinds of halfway houses that you would have in District of Columbia where hundreds are dumped into hotels and that sort of thing. That's not a halfway house; it's a mini-institution in the community with relatively little supervision being available.

I don't know how you can have it in that kind of a setting.

Senator BIDEN. The cost would be lower?

Mr. MILLER. The cost would not be higher.

If one considers the total context of the prison system——

I'll give a quick example.

We have an inverse system now whereby the cost for the inmate who is most likely to victimize on the street—the rapist, murderer, mugger, and that sort of thing—those inmates generally in the present system we're spending the least on and putting in the largest human warehouses where they'll sit around and steam for a few years and come out and repeat their crimes.

We have an inverse system where those persons who are going to present the major problems to the society are getting the least attention and care, if you will.

Senator BIDEN. Attention in terms of time?

Mr. MILLER. In terms of time and involvement and individualization and at least dealing with some of the effects of the present large institutional structures which only insure things are going to get worse for those individuals.

Senator BIDEN. Is there any evidence that given that time would make it any better? Other than from a humane standpoint, it makes sense to treat someone humanely. But beyond that is there anything?

Mr. MILLER. I don't think there's any evidence that one can rehabilitate that well. I think there is some evidence that one can debilitate less effectively, if you will; that one can mitigate some of the disastrous conditions in the large prison setting.

I think one can provide more humane care and still do it within present budget restrictions.

For instance, say in Massachusetts in 1970, when we had 800 to 1,000 or thereabouts in State schools. To move all of those juveniles into the community, if we had to spend the same amount for each of those juveniles in the community, of course it would have been more expensive in the community than in the institution. But if in community settings, one could get a wider spectrum of options available and tailor things more individually, one could then within the same budget spend a great deal more on those kids who are most likely to cause major problems. And you don't have to spend the institutional budget on youngsters where family therapy is going to be enough or where some sort of stopping-by by a community advocate every day is going to be enough to keep that juvenile out of trouble.

The system right now does not discriminate very much.

Senator BIDEN. I think you're correct.

The point I'm trying to get at—and I don't know the answer—is has this deinstitutionalization that has taken place in Massachusetts had

any effect in terms of that particular child going back into society and reaping whatever havoc he did before.

Mr. MILLER. Dr. Coates will speak to that.

My understanding of the research and my experience with it is that certain things do have an effect with certain juveniles. Certain programs work very well and others do not work well at all.

Across the board, there's not that much difference in the total picture of the State because of that mix.

However, if I had it to do again, for instance, in Massachusetts, I would have not moved into group homes to the degree we did. I would have developed all sorts of individual advocates in smaller three-to-one type settings.

I think we could then show a dramatic drop in statewide recidivism as those programs specifically show.

And I would have developed a different kind of secured option for the more difficult repeat offender.

I'm not at all sure with that offender we're going to have much that works, but I do think that we can guarantee more decent care and still guarantee public safety.

If one has to pay the same amount to mistreat people and get a certain level of public safety, as one pays to treat people decently at a certain level of public safety, I would hope we would opt for the latter.

Senator BIDEN. I do, too. But I think it runs contrary to human nature.

Mr. MILLER. It may, but hopefully we help it evolve a bit through government.

[Laughter.]

Senator BIDEN. I saw a cartoon in a magazine which I won't mention because I guess I shouldn't be reading it.

There's a picture of two inmates sitting at a table. The one looks at the other and says: The food was a hell of a lot better when you were Governor.

[Laughter.]

Mr. MILLER. I think that one can insure justice through other means than imprisonment.

For those who say let's get away from rehabilitation, in terms of dealing with the straight-out justice issue, the retribution and all, I think one can even opt for that and still not rely upon imprisonment as a major vehicle for insuring justice.

You can speak to restitution programs, such as those developed by Dr. Fogel in Minnesota and have been developed in Great Britain and many European countries.

Public service sentencing, which Great Britain has pioneered, where a person is sentenced to evenings and weekends—not during their regular job—and very often for a long sentence of 5, 6, or 7 years to do public service in the human services—working in homes of the aged, hospitals, and that sort of thing.

There is a British white paper on it, and they've developed some fairly sophisticated ways of screening the kinds of inmates who would do well in that kind of program. I think much of it is applicable here.

Incarceration does not appear to insure justice well, other than in a retributive sense. Simple retribution hardly compensates the victim, and at the same time it certainly alienates the offender.

I think we have an opportunity to do better by proposing alternatives to prison rather than variations on a theme of how long it should be used in the case of a particular offender.

I am very much for the set sentences, but at the same time, there is a concomitant responsibility that we talk about the vast majority of imprisoned people that should be in alternative nonincarcerative programs.

If we can combine the two, that is, set sentences for violent offenders and alternative programs for the majority in prison, it will make sense. But if it's not combined, I think there's a danger in presenting the set sentence formula in the present political arena. Because there is the danger that, as speeches are made about it, the sentences go higher and higher as a simple sort of answer to our crime rate.

Although the concept makes great sense and is well motivated, as I've watched it develop in some legislatures it is bothersome to see what comes out.

Senator BIDEN. I have a number of questions which I'll withhold at this time.

But there is one I would like to ask now, and if you could just answer it broadly and then flush it out later.

Do you make the same arguments with regard to adult offenders as you do to juvenile offenders—the same rationale applies?

Mr. MILLER. Yes; I do.

I think the percentages, however, of those at the serious end would be lower in the juvenile area. But I don't think that they're that much different between the ways in which one would treat a 17- or 18-year old.

Senator BIDEN. But you would do away with all prisons, period?

Mr. MILLER. I would not do away with all incarceration. I would do away with all of these large facilities we call prisons.

Senator BIDEN. I see.

Mr. MILLER. I would talk about small units—10, 15, maybe 20 per unit—for very violent and dangerous people. I have no quarrel with those who say that those involved in violent crimes should be incarcerative settings.

But there's a whole thing that comes into play in the large incarcerative setting.

Senator BIDEN. I'd like to pursue that in a moment.

Before we move on to Dr. Coates, I would like to recognize Speaker Redmond, the Speaker of the House of the Illinois House of Representatives, whom I observed has just walked in.

Mr. Speaker, it is good to have you here.

As you've probably noticed by now, Dr. Coates, you are in a political setting, so fire away.

STATEMENT OF DR. ROBERT B. COATES, HARVARD UNIVERSITY

Mr. COATES. Thank you.

I have the feeling that we're all becoming rather redundant this morning.

Senator BIDEN. It's not redundant to me. It takes me a long time to comprehend.

Mr. COATES. I'd like to summarize the first few pages of this statement.

Senator BIDEN. I have an equally flattering biographical sketch for you, which I will put in the record along with your prepared statement, to save you some time.

[Material follows:]

PREPARED STATEMENT OF DR. ROBERT B. COATES

BIOGRAPHICAL DATA

Associate Director, Center for Criminal Justice, Harvard School of Law

Robert B. Coates joined the staff of the Harvard Center for Criminal Justice as a Research Associate in September, 1971. He has co-directed, a 6-year study of the Massachusetts Department of Youth Services deinstitutionalization effort looking at organizational change processes and program impacts for youth. He has also directed a police-citizen interaction study as part of the Center's methadone study based on Ministry and Juvenile Justice at the Harvard Divinity School. He has served as a consultant and as a member of various advisory boards locally and nationally in the area of juvenile justice and evaluation.

Dr. Coates has published numerous articles and book reviews in the areas of juvenile justice and evaluation.

Dr. Coates received his B.A. from Wisconsin State University—Whitewater in 1966, attended Wesley Theological Seminary, earned his M.A. from the University of Maryland in 1969, and his Ph. D. in sociology with a specialization in criminology from the University of Maryland in 1972.

The debate over the efficacy of institutions versus community based services as the primary means for handling and controlling juvenile delinquents continues. The debate is not merely academic; it is replete with policy implications. The underlying issues are complex and deserve careful study. In the brief time allotted here, I will try to lay out one perspective on this debate—other points of view certainly exist. In the course of doing so, I will make a case for expanding our conception of the corrections arena, especially as it applies to youthful offenders. I will also present in summary form some of the findings of a seven year research effort conducted by the Harvard Center for Criminal Justice on the Massachusetts Department of Youth Services deinstitutionalization effort. While these comments are based specifically on research conducted in juvenile corrections, many of the issues and findings should be relevant to adult corrections as well.

While the large congregate institution for offenders has come under attack from any groups, it does accomplish one short run goal—containment. If there is a strong enough will, our technological advances through the various uses of concrete, steel, and electronics can provide us with reasonable assurance that it is possible to hold on to, to isolate those persons whom we do not want to freely move throughout society. It is difficult to imagine a situation when there will not be some people who will require this kind of security for the protection of others. However, it seems equally clear that these large, secure structures are not well suited to meet the long run objective of corrections, that is to successfully reintegrate the offender into society in such a way that chances of further acts of crime are greatly reduced. It is also equally clear that institutions, in this country, are vastly overused and misused. In 1970 in the United States the rate of imprisonment in State and Federal prisons per 100,000 was 96.7. In England it was 72 and in Holland it was 19 prisoners a day per 100,000. A factor affecting this low rate in Holland is the length of sentence—90 percent of all prison sentences are for 6 months or less. In addition, an extensive system of restitution is used.

Especially for the juvenile offenders, institutions have a high price tag in economic and human costs. In order to prevent a young person from committing another crime for a brief period of time, we break any constructive linkages which he may have had with persons and legitimate opportunities in the

community. We place him in an institution, through a legal process which often appears to discriminate against the poor and to reinforce feelings of alientation and worthlessness. We place him in a position where he can sharpen his skills for a criminal career—frequently these skills must be developed in order to survive within the institution. By tagging the youth as needing institutionalization, we provide him with a label which will greatly reduce his changes for adequate employment or school placement on return to society and enhance the breaking of ties with family and significant others—and by doing so, we have gained a short run goal of containment but have probably increased the chances that the youngster has fewer long run alternatives to a delinquent or criminal career.

If juvenile training schools are ill suited to achieve reintegration goals, what alternatives exist? During the past decade, the field of human services generally, including corrections, has been gradually moving away from institution based to community based services. Some observers would probably describe this movement as a passing fad or a surface "band wagon" phenomena. The movement is probably not a fad; it seems likely to persist. But, it most certainly has benefited from the "band wagon" effect. Nearly every state now has its showcase programs to publicize its progressive approach to serving human needs.

Community based services remain, however, in ill defined and hetergeneous collection of strategies for handling juvenile and adult offenders. This lack of agreement detracts from public acceptance and effectiveness of community based policies, and it makes systematic research, planning, and implementation difficult.

How can we conceptually delimit those essential qualities which make some programs more community based than others? The words "community based" focus our attention on the nature of the linkages between programs and the community. A basis for differentiation among programs may be found in the extent and quality of relationships between program staff, clients, and the community in which the program is located. These relationships provide the underpinning for a continuum of services ranging from the least to the most community based as frequency, duration, and quality of community relationships increase.

Frequency and duration of community relationships are important in this concept of community based corrections, but the quality of relationships is especially so. The chain gangs of an earlier era set inmates to work in the community outside the prison walls, but did not yield the kind of relationships with the community that is envisioned here. The type of relationships of particular interest here are those which support offenders' efforts at becoming re-established and functioning in legitimate roles.

One consequence of this conceptualization of community based services is that it broadens the traditional understanding of the correctional arena. It includes taking into consideration and directing action toward families, peers, schools, other youth service groups in the community as well as the individual offender. In short, the arena of corrections encompasses the person in his total life situation.

Having briefly considered the concept of community based alternatives to institutions, let us look at the effort within the Massachusetts Department of Youth Services to close its training schools and establish a community based system.

The Harvard Center for Criminal Justice has nearly completed a seven year study of that effort, directed by Lloyd E. Ohlin, Alden Miller, and myself, funded by the Massachusetts Committee on Criminal Justice and the National Office of Juvenile Justice and Delinquency Prevention. The study has had two major objectives. First, it has focused on the process of organizational change. How does a sizeable state bureaucracy radically alter its organizational structure and its means of providing human services? Second, it has focused on what impact the reform effort has had on the youth being served. Data were gathered on youth in the institutions prior to their closing in 1972; and a large sample of youth were followed through the newly formed community based system.

The Department of Youth Services works with adjudicated delinquents between the ages of 7 and 17. It operates under a youth authority act, which gives the Department responsibility for placement, treatment and parole. As of June 30, 1968, the Department had under active supervision, a total of 2443 youth—833 in its six institutions and 1610 on parole. During the sixties, the Department had come under considerable attack for lack of care and abusive treatment within the institutions. One of these studies was conducted by HEW.

In 1969, Dr. Jerome Miller was hired as commissioner to institute reforms within the institutions. Various efforts were taken to make the institutions more humane and to upgrade treatment. Many of these efforts were strongly resisted by recalacitrant line staff. By 1971, the administrators had decided that reform efforts within the institutions were futile, and that reintegration of youth could be best accomplished by providing services based in the community and purchased from the private sector. By early 1972, all training schools for boys had been closed; the training school for girls was closed shortly thereafter.

What impact did these reform efforts have for the youth being served? It should be noted that what we observed was a total system change—we were not looking at a few showcase programs. One of the immediate payoffs of the change was that a considerably broader range of placement options were available. Youth of a certain age and sex were not simply segregated in an institution. On a given day in June of 1975, the Department had 1,912 youth under active supervision. One hundred and ten were in secure care units, 262 were in group homes and boarding schools, 220 were in foster homes and 643 were in non-residential programs (96 of these youth were also in group programs at the same time), and 778 youth were on parole. Thus, the closing of the training schools brought about a system with greater diversity and flexibility for meeting the individual needs of the youngsters under its supervision.

The quality of life within the programs of the new system exceeds that of the older training schools system. Youth in both systems were asked about their relationships with staff and with other youth. Youth in the new system indicate that their programs are less likely to be characterized by a negative peer group subculture. They are more likely to participate in decision-making about their futures, to reward other youth for good behavior, and to believe that the staff is helpful than were youth in training schools. While abuses still remain in the new system, the use and threat of force to bring about conformity to staff expectations has been considerably reduced.

The extent of interaction with local communities has increased dramatically as a result of the reforms. In a sample of training school youth, only 6 percent indicated that they had routine contact with the community. In a sample of youth from the community based system, over 50 percent indicate that they had such contact. However, only 22 percent of the sample were in programs which were rated as yielding high scores on our community based continuum. Thus while few youth are in programs which are completely isolated from the community, most youth are in programs which are not adequately interconnected with local communities. Many of these programs may be "humane," but they are still not providing fully the kinds of linkages with the community most likely to enhance the probability of successful reintegration.

Given the last statement, it is not surprising that when we look at recidivism (recommitment to probation, the Department, or adult corrections for a new crime), that we discover no great difference between the training school system and the community based system. In fact, if we simply look at two statistics—one representing a 1968 sample of paroled boys and girls and another representing the 1973–74 boys and girls committed or referred to the Department, we find that the latter group recidivated at a slightly higher rate for the initial year following program exposure. The comparisons for boys is 47 percent recidivating in the 1968 sample and 55 percent in the 1973-74 sample. For girls it is 16 percent and 25 percent respectively. Further analysis shows that some of the regions within the state were doing better in 1973–74 than they had in 1968, while others were yielding higher rates. The reforms were not implemented evenly across the State—where we find greater diversity and flexibility in program we generally find lower recidivism rates. We can show that programs which were more community based also tended to be related with lower recidivism rates, and the differences cannot be simply explained away by differences in the characteristics of youth served.

The differences in recidivism rates over this 8-year period may be explained in part by broader societal trends in youth crime, the fact that the Department is currently working with an older population, changing attitudes toward females, and changes in police and court resources. However, careful analysis of these data strongly suggest that experiences in the community prior to entry into DYS and after DYS tend to wash out the positive effects of programs. Furthermore, it is clear that moving from training school models does not necessarily mean that programs will be readily tied to local community networks. Instead of having

"institution kids" we now have a new group of "agency kids." They are generally treated better, but their experience in these agencies is still quite foreign to the worlds in which they live. If these private agencies are to be an improvement upon the training school model, in terms of recidivism, they must take the risk of becoming involved in the community to a more significant degree than simply retaining a "community board." It therefore seems evident that while the reforms in the Department have moved in the right direction, they have not gone far enough in constructing positive linkages for youth in the community to bring about a major change in the rates of recidivism. It also seems clear, however, that the bulk of the youth who would have been handled in training schools were handled in the community without producing a major juvenile crime wave.

The economic costs of providing community based services to youth in the community in Massachusetts remains approximately the same as provision of services in the training school system. In 1968 the total cost, including parole, per youth day in institutions was $29. In 1975 the total cost, including parole, per youth day in programs was $30. A broader range of services and a better quality of services is being provided to delinquent youth without greatly increasing the costs to the taxpayer.

Numerous documents supporting the statements regarding the reforms within the Department can be made available to this committee if so desired.

In sum then, it is our position that institutions have been grossly overused. However, there will remain a need for small, humanely operated programs which are quite isolated from the community for a small number of offenders. The major objectives of reintegration and long run deterrence can best be served by broadening the corrections arena and by placing more emphasis on helping offenders reestablish constructive ties within community networks. Community based services and close supervision in the community provide an opportunity for protection and support at the same time.

Mr. COATES. The debate over institutions versus community corrections is not new, and it's the debate that I would like to spend most of my time talking about.

I want to deal with the notion of what we mean by community corrections; and I want to deal specifically with some data from our study of the Massachusetts experiment.

Because of that, I will stay fairly close to this text, because I don't want to misquote our own data.

In the opening paragraphs of my prepared testimony, I have made similar statements to those made by Dr. Miller and Dr. Fogel concerning the ineffectiveness of incarceration in institutions, particularly as they apply to training schools in the juvenile area.

I want to skp that part since it's already in the record and move on to a discussion of alternatives to juvenile training schools.

During the past decade——

Senator BIDEN. Excuse me. Do these same alternatives apply to adult prisons?

Mr. COATES. I think many of them do. I would agree with Dr. Miller that we're probably talking about a smaller percentage of that population. But it seems to me that the rationale applies to adults as well as to juveniles.

We do have to remember that the bulk of the adult population is only about 5 or 6 years older than the juvenile population.

Senator BIDEN. Thank you.

Mr. COATES. During the past decade, the field of human services generally, including corrections, has been gradually moving away from institution-based to community-based services.

Some observers would probably describe this movement as a passing fad or a surface bandwagon phenomena.

The movement is probably not a fad. It seems likely to persist. But it most certainly has benefited from the bandwagon effect.

Nearly every State now has its showcase programs to publicize its progressive approach to serving human needs.

Community-based services remain, however, an ill-defined and heterogeneous collection of strategies for handling juvenile and adult offenders.

I think it's very important for us to try to clarify what we're talking about in terms of alternatives, particularly in terms of what constitutes a community-based program.

Frequently, as we travel across the country, administrators will tell us: We have set up a community-based program; it's called a halfway house.

One can venture out to that program and find 60 people in it. And it is being run as a mini-institution.

So what constitutes or what are the essential qualities which would make some programs more community based than others?

It seems to me that the words "community based" focus our attention on the nature of the linkages between programs, offenders, and the community.

A basis for differentiation among programs may be found in the extent and quality of relationships between program staff, clients, and the community in which the program is located.

These are relationships. They are concrete. They are measurable.

They can provide us with an underpinning for a continuum of services ranging from the least to the most community based as frequency, duration, and quality of community relationships increase.

Frequency and duration of community relationships are important in this concept of community-based corrections, but the quality of relationships is especially so. The chain gangs of an earlier era set inmates to work in the community outside the prison walls but did not yield the kind of relationships with the community that is envisioned here.

The type of relationships of particular interest here are those which support offenders' efforts at becoming reestablished and functioning in legitimate roles.

One consequence of this conceptualization of community-based services is that it broadens the traditional understanding of the correctional arena.

This is our world of work from the correctional point of view.

It includes taking into consideration and directing action not simply toward the inmate or the juvenile offender but toward families, peers, schools, and other youth service groups in the community.

We pay a lot of lip service to family therapy—at least in juvenile corrections. But when we actually go out to the field and observe it, families are very seldom involved in what happens to their youngsters once they've been committed to the department.

In short, the arena of corrections encompasses the person in his total life situation. They can't be isolated. It is focused not only on the individual by himself, his attitudes or whatever but on his total situation—his relationships with families, peers, schools, the world of work and so on.

Having briefly considered the concept of community-based alternatives to institutions, let us look at the effort within the Massachusetts

Department of Youth Services to close its training schools and establish a community-based system.

We have nearly completed a 7-year study of that effort. It is being conducted by the Harvard Center for Criminal Justice under the direction of Lloyd E. Ohlin, Alden Miller, and myself.

This study has had two major objectives. First, it has focused on the process of organizational change. How does a sizable State bureaucracy radically alter its organizational structure and its means of providing human services?

Second, it has focused on what impact the reform effort has had on the youth being served.

Data were gathered on youth in the institutions prior to their closing in 1972, and a large sample of youth were followed through the newly formed community-based system.

The Department of Youth Services works with adjudicated delinquents between the ages of 7 and 17. It operates under a Youth Authority Act which gives the Department responsibility for placement, treatment, and parole.

As of June 30, 1968, the Department had under active supervision a total of 2,443 youth—833 in its 6 institutions and 1,610 on parole.

During the sixties, the Department had come under considerable attack for the lack of care and abusive treatment within the institutions. One of these studies was conducted by HEW.

In 1969, Dr. Jerome Miller was hired as commissioner to institute reforms within the institutions. Various efforts were taken to make the institutions more humane and to upgrade treatment. Many of these efforts were strongly resisted by recalcitrant line staff.

By 1971 the administrators had decided that reform efforts within the institutions were futile, and that reintegration of youth could be best accomplished by providing services based in the community and purchased from the private sector.

By early 1972, all training schools for boys had been closed. The training school for girls was closed shortly thereafter.

What impact did these reform efforts have for the youth being served?

It should be noted that what we observed was a total system change. We were not looking at a few showcase programs.

One of the immediate payoffs of that change was that a considerably broader range of placement options were available.

Youth of a certain age and sex were not simply segregated in an institution, which was the common result in the past.

On a given day in June 1975, the Department had 1,912 youth under active supervision; 110 were in secure care units; 262 were in group homes and boarding schools; 220 were in foster homes; and 643 were in non-residential programs. Of these youth ninety-six were also in group programs at the same time.

Senator BIDEN. Is there any correlation between the 2,400 that you looked at in 1972 prior to eliminating the institutional setting?

How many of theme were either in an adult prison or still in the program?

Mr. COATES. I don't have those percentages available.

It is a factor that we have looked at in our analysis.

Prior institutionalization did not play that major a part in explaining any of these variables. It was rather surprising.

I don't have the percentage of the number of youth coming from the training schools and graduating on into the adult system. I know it's high.

We can obtain that for you if you'd like.

Senator BIDEN. I'd appreciate that for the record.

[The material referred to had not been received when this publication went to press.]

Senator BIDEN. At this point, I would like to break for a vote.

[Recess taken.]

Senator BIDEN. The hearing will please come to order.

Dr. Coates, if you will continue.

Mr. COATES. When you left, we were talking about the fact that closing the training schools has brought about a system with greater diversity and flexibility for meeting the individual needs of the youngsters under its supervision.

The quality of life within the programs of the new system exceeds that of the older training school. Youth in both systems were asked about their relationships with staff and with other youth. Youth in a new system indicate that their programs are less likely to be characterized by negative peer group subcultures. They are more likely to participate in decisionmaking about their futures, to reward other youth for good behavoir, and to believe that the staff is helpful than were youth in training schools.

While abuses still remain—and I want to make it clear that we're not talking about Utopia—in the new system, the use and threat of force to bring about conformity to staff expectations has been considerably reduced.

The extent of interaction with local communities has increased dramatically as a result of the reforms.

In a sample of training school youth, only 6 percent indicated that they had routine contact with the community.

In a sample of youth from the community-based system, over 50 percent indicate that they had such contact.

However—and this is an important point—only 22 percent of the sample were in programs which received high scores on our community-based continuum.

We go back to our notion of what constitutes community based. We can measure programs and place them on a continuum.

Only 22 percent of our sample were in programs that yielded high scores on that continuum.

Thus, while few youth are in programs——

Senator BIDEN. Can you give me an example of one of those programs?

Mr. COATES. The program that Dr. Miller was describing, where there would be an advocate responsible for one or two youngsters spending 30 to 50 hours a week monitoring the activity of that youngster.

Senator BIDEN. The youngster back in the public school system?

Mr. COATES. He may be in a public school; he may be in an alternative school setting.

Senator BIDEN. What's an alternative school setting?

Mr. COATES. The best definition of that that comes to mind is——

Senator BIDEN. Give me an example of one.

Mr. COATES. It can be providing tutorial opportunities. There is a facility away from the public school; the youngster comes and participates during the day. There is a program in Cambridge called the Group School which is one example if you want to follow up on it.

Senator BIDEN. The reason I ask that is that you all use these terms as if everyone knows them, and most of us do not.

Mr. COATES. Usually what we mean by an alternative school setting is a faculty outside the public school system where the approach is much more individualized. Much of the learning takes place through one-to-one tutoring or in very small groups.

Sometimes these youngsters then go back to public school after they've been brought up to a certain level.

Alternative schools are generally run by private agencies.

Senator BIDEN. Thank you.

Mr. COATES. Thus, while few youth are in programs which are completely isolated from the community, most youth are in programs which are not adequately interconnected with the local communities.

Many of these programs may be humane, but they are still not providing fully the kinds of linkages with the community most likely to enhance the probability of successful reintegration.

Given this last statement, it is not surprising that when we look at recidivism—which is defined here as recommitment to probation, the Department of Youth Services, or adult corrections for a new crime—that we discover no great difference between the training school system and the community based system.

In fact, if we want to simply look at two statistics, which really oversimplifies the question, one representing the 1968 sample of paroled boys and girls and another representing the 1973–1974 boys and girls committed or referred to the department, we find that the latter group recidivated at a slightly higher rate for the initial year following program exposure.

The comparisons for boys is 47 percent recidivating in the 1968 sample and 55 percent in the 1973–74 sample.

For girls, it is 16 percent and 25 percent, respectively.

Further analysis shows that some of the regions within the State were doing better in 1973–74 than they had in 1968, while others were yielding higher rates.

The reforms were not implemented evenly across the State. Again, it's important for us to realize that we're talking about system change and not a single showcase program. Where we find diversity and flexibility in a program, we generally find lower recidivism rates.

The region with the best program mix for youngsters had 67 percent recidivism rate in 1968 and 45 percent rate in 1974.

We can show that programs which were more community based also tended to be related with lower recidivism rates, and the differences cannot be simply explained away by differences in the characteristics of youth being served.

For example, youth in foster care programs were recidivating at a 41-percent rate. Nonresidential programs were recidivating at a 45-

percent rate. This was contrasted with youngsters who were in secure care—the most isolated and secure programs we have in Massachusetts—were recidivating at a 67 percent rate.

So the type of program does make a difference.

The differences in recidivism rates over this 8-year period may be explained in part by broader societal trends in youth crime. The fact that the Department is currently working with an older population.

Over two-thirds of the youngsters in the Department at this point are 16 or over.

Changing attitudes toward females and changes in police and court resources may also account for differences in recidivism rates.

However, careful analysis——

Senator BIDEN. What are the changing attitudes? Could you explain that?

Mr. COATES. As toward females?

Senator BIDEN. And also the court system.

Mr. COATES. All we're alluding to at this point—I don't want to make a lot of it, because while these are variables that may affect the rates, but it's very difficult to measure to what extent they affect the rates. We do know that as the resources to the police department and the courts increase, we're going to have more children coming through the system.

Changes toward females: In the past, females have been protected by judges coming from a specific point of view around sex roles. Apparently that attitude is changing. We're finding more females coming into the system.

Some of the females are coming in for tougher crimes, than they have been in for in the past.

Careful analysis of these data strongly suggests that experiences in the community prior to entry into DYS and after DYS tend to wash out positive effects of programs.

Furthermore, it is clear that moving from training school models does not necessarily mean that programs will be readily tied to local community networks.

Instead of having institution kids we now have a new group of agency kids. They are generally treated better, but their experience in these agencies is still quite foreign to the worlds in which they live.

If these private agencies are to be an improvement upon the training school model, in terms of recidivism, they must take the risk of becoming involved in the community to a more significant degree than simply retaining a community board.

It, therefore, seems evident——

Senator BIDEN. How do they become involved?

You both have used that—getting more involved in the community. I'm not sure what you mean.

Mr. COATES. Let me talk about the concept of advocacy. We can talk about it on three levels.

Advocacy implies that the program worker is trying to do the most that he can to bring together community resources around that youngster's needs.

We can talk about individual advocacy, where the staff person will actually play the role of an absent parent at times by going to a school to talk with the vice principal in order to find out what prob-

lems exist—not assuming that the youngster is always right but providing the same assistance that you or I would do for our children if they are in trouble in school.

That's involvement in the community.

Senator BIDEN. But does the child live in the community. Do they live in the neighborhood?

Mr. COATES. Yes.

Senator BIDEN. Have you had resistance from zoning changes to move into neighborhoods?

Mr. COATES. That's a whole area of study that we did conduct a 6-month study on.

There is strong resistance in some communities to the notion that a group home or a nonresidential program is going to move in.

Senator BIDEN. Do you try to move the children into indigenous neighborhoods?

Mr. COATES. In Massachusetts, we can identify group homes and nonresidential programs that have moved into a variety of neighborhoods.

Maybe I misunderstood your question.

Senator BIDEN. Maybe I misphrased it.

Is it worthwhile to attempt to move children into neighborhoods from which they came? Or is it better to move them into a better neighborhood than from which they came?

Mr. COATES. We have to become more specific and talk about particular kids and particular situations.

Certainly for most youngsters, in my opinion, if we can provide resources to them in their own communities and their own family settings, that's an advantage. Because that's where they're going to return anyway.

On the other hand, there are some youngsters coming from families where the relationships are so deteriorated that their parents don't want them, they don't want their parents, and there's no reason for us to try to force those kinds down the parents' throats.

At that point, it makes sense to move the youngster out of the community into another community—not isolate him from that new community but get him integrated into that.

Senator BIDEN. But you try to make it similar in the socioeconomic background?

For example, in my State, there was a move for awhile to move children—I guess you would call them after-care homes. And buy up homes in neighborhoods to bring children out of the institutional setting into the home.

What they were attempting to do—and it was thought to be by the prime movers of that project—that what we wanted to do was to buy homes in upper-income neighborhoods. And what we would do is move poor white and poor black children into the upper-income neighborhood.

To vastly oversimplify it, sort of a bussing concept. Move children into an area and a school system. If they moved into the neighborhood, you put them in that public school system; and they would be better off.

Is that a wise way to go?

I know you're not talking about homes. You'd prefer not to have—or at least Dr. Miller would prefer not to have—another institutional setting only smaller in the neighborhood. But which is the wiser way to go?

Again, I'm trying to understand your community-based idea. You emphasized how critically important that is.

Whatever the program is, is it better to tie it to a community from which they have come and they are likely to go, or is it better to try for some upward mobility and tie them into a different community?

Mr. COATES. I can't really answer that question on the basis of very much empirical data; because I think that most of the programs that we have observed are in either lower-class or middle-class communities. There are certainly not very many upper-class communities represented, although there is some cross-fertilization when you look at the boarding schools.

Boarding schools have come on poor economic times as of late and are starting to expand the population that they work with.

At least in Massachusetts, where we have a number of them, some of those programs have taken on youth from the Department of Youth Services.

That has created problems for the boarding schools and it has created problems for the youngsters.

It seldom works out as a good mesh. Now that may be a key for us.

I would personally not expect it to work as a general policy to take kids from the inner city of Boston and place them in programs in Concord, Mass. It might be a very advisable objective and goal, but I'm not sure it's going to work—at least in the context that we're looking at.

Senator BIDEN. That's really what I'm trying to get to, because your explanations of the programs and the very laudible objectives that you state. Being put in the position I am right now and where I was before I got into politics, I know the practical application of these programs ends up that somebody like me is in a community somewhere and has the good doctors from Harvard who tell us it's a good idea to do this and we have to sit there and say: Now where physically do I put this child? What home does he go in?

And that's what I was trying to get at.

Mr. COATES. I'd like to make one more comment on that before we move on.

It seems to me that one of the ways one can penetrate the Concord community is through foster homes. You do certainly come across individual families who are willing to work with a youngster in trouble with the law.

If he moves into that family in Concord, he then has parents who are willing to advocate on his behalf with the school.

That's a better situation than trying to force a group home into that community. For you would probably bring about a holy war which you could not win.

Senator BIDEN. Dr. Miller, did you want to say something on that point?

Mr. MILLER. I just agree with that, Senator.

I would say that there is a lot of concern around communities of setting up these options.

When we did our program in Pennsylvania, we had similar problems.

But if the will within the bureaucracy is there to do it, it can be done and with significant community support. I think we showed that in Massachusetts. In fact, we did move a total State training school population totally into a community with 1 year.

Some of the Harvard papers relate to some of the ways we used to do that. We did not, incidentally, go into any communities where we weren't welcome. If a lawsuit started to be raised, we left. We just didn't think it was worth it. They can tie you up for so long.

Senator BIDEN. For the record, I'd like to know what communities you are into. Just for my own gratification.

Please proceed. I won't interrupt again.

Mr. COATES. I think that it is fair to say that we have witnessed in Massachusetts the closing of the training schools without witnessing a major juvenile crime wave—which I think is one of the basic questions that people are asking across the country.

Before moving on from recidivism—and I am almost done—I would like to make another comment about recidivism in general.

It seems to me, at least coming from a community-based perspective, that recidivism should not be seen as solely the responsibility of a juvenile corrections agency. In other words, it alone should not be the bottom line of whether *a* correctional policy is good or bad.

Recidivism may be an appropriate indicator of how our society is working with troubled youth. For then we are talking not only about the effectiveness of corrections, but also about the effectiveness of schools, churches, the world of work, and even our most sacred institution, the family.

Senator BIDEN. No one really argues with that though do they? With the premise that you just stated?

Mr. COATES. In our field, recidivism is frequently seen as the bottom line and the only criteria that people are interested in. If it doesn't reduce crime, then it doesn't work.

I'm suggesting that the crime problem is much more complex, and it needs to involve significantly more actors.

Senator BIDEN. I really apologize for this. I'm not the majority leader, and I can't schedule these votes. I will not be offended at all if those of you who have testified wish to leave. I'll come back for the rest of the testimony.

Mr. Nagel, I'll be back to hear your testimony if you can wait. But I suspect there is probably going to be another vote after this in 15 or 20 minutes.

I'll stay, but I could submit these questions in writing to you.

I'm sorry. I'll be back shortly.

[Recess taken.]

Senator BIDEN. The hearing will come back to order.

Let's give it another try.

Mr. COATES. I think we'll finish this time. We have only one more criterion to look at, and that is the issue of economics.

The economic costs of providing community-based services to youth in the community in Massachusetts remains approximately the same as provision of services in the training school system.

In 1968, the total cost including parole per youth day in institutions was $29.

In 1975, the total cost, including parole, per youth day in programs was $30.

A broader range of services and a better quality of services is being provided to delinquent youth without greatly increasing the costs to the taxpayer.

In sum, then, it is our position that institutions and training schools in particular have been grossly overused in this country—and certainly overused in Massachusetts—in the past.

However, there will remain a need for small, humanely operated programs which remain relatively isolated from the community for a small number of offenders. Particularly we have in mind the violent offender.

The major objectives of reintegration and long-run deterrence can best be served by broadening the corrections arena and by placing more emphasis on helping offenders reestablish constructive ties within community networks.

Community-based services and close supervision in the community provide an opportunity for protection and support at the same time.

Senator BIDEN. Thank you.

Mr. Nagle, would you come up please.

Thank you for your patience.

STATEMENT OF WILLIAM G. NAGEL, EXECUTIVE VICE PRESIDENT, THE AMERICAN FOUNDATION, INC., PHILADELPHIA, PA.

Mr. NAGEL. Thank you for inviting me to come down here.

I want to say two things in introduction.

First, inasmuch as you don't know what the American Foundation is, I would like to say very briefly that it is a privately endowed foundation of a deceased Philadelphia publisher, Edward Bok.

The foundation has had as one of its basic purposes to help to make representative government more responsive to the needs of the people.

So I'm glad to be here before you who are representatives of a representative government.

Edward Bok's son was a supreme court judge in our State of Pennsylvania. That's one of the reasons that our foundation has such an intensive interest in the whole criminal justice field.

His son is the president of Harvard University. Previous to that was the dean of the law school. That also adds to our interest in criminal justice.

I also want to make one other statement prior to my prepared statement.

I want to affirm here my repugnance that Americans lock up so many Americans. I want also to say that few, if any, crimes are more serious than that one of keeping 48 percent of the black youth in my city of Philadelphia out of work, out of hope, and out of the American opportunity system.

It's inconceivable that in our highly touted economic system we have to sputter along with a 7.5 to 9.5 percent unemployment rate, and then deal with the consequences of that by building prisons.

My interest in prisons and criminal justice has been a long duration—30 some years—and it covers the entire spectrum.

However, I have limited my remarks purposely to one aspect of it; because, when I was contacted on the phone, I was asked to discuss some aspects of rehabilitation. Some of my views were then expressed to your staff people and I was asked by them to speak essentially to that.

It is my understanding that these hearings are being held to give reconsideration to the purposes of corrections. That is good. The professional in corrections, the legislator, and the public are all in a state of vacillation. To punish? To deter? To segregate? To rehabilitate? They are the questions.

It has been thus throughout the nearly two centuries since the penitentiary was invented in my home city of Philadelphia. The people who successfully lobbied the legislation that changed America's principal criminal sanctions from corporal and capital punishment to imprisonment were not all of one mind. There were the Quakers who felt that the purpose should be restoration. Their method was removal of the offender from the evil influence of 19th century Philadelphia. The offender, so removed, would become penitent and cleansed. Thus the name—penitentiary. Others viewed the basic cause of crime to be the offender's ignorance of the "word." They put Bibles and religious tracts in the solitary cells. No longer would the offender be ignorant of God.

Still others felt that criminal behavior was a natural byproduct of indolence. Therefore, a spinning wheel, a loom, or a shoebench was put in each cell. As the individual offender learned to labor, indolence would, it was thought, be overcome. Still others had no such sophisticated theory of restoration. They argued that the prison would, if nothing else, deter. What rational person would choose crime in the face of imprisonment? Still others wanted only to punish. In this new land, espousing freedom as its highest quality, what greater punishment could there be than a deprivation of freedom?

Thus, the prison back in its earliest days, was all things to all people. It still is.

This week you are being told that the purposes of contemporary corrections are, pure and simple to: (1) punish, and (2) incapacitate. The latter means "get them off the street." You are also being promised the death of rehabilitation. It is a vain dream. It has failed. It is not cost-effective. It must go.

You, and the Nation, are being told these things, not by brutal primitives but by charming men in academic robes; by politicians of impeccable liberal credentials; by politicians of impeccable conservative credentials; by editorialists; and by correctional leaders who keep close to the pulse of academics, politicians, and editorialists. I have chosen to speak to just one reason why the rehabilitation ideal must not be permitted to die.

We have been at rehabilitation's death bed before. You will recall, from David Rothman's remarkable history of prisons and asylums in America, that following an early commitment to rehabilitation—it was called reformation in those days—we abandoned this ideal in behalf of the readily obtainable. Warders—the term suggests caring

for—became keepers. The American prison became brutal beyond description. I commend Rothman's book "The Discovery of the Asylum" (Little, Brown, Boston, 1971) to those of you who have not read it. As long ago as 1870, leaders of the prison reform movement recoiled against the resulting intolerable conditions. They began once again to articulate the purposes of imprisonment in rehabilitative terms. In their famous statement of principles presented at the first meeting of the American Correctional Association in 1870 they affirmed the recommitment.

A long and persistent effort to bring more noble purposes than punishment and simple confinement into the American penitentiary was begun. The task has been long and difficult, but by the forties the purpose of imprisonment was no longer viewed as simply punishment or sterile confinement. The expression "you were sent here as punishment not for punishment," became the correctional imperative. For employees of the system, this meant that once incarcerated the purpose was to restore. As a result a new breed of correctional leadership began to penetrate the system. Humanists such as Sanford Bates of Massachusetts, James Bennett of the Federal Bureau of Prisons and Richard McGee in California, came into the system out of the practice of the law with determination to make the prison system more humane, more responsive to the needs of prisoners. Other leaders came out of the social sciences—Bixby from psychology; McCorkle and Wagner from sociology; Miller, Schoen, Sielaff, and Powers from social work; Sharp from education; Walter Menninger from psychiatry. Religious education provided Texas' Beto. Thousands of able young people from the helping professions gravitated into prison work bringing their energy, their hope, and their belief in the improvability of man. Among them, in addition to myself, were Norman Carlson and David Fogel who have already appeared before you.

For many years, I worked in what was then regarded as one of the most progressive correctional institutions in the country. My colleagues were pioneers in the development of several treatment techniques which were, at the time of my employment there, considered very advanced. We went far and wide to recruit eager and competent psychiatrists, psychologists, social workers, teachers, chaplains, and other skilled persons. They worked with imagination and devotion. We developed an institution with a high morale, a great sense of purpose, and a flexible approach to the treatment of crime and delinquency. In spite of all our efforts during those exciting years, we did not appreciably change the recidivist rate. But we did have a more humane institution, a more responsive one, a more caring one. Such values may not be measurable by either statisticians or accountants, but they are not inconsiderable. A civilized people will not denigrate them.

I do not believe that "rehabilitation is dead," for a second reason. Our level of civilization has moved past the primitive "punish and confine" mentality. Americans, in their finer moments, have been closer, philosophically, to the Sermon on the Mount than to Jeremy Bentham's "utilitarianism" or to Immanuel Kant's belief that the ultimate function of government is to punish the law breaker. The latter two provide much of the philosophic base for the exponents of punitive imprisonment.

The late Pennsylvania supreme court judge, Curtis Bok, once wrote that a people that has lost the will to "restore" has lost its soul. We as a Nation have not, and must not.

But what is more germane to your concern—the future policy—is the consequence of a return to a punishment model for imprisonment. One of the consequences would be this. Who would seek a career in a field avowing only two purposes—to hold and to punish? Within a decade a prison system that always teeters on the brink of inhumanity will plunge over it.

Curiously enough, a Federal judge within the past month has given indication that the Federal Bureau, with its new emphasis on punishment, may have already taken a first step toward viewing punishment not only the purpose but the method of punishment. *Wolfish* v. *Levi*, is a case testing the constitutionality of some aspects of the Bureau's new "model" Metropolitan Correctional Center in New York City.

One of the many issues was the petitioners' complaint about what they perceived to be the administration's excessive restriction on their rights to possess personal property. Judge Marvin Frankel took note of the Bureau's position that "restrictions on personal property also serve the legitimate purposes of punishment."

The judge observed that "this is a curious argument indeed. Most of us in the Federal law business," he said, "associate respondent Director Carlson with a good deal of penological wisdom extending well beyond, but surely including the maxim that people are sent to prison as punishment, not for punishment." The judge concluded that the witnesses' declaration was indicative that "jailers are determining forms of punishment with no suggestion that their statutory powers were meant to embrace that profound responsibility."

Admittedly, denial of personal property may seem to some a mild form of punishment. Let me assure you, however, that history has shown jailers to be capable of unspeakable inventiveness when they perceive punishment to be their principle mandate. In short I cringe at the thought of a prison system led and operated by men and women who see their only purposes to be (1) to hold, and (2) to punish.

Perhaps part of the disillusionment with rehabilitation lies in the fact that it is often (and by some exclusively) equated with the "medical model" and with "indeterminate" sentencing. Abuses of indeterminancy have been well documented elsewhere. I count myself among those who do not believe that release should be tied to the success or failure of the restoration process. The sentence should reflect the degree of repugnance that society, through its legislatures and judges, attributes to specific acts of unacceptable behavior and not be designed to fulfill such utilitarian purposes as deterrence, incapacitation, or rehabilitation, though it may, in fact, fulfill all three. The term "medical model" conjures up such words as "sickness," the couch, drugs, shock, individual and group therapy and coerced treatment. I consider none of them to be central to rehabilitation. Rather I view the restoration to be related to coping. In the outside world a person, in order to cope, usually needs to be able to read, to figure, to work, to get along with peers and boss, to make constructive choices, to be self-disciplined. The heart of the correctional process—the rehabilitation effort—should be directed toward noncoercively helping the offender

toward these goals. For some it might involve medical processes, for offenders, like other people, do suffer medically and psychologically. In summary then, the sentence to confinement is indeed punishment. No loss of freedom could be otherwise. But the thrust of the confinement experience itself must be nonpunitive. To the highest degree possible the thrust of corrections must be to restore.

There is one additional, and somewhat different, point that I wish to stress. Great pressure is, and will continue to be, placed upon policymakers, such as you, to build more prisons. They are overcrowded you are told. They are antiquated. They are remote. They are unconstitutional. We must, therefore, build more.

It is hard for me to believe that Texans are inherently 3½ times as evil as Pennsylvanians or that Georgians are 10 times as dangerous as Minnesotans, or that North Carolinians are so infinitely more criminalistic than West Virginians. Yet Texas has 3½ times as many of its citizens locked up per 100,000 as do we Pennsylvanians; Georgia 10 times that of Minnesota; and North Carolina 5 times that of West Virginia. It is especially difficult to accept that we Americans are innately so less law-abiding than the peoples of any Western industrial nations. Yet no such nation comes close to our incarceration rate per 100,000 of population.

As inventive as we as a people are, we seem to have no solution to the ravages of crime other than "to lock them up." Must we continue to put buckets under the leaks? Can't we fix the roof?

There are at least a dozen careful studies that show the relationship of unemployment to crime. One is your own Joint Economic Committee study done by Johns Hopkins University. Two others I attach as supplements to this statement. The first, which I wrote, shows that there is no relationship between confinement rates in the 50 States and crime rates, but there is a very close relationship between crime rates and unemployemnt rates. There is no relationship between percentage of blacks in a State and crime rates, but there is a remarkably close relationship between percentage of blacks and incarceration rates.

The second is a much more sophisticated study done by my son Jack, an associate professor of political science and public policy at the University of Pennsylvania. Protective of his father, he undertook his study, much less impeachable than mine, because "Nagel (that's me), by his own avowal is not a social scientist. Nagel's research suffers from important methodological weaknesses."

His efforts were undertaken to determine whether or not, when the methodological deficiencies were corrected, "Nagel's key results would be sustained." After miles of computer runs and pages of analysis based upon a sophisticated technique known as "two-page least-squares regression" he asks "How do Nagel's conclusions stand up against such scrutiny and analysis?" "Very well, indeed," he answers.

In closing I share two vignettes from his analysis.

First, relative to the relationship between unemployment and crime he states:

> For an average State of 4 million population—about the size of Maryland—we would expect a 1-percent decline in unemployment to prevent more than 10,000 index crimes each year. If, in 1975, Maryland's unemployment had been 4 percent, the so-called full employment level, instead of its actual 7.5 percent,

citizens of the State would have experienced an estimated 32,500 fewer index crimes, a 13-percent reduction.

That is something to think of when considering new prison cells.

And second, relative to race and incarceration he notes:

Although percent black has no effect on crime rates, for each 10 percent increase in black population percentage, States tend to add 37.6 prisoners per 100,000 population. For a State with the size and black population of Georgia, this effect amounts to a prison population over 4,400 larger than it would be if there was no racial bias. That is enough inmates to fill five large prisons.

You who are concerned about Federal prison policy should know that in your own Federal institutions crime for crime, first offender for first offender, second offender for second offender, and so forth, black prisoners are held longer than white ones. This is true even for violations of the Selective Service Act.

Since 1969 the Federal Government has added 4,871 new cells to its system. During the same period its black population has increased by 4,904. In short, you have, unconsciously of course, been funding the expansion of the Federal Prison System to receive our black unemployed.

The States have been doing likewise.

I respectfully suggest that this committee reject a nihilistic and despairing policy that demands prison construction.

I suggest public policy that will reduce the chronic unemployment of our people. Then new prison cells will not be a necessity, let alone the urgent necessity that they seem to be today.

Thank you.

Senator BIDEN. Thank you very much, Mr. Nagel.

I would like to submit some questions in writing to each of you, but I have a few questions now to ask.

Mr. Nagel, I think you're right that people are closer to the idea of the Sermon on the Mount. The only problem is they're worrying about getting mugged climbing up the mountain. That's what's happening today.

I'm sure that much of the reason why we're here today is because of the political atmosphere you've all referred to one way or another.

But the fact is that it's there. We can explain that we should not operate in a political atmosphere, and we can talk about how it would be nice not to do that; but the fact of the matter is that's real life.

I guess it was Emerson who said that society is like a wave. The wave moves on but the particles remain the same.

We haven't created a new brand of man in a long time, and I don't expect something to come along real quickly that's going to change the way in which we react individually.

But enough of my editorializing.

If I may ask two questions for Senator Mathias. He wanted to be here but is tied up with another hearing.

This question is for Professor Fogel.

Professor Fogel, your justice model suggests that sentencing should be based on classification of offenders into risk categories. Aren't you then inviting the discretionary sentencing you deplore?

What do you mean by risk; and does that take us back to the concept of assessing a person's chances for rehabilitation for sentencing purposes?

Mr. FOGEL. The risk, as I have thought it through, has nothing to do with the clinical diagnosis of risk or future danger in the sense of trying to isolate dangerousness. But rather, even though it's difficult, legislatures are at least attempting to deal with it. Risk has statutory criteria for the imposition of a sentence. A dangerous risk would apply to previous felonies whether the kid had been living with a gun since he was 12 or not and used it four times before. It's much more of a public safety question than a diagnostic question.

It's a plain matter of fact rap sheet question that I'm referring to.

Senator BIDEN. You have deplored the overcrowded conditions in our nicest prisons, Dr. Fogel. How does your justice model deal with this problem? Wouldn't your plan for definite sentences increase the number of incarcerated persons?

Mr. FOGEL. No; I don't think so.

We have done several simulations of it. In the phase 1 study that was mandated by Congress in a population, which you probably have now, you will see difference in areas. It doesn't have to increase it.

Some of my colleagues, even at this table, are afraid that if we throw this idea into the legislature, all these Neanderthal types who are elected officials will simply raise sentences. I have been to many legislatures. I have testified before this body before several times, and that doesn't happen.

What does happen is that for the first time legislatures have to be confronted with the costs of law and order talk. If you adopt a fairly narrow range and have three or four classifications of crime and you do some simulations, you can figure out in advance what your prison population is going to be.

That makes the legislator who is interested in 30-year sentences for marihuana, for example, very tentative. Because now he knows exactly how many cells are going to be necessary. And when he goes home, he has to also explain to his constituency where's he's going to get that extra one quarter million cells to lock up everybody.

So you get more honest discussion.

Let me give you one story.

In one legislature in the South, where we proposed this, the legislature liked it so they had a simulation done to find out about costs.

I had suggested a top sentence of 8 years as the presumptive sentence with 4 years off for good behavior—that would be just a 4-year max if the person was good all his time in.

I don't suggest to anybody that prison ought to be the first way. I'm talking about loading up, by funding, the front end of the system. Make the State exhaust all less-onerous outcomes before you give a prison sentence.

When it's a prison sentence, by statutory criteria, then it ought to be determined.

The State did this, and they found out it would cost them $100 million more than they were spending to go to flat time. I inquired as to why. And they said: "Right now we have a 60-year sentence for a drug offense, and a lot of people go in for drug offenses. If we cut it down to 8 and 4 off, it would cost us $100 million."

I said: "How can that be?" The guy said: "We give 6 to 2 now, and they're getting out on an average of 2."

That's the thing about our system of justice. There are people playing games with it. But what it does is it focuses the legislature on bodies and buildings.

That's another thing, and that's why some of my colleagues are not thrilled with it. It demystifies a corrections budget.

Now if the legislature knows as much as the director of corrections, one wonders why he is such an expert. [Laughter.]

We're all going to look good in the next couple of years no matter what we do.

Senator BIDEN. The old folks are getting meaner though. They're getting tough.

Mr. FOGEL. If you pass a guaranteed annual income or family assistance or whatever, that will probably do a lot more than rebuilding State prisons. Rebuild the south end of Chicago.

If you want to affect crime, don't look to us to improve the crime rate. We're never going to be able to produce that for you.

Senator BIDEN. Do you all agree, by the way, that there is—and I do not want to spend time on this. I just want to know if you agree—I would like you to note if you disagree with the premise of a direct correlation between crime and unemployment and crime and living conditions.

Do you all agree with that?

Mr. COATES. Yes.

Mr. MILLER. Yes.

Senator BIDEN. It is 1:30 now. I am able to stay, but you can leave at this point if you like and I will not be offended. I promise. I know that you have other things to do.

Mr. FOGEL. This group doesn't get together that often.

Senator BIDEN. Then I am going to keep you together then.

I would just like to make one point that I have not made today, and I'm not sure I made it yesterday.

The purpose of my seeking the chairmanship of this subcommittee and holding these hearings does not negate the fact that the real culprit, in terms of our whole criminal justice system, are our societal values and our economic system and people being unemployed, among many other things.

All the things that we do as a Nation to bring about the demise of the American family, the attitudes that we have—There's a whole range of things. The same range of things that impact upon performance in schools and impact upon divorce rates and impact upon a whole lot of other things.

I don't mean to profess, and I hope I don't appear to be so simplistic as to assume that we are going to deal ultimately with the crime problem through a prison system—a parole system, a probation system, any aspect of that criminal justice system.

But the fact of the matter is that because of the way our political structure is, while some of us at least believe that we should be working toward full employment goals and legislative action to accommodate that and welfare reform in a positive way, and a whole range of things, while happening, it is going to take time unless we have a revolution.

They are still plagued with the problem about what do we do about Mrs. Jones who is part of a problem but is not the direct cause of the

problem, who walking from her shopping in midday to her automobile gets smacked on the head and her purse taken. Or worse happens to her.

What do we do about the neighborhoods that we all live in that are being burglarized at ever-increasing rates. What do we do about the fact that estimates—and you are the statisticians, among other things—there is a phenomenal number of crimes that are not reported because people have given up on the system. They don't believe there's any equity; they don't believe there's any justice; they don't believe that they'll be anything but losers—beyond being the victim in the first instance.

Those are all things that we are faced with right now. At least I am as an elected public official.

What do we do about that now while we're going through what we all used to talk about were the root causes of our system.

I assume you all assume that. But in light of your comments, Mr. Nagel, I'm not sure you assumed it. And I guess I wanted to make sure you at least understood if not believed my rationale for conducting these hearings.

The reason why I want to focus on three primary things is:

First is the sentencing aspect of the criminal justice system; the second is the rehabilitative possibilities within whatever system you are sentenced to, because even if it's a totally community-based system you are sentenced to it; and, third, the whole aftercare, regardless of what the system is. We call it probation and parole now—after you're paroled and you're on probation. That aspect of the system.

It is not meant to negate the many other problems that exist and impact upon this.

In front-end loading the system financially as you've indicated, Dr. Fogel, and the need to do that.

So they are the three things I would prefer to, for the sake of this discussion, focus upon.

In that regard, I would like to throw in something that I think is often missed; and I think I detected that you all agree on. It is not spoken of very much.

There is not much distinction in chronologic age between the youth offender population and the adult offender population is there—or is there?

The adult offender population in the prisons is in the twenties; is it not? In the midthirties?

Mr. Fogel. Just a quick comment on that.

Several States have different ages for juveniles. So take a State that says 18. You will find that up to 18, he is a juvenile. Then the crime at risk group is heavy between 18 and 20, but they are incubated. The prison population starts really at about 20. Even if the kid had a long juvenile record, he starts de novo now as an adult. He will be a first offender for two or three times. Then the prison population starts at—there is a sort of hiatus in between.

Senator Biden. But of all those persons in our society that we feel there is need, if we could, to apprehend and sentence to something, the vast majority of those persons fall between the ages of 15 and 30; don't they? Isn't that what we're talking about or are we?

Mr. FOGEL. Yes. You'll find really up to 44, but the curve starts going down in the thirties. You have a long record; you're well known; you're not as good a cat burglar; you don't run as fast. So for all of those reasons.

Senator BIDEN. I'm not suggesting it's because of anything institutionally we've done.

I guess what I'm driving at is this.

Those methods that we come up with to deal with the juvenile who is 17 or 18 years old are, in the past at least it's been believed—and I've been out of this system now for 5 years and was only in it 5 years sitting in family court and criminal court day in and day out—that there was something magic about 18. That somehow what would work for somebody 17 we couldn't apply on somebody 20; or we couldn't apply on the adult population, because it was in a vastly different population.

When you spoke to people, they thought in terms of the adult prison population being people in their forties and fifties, and the juvenile population that we were dealing with were people that were ostensibly 12, 13, 14, and 15. When the fact of the matter was that there was a big bulge there. Isn't there?

Mr. FOGEL. That's true. But as a practical politician, you know that this society permits you to get away with things because we label them juveniles or women.

You can get away with less onerous outcomes with those two groups.

Senator BIDEN. I know.

Mr. FOGEL. What you did as a kid is a nuisance. As soon as you reach 18, that same behavior now makes you a menace. It's a cultural pattern in this country.

I think that someone testified to this that women are not currently being dealt with that easily any more.

Senator BIDEN. The fact of the matter is that they still are. They're dealt with considerably more easily, because many of them never get into the system.

The police officer who intervenes in the antisocial behavior, or whatever it happens to be, witnessed time and again, will apprehend and bring into custody the male who is doing the same exact thing that the female was doing but send the female home to mother or father because she's a woman.

I'm not suggsting that's good, bad, or indifferent; but I'm not sure how that impacts upon the system.

But if we could get to the question of rehabilitation.

The argument this morning that the juvenile care facilities being abandoned and moving to community-based facilities has not impacted appreciably one way or another on the rate of recidivism: Is that correct? Is that what you said?

Implicit in that, I thought, was that when we lock people up by keeping them in a jail, it doesn't make society any safer. Is that right?

Mr. MILLER. That's correct, although I also took issue with Bob privately about it. I often think my friends in academia don't understand the political consequences of the ways in which things are put down in research studies.

Another way of looking at the Harvard study, although statewide recidivism would be close to the same from training schools to com-

munity based, by region and by program there are dramatic differences.

Stated in another way, you could say: We have shown in the new community-based programs that indeed there are specific programs which implemented and specific regions which impinge very dramatically on recidivism rates.

Senator BIDEN. When we lock people up, by definition, isn't it least likely to impact upon the degree of increase in crime? They're in jail; they can't be committing any crime.

Mr. FOGEL. At the very margin, that may be true.

I don't know if it's been stated—I don't recall it—but I have a feeling just from my own knowledge of people that have done time, and there are lots and lots of folks like that, that they are a little bit less safe when they get out after the experience they've had.

There are different kinds of institutions.

If I had the choice of someone living next door to me who came out of 2 years of State or 3 years of Vienna, Ill., I would always opt for the Vienna because they're treated there as human beings. The other one's a jungle.

Whether they have now found and calculated the recidivists or not, it doesn't make any difference. These guys are animals, and they have been subject to experiences that we couldn't conceive of.

I just testified in one of our counties the other day about what happened to a man just waiting for transfer in a local jail.

These are unspeakable kinds of things that become routine to prisoners—in a maximum custody fortress-type prison. There are other ways of dealing with people.

Senator BIDEN. Let me ask you then: Do you think that we should move in the Federal prison system the way in which Massachusetts has moved in the juvenile correction system? That is, to build a lot fewer prisons and empty the prisons we have now.

Mr. FOGEL. That has been my testimony before a House Judiciary Committee.

As a matter of fact, some of us at the table agree that there is no need for a Federal Bureau of Prisons.

I don't know if you want to get into that whole discussion or not.

Mr. Nagel has written a very good paper on that.

Mr. NAGEL. I was in Governor Scranton's office. When I served in that function, there was one thing that was rather remarkably impressed upon me. Just about every human service is partly funded by the Federal Government but operated by the State or the local government. That's true of mental health, vocational rehabilitation, public assistance, child welfare. You go through the whole spectrum of services.

Except for one—just one: Prisons.

The Federal system has developed a separate system of prisons which now give us three systems of prisons. We have our Federal, State, and the local.

I think the Federal prison system would be much more helpful, in terms of improving the quality of incarceration in this State, if they were an agency which established standards and funded States toward reaching those standards. And you put your Federal prisoners there, close to home, instead of having Federal prisoners come from Leavenworth or wherever.

They are getting around that now by saying we will build prisons close to home. We'll put one up at Lake Placid, which is real close to New York—400 miles or something like that.

It is absolutely the height of ridiculousness.

If you will pardon me this little thing. The Federal Bureau of Prisons was a tiny, little bureaucracy primarily meant for those States which were still territories until Mr. Hoover developed such a successful police department.

The Federal Government then wanted to create more and more crimes that would come under the purview of the FBI. And as they come under the purview of the FBI, more and more criminals had to be sent to a Federal system rather than to the State system, because they were identified as Federal crimes.

As Mr. Fogel said here this morning, if you're in Nebraska and you steal a car in the middle of the State and drive it 20 miles, you're a violator of a State law. But if you're from Rhode Island and you steal it and go 20 miles, you end up in Massachusetts, and you're the violator of a national law.

The same kind of a person—and we talk about the differences and the kinds of people that are in the Federal system—the differences are not that much.

I have analyzed State prisoners and Federal prisoners person for person. Their differences are not that much. There are a few of these esoteric types, like Watergate people and so forth, but generally line for line the prisoners are of similar personality and behavior.

So why do we have this duplicate system I'll never know, but we do.

And you brought the question up.

Senator BIDEN. I did.

By the way, I have a piece of legislation on prison construction, as does Senator Mathias, that is designed to go a long way toward what you're saying. I feel very strongly that we should be involved in the standards of local prison construction. I think we should be moving to allowing States to have regional shares in the facilities.

I hadn't thought of it; but quite frankly, I find that it's a very attractive idea—what you have just suggested.

One of the problems is that I have always assumed—and apparently incorrectly—that it was the fear on the part of the liberals in the United States Congress to let the fate of those arrested in some of the States you named be meted out by people in there. The misimpression that Federal prisons were more humane, apparently, than State prisons.

Let me ask that question: Is that correct or incorrect? That Federal prisons are more or less humane? Are they all the same?

Mr. FOGEL. I would think the Federal system is probably our best—certainly it is among the two or three top systems and probably more responsive.

But it has been dragged through the courts in class action suits.

Senator BIDEN. I understand that. I'm not suggesting they're models. All I'm suggesting is that when viewed in the past, between having someone sent to a Federal prison or to a chain gang in another State, it has been viewed that it less.

But I am very attracted to the idea that—I'd love to see us get out of the business of prisons, as long as we didn't get out of the business of providing the standards. And not leave it to the States to determine what is humane and what is inhumane.

I feel very strongly we have to take very strong action in providing for prisons, if we have to have them—and some of you argue we need not have them. But if you decide to have them, then they absolutely must be considerably more humane than they are now.

Mr. COATES. Excuse me, Senator, I have to leave now to catch a plane.

Senator BIDEN. Thank you for your testimony.

Mr. NAGEL. I'd just like to respond to your question as to whether Federal institutions are or are not better.

I think that it's a strange thing that we really believe in democracy in a small way.

In regard to the criminal justice system——

Senator BIDEN. I don't think we do, by the way, but that's another argument.

Mr. NAGEL. Maybe so. But we talk it anyhow.

But in terms of the prison system, we must admit that the county jails which are closest to the people are most poorly financed and most poorly staffed and most poorly operated. And the State jails which are a little bit insulated from the immediate visceral reactions of the general public are of a higher quality in terms of staffing standards and financial support. The Federal system, which is much farther away, has a higher quality of support. I think, generally speaking, it has a higher quality of staff and a greater variety of programs.

However, the remoteness counterbalances its fiscal advantages.

Senator BIDEN. I understand what you're saying.

Mr. MILLER. With reference to your earlier comment about whether that experience would apply in the Federal system, I think it would with reference to a large majority of prisoners in the Federal prison system.

My own understanding of the population in the Federal system is that it's a relatively small number of violent offenders—percentage-wise—of those presently incarcerated in the Federal system.

I think that the reason things have not moved out of there—the reason they're in a crunch—is not either because of laws or because of judicial intransigence, but really because of bureaucratic intransigence.

Had I waited for legislative referendum or a statewide referendum before doing anything within Massachusetts, nothing would have happened.

The Bureau of Prisons has within its own legislative mandate the ability to set up and to move a large percentage of those prisoners into options and to begin to develop contracts with the private nonprofit sector, to develop teams to begin to move that bureaucracy.

Virtually 80 percent of Federal prisoners are eligible for parole the day they come in.

Senator BIDEN. Eighty percent?

Mr. MILLER. That's correct.

The question is whether the bureaucrats who run that department are willing to risk their jobs a bit and willing to risk some anger from certain judges and legislators and do what can be done.

I think they have to view themselves as a bit expendable in that process. It's the only way that change will be introduced.

But a large percentage of those prisoners could be put into alternative programs; and those programs could be developed rather quickly without any danger on the streets.

You could balance that politically with a very strong hardnosed statement about how we're going to incarcerate violent offenders and we're going to develop special programs or whatever.

But that could be very well-balanced and done, I think, politically well.

Senator BIDEN. You have the right to ask that of an elected official but not of a bureaucrat. [Laughter.]

We expect to get that.

Gentlemen, you've spoken a lot about the emphasis and what happens to how we make prisons more humane.

What worries me is that I think that the reason why this conservative wave that everyone has testified or at least alluded to fearing has come about is because people have really lost confidence in our ability to do anything. They really are tired of hearing that Johnny who raped me had a psychological deficiency as a consequence of his inability to cope with the black or white society in which he lived. And, consequently, the mother——

They're getting really concerned. Especially when they pick up the paper and read—what is not the rule but nonetheless is not isolated—that Johnny went back out again and psychologically was again forced to do the same thing.

Or they see that there is a vast discrepancy between the sentence that a black man and a white man get for the same crime.

I don't have any statistical analysis of that, but I can tell you that I have stood with several hundred—which says something about my ability as a defense attorney—convicted or pled defendants. I knew very well that if they were black and had an Afro, they were going to get a little more than the same kid who was white from suburbia—from what was considered to be a fairly enlightened bench.

Mr. FOGEL. And short hair.

Senator BIDEN. Right.

So those things play a large part, I think, in further distabilizing—to use a word that is very much in vogue—public attitudes.

So I think they turn out——

For example, you mentioned Speck. I think the reason why there's a hue and cry for capital punishment today—and I personally oppose it—is not because people are so bloodthirsty. They're so damn frustrated.

They start to listen to the Frank Rizzos of Philadelphia because they were tired of the Joe Bidens and Joe Clarks who talked about love and concern and all the rest of that. That doesn't get it. That doesn't buy it. That doesn't do anything.

Mr. Nagel, you'd last about 22 seconds in the political arena right now with the speech that you made. And you're a competent, well-informed man.

But they're sick and tired of it.

So really what they want is—and I don't believe they want the Specks, though I believe many do, or want to make sure that anybody convicted of a capital offense hangs—what they don't want is for that person to be out on an average of 12 years. If that's still an accurate figure.

Someone sentenced to life, which would have been under a capital punishment system death, is on the average going to be back out on the street.

Now maybe some of them die in prison and that has an impact upon the percentage; but they clearly don't serve a life sentence.

Or the mere fact that they could even consider somebody being paroled after being given 600 years or something.

So out of frustration they say the hell with it. Kill him. Get rid of him.

I don't believe the American people are that base and that unfeeling. But I think it's because they're tired of hearing many of us talk about all the things we talked about this morning.

That's why I think that the thing you brought up this morning, Dr. Fogel, about the treatment of witnesses, treatment of jurors, and the treatment of the victim can do as much if not more to quell public attitudes and bring more rational discussion back into this whole topic than almost anything we can do.

But the problem they see is that many of we so-called liberals and reformers, Mr. Nagel, don't talk about those folks.

I mean "we" in an editorial sense. All of you may be exceptions to that.

But the American Civil Liberties Union—of whom I think I am held in some positive regard—doesn't spend a lot of time showing up at public meetings talking about the plight of victims.

Mr. NAGEL. Senator Biden, I worked in a prison for 11 years. I know what people are like who are in prison, and I don't underestimate their viciousness.

My concern for the public is so great that I don't want people in prison because I have seen the people who came out of my prison and what they were like afterwards.

I was mugged by one of my former parolees on the streets—a guy who had been in for larceny of a motor vehicle. He mugged me later, and he didn't even know he was mugging me.

What I'm saying is that if you really care about the victim, you'll do something about eliminating the need for so damn much imprisonment in this country.

That is not solving the problems of the victim.

Senator BIDEN. Well, the counter argument is made that you're not keeping the prisoner in prison. That if you put him in prison and made it punishment instead of what it is for a vast majority of people who move from a social setting that is not significantly different than the setting you're putting them in and keeping them there for limited amount of time, you might impact upon that.

The experimentation, even if we haven't funded it, has been looked upon, as has been spoken to, as having been a failure.

I've been in prison. Had myself put in prison and been to the prisons. I've not had the experience that any of you have had in it,

but I have literally defended and/or been involved in over a 1,000 criminal cases.

I tell you what. I have not seen where somebody from the East Side of Wilmington is really very concerned about heading out to Smyrna for a year or 18 months. It really isn't that much of a gig to do. It's no big thing.

They're not moving into anything that's any less inhumane than where they are.

Again we get to that certainty thing. The only thing they want to know is whether they will get out by spring, because they have something going. It's those kinds of questions I got asked.

I remember how flabbergasted I was when I first started practicing criminal law.

When they put me in prison, and I didn't stay in 5 days like you, but just going in for a shot—when that door clinked behind me, even though I knew that the authorities knew who I was and they were going to let me out, it sent a shiver through me that I never even want to think about again.

Most of my clients—black and white—it didn't make a whole lot of difference.

Do you understand what I'm saying?

But what happens if they know that they're going in for 10 big ones? Or 5, 4, or 3? And they're going—period. We don't make it any less humane; we make it more humane. But they're going.

That's what society is asking now. I don't think it's because they want to go out and hang him or beat him or kill him. They want it for the same reason that you do.

Mr. NAGEL. I don't think it does impact.

You asked a question. I'd like to answer it.

Florida is probably as good an example as you can have.

I've made studies of the criminal system in Florida. They have a population of about two-thirds that of Pennsylvania, and they have three times as many people locked up.

Senator BIDEN. What's the average time served?

Mr. NAGEL. A long time. They have long sentences.

Senator BIDEN. I don't believe that.

Mr. FOGEL. Long sentences but how long do they stay?

Senator BIDEN. How long are they in jail? What does the average person serve in jail.

Mr. NAGEL. I can't answer that.

But Florida has notoriously a long incarceration rate and a long incarceration period.

More than that, in Florida——

Senator BIDEN. With all due respect, I don't believe that's correct.

Now they may have a long incarceration sentence. They walk through that gate with big numbers.

Mr. NAGEL. Of course, I don't know what you would call a long sentence.

When I consider that in Holland those individuals who have just been found guilty of hijacking the train and sentenced to 6 years—which Hollanders considered to be almost unbelievably long. Compare that to America. I listened to the program Sunday on 60 Minutes, one

man from Marion Federal Prison had life plus 900 years. That was his sentence.

Senator BIDEN. Yes; but how much did he serve?

Mr. NAGEL. He's already served 21 years. I don't know how much longer he has.

Senator BIDEN. Let's take my State of Delaware. It's considered pretty rough on criminals. We're considered to be a border State, Southern in sympathy, and our attitudes are not argued by Pennsylvanians to be as enlightened as Pennsylvanians are. A State you're somewhat familiar with.

Armed robbery is 25 years. Average sentence is 8 years; average time served is more like 17 or 18 months.

Mr. FOGEL. That's very low.

Florida, I think, is 2 plus 2—2 years and 2 months average.

There are some people who need to stay in life plus 900 years if you could work that out. There aren't a heck of a lot of those folks around.

Your comment before about victims.

When the English instituted victim compensation, one of the findings of a study following that process was sort of an insurance scheme with the whole schedule and what have you. What the hole in the head was worth, three stitches, and all of that and loss of work.

The study which followed it by a group called Justice—a prestigious group in England—was that it created a public atmosphere in which you could have a rational discussion about prison reform.

Senator BIDEN. That's my point. I was unaware of the study, but that's the point I'm trying to make.

The other point I'd like to make in that regard, in terms of attitudes of people, is this.

I don't know how you can measure it, but my gut instinct tells me—the one thing, as justifiably maligned as we politicians may be, our instinct for the public attitudes is at least as good as most other people. If you're going to pick a profession which guesses it best, we can guess it as well as others in the most negative light.

But that instinct tells me that there is a significant portion of crimes, particularly larcenies and burglaries, that are never ever reported.

Time and again, I can name people—and you all do too—who just don't want to go through the process.

I think that has an impact upon—forgetting the whole prison and sentence system—encouraging such activity. The likelihood of people not reacting increases, in my opinion—and I cannot substantiate it with facts and figures but just an instinct of response—increases the likelihood of a further commission of those crimes.

One of the reasons that's happening is that people don't want to go in the system.

How many times have you sat—better you, Dr. Miller, because you work in juvenile corrections—especially in juvenile court, where someone is asked to take off work to come in and testify as a witness in a case; and he'll sit there for a whole day and told to come back the next day and then the case is dismissed. And they were never even informed by the AG or the family court that the kid had been dismissed.

They don't go home and forget that. They go home and tell their brother, sister, aunt, uncle, and it has a whole rippling effect it seems to me.

Mr. MILLER. I think much of the current concern, and at times hysteria, around violent crime in particular has emanated around the juvenile area—the muggings of the elderly. Particularly there is a major switch in the pages of the New York Times that is now righting itself. But it certainly is the paper of record.

But if you look closely at that issue—you hate to say it, because it's politically almost unacceptable to say it, but in terms of actual numbers of juveniles involved in violent crimes, it's a relatively small number—absolute number—as well as a very small percentage.

Senator BIDEN. I think that's correct.

Mr. MILLER. For instance, in Pennsylvania, if we used the present rather stiff sentencing law that New York has—forcible rape, sodomy, assault with a weapon a second time, murder—they have a mandatory sentencing law for those kinds of violent juveniles—we would be hard put to find 40 juveniles in our total State juvenile correctional system that would qualify under that.

New York, in the first 6 months——

Senator BIDEN. Qualify to be sentenced under that procedure?

Mr. MILLER. That have been arrested, convicted, and sentenced.

In New York, in the first 6 months of that experience with that law, they have identified 50 juveniles in the courts—25 of whom they felt were sentenceable under that. There have only been 25.

Governor Carey's task force that Dr. Cahill headed, on the same issue, estimated that with that law they would be hard put to find 150 juveniles statewide—in a population of 18 million—per year that would qualify.

They exaggerated it and made it 150. Their actual figures were under 100.

So it's a relatively small number.

Senator BIDEN. There is nothing politically impalatable about saying that.

You can go out and say that and argue that, as long as concurrently argued with that is that when, in fact, that person is apprehended that it is taken care of.

I think that's the whole essence of what we're saying here.

Mr. MILLER. What has often been misunderstood to be permissive is really bureaucratic chaos.

In New York, for instance, kids being rejected by agencies and falling between the cracks, misdiagnosed, shunted out the front door from this place to that place, and eventually someone gets killed.

That is not necessarily a process in the kid so much as it is total bureaucratic chaos.

The Veer Institute recently completed a study for the Ford Foundation on the numbers of violent juveniles nationally. Again, it came up with a figure of under 1,000 nationally that would fit that same kind of definition.

If you look at the—when Mr. Nagel talks about overincarceration, for instance—maximum security locked facilities for juveniles in this country, they are invariably filled with management problems from other institutions. They are not filled with people who have committed violent crimes on the street. They are filled with kids who are sassy, who throw things at staff, who don't stay where they're told,

who are a pain to the court, and all of that; but they are not full of rapists, muggers, murderers, and so forth.

Senator BIDEN. Did anybody dispute that point?

I think that point does not at all fly in the face of——

Mr. MILLER. If that point could be coupled with the mandatory sentencing, if that point could be coupled in the adult setting.

For instance, we are going to handle this type of prisoner in incarcerative settings—and I would opt for smaller, more individualized settings.

But at the same time, we are going to provide other kinds of options for the nonviolent offender. That is the majority in the Federal prisons.

Senator BIDEN. I agree.

I'll risk my political life on this: If the folks believe you are going to do one and the other, it would be salable, palatable, and the rest. But the problem has been to date that we have not been able to discuss them both.

We have either taken the line that everyone is capable of rehabilitation; therefore, the sole purpose——

It used to be the judge in my State would have to say that the reason I'm sentencing you to 2 years instead of 20 years is because I believe you are capable of being rehabilitated.

Mr. FOGEL. May I make a few suggestions.

You are probably going to hear from other administrators—correction administrators.

In order to be credible to the public and be able to even introduce voluntary rehabilitation and humane programs, correctional administrators are going to have to gain the confidence of the public about what a colleague of mine calls the throwaway group.

The ones where there is really consensus they're going to stay in for 900 years.

If you simply say that we can restore everybody who is at the cutting edge of human knowledge and all we need is a few more years and let's not tighten things up now, what you're going to hear very quickly from other people—people who have never in their careers betrayed any interest in rehabilitation or humanity—are now passing resolutions saying folks like me and some others are the hardliners and what we need now is more caseworkers——

They have never betrayed this before.

Parole boards are now having hearings and appeals and giving reasons. But I warn you this is adaptive behavior. It's survival behavior.

In the 40 years they've been around, they have been arbitrary and hidden and everything else. When the danger of disappearing becomes apparent, everybody opens up a bit.

Senator BIDEN. Sure.

Mr. FOGEL. And don't buy——

In 1870, there was a mountaintop experience; 39 resolutions were passed and a declaration of principles. That was 3 days out of 365. They put down the whips and the clubs, sang hymns, and carried banners—literally so. They went back home to the brutalities of the system.

All during the period of rehabilitation in the programs, the system has always been brutal.

It was brought to its greatest point in rehabilitation in California. Richard A. McGee, the dean of American corrections, was the first one who said a few years ago in a publication, in September 1974:

> I think we made a mistake, because at the very height of things in the 70's—all the rehabilitation and all the fine programs—we were getting a killing every 7 days—either inmates or of guards.

All he had was the rhetoric—the appendages—of reform.

If we're going to talk rehab—I'm not averse to that word—don't force it on people. Don't keep them in prison longer.

Why can't voluntarism, choice, justice, and constitutional standards be part of anybody's treatment and regimen. Just ask yourself whether you respond better to someone who gives you a choice—even if it's limited by geography of the prison—or somebody who tells you to go to group therapy or this or that.

If we can reduce all this rhetoric and the fantastic claims, consistently and historically we get impaled on that rhetoric.

Somebody finally says that we need caseworkers, but what have we produced. Mainly nothing.

If you haven't already discovered Patuxent Institution in Maryland, where there is the highest level of clinical staff to inmates, some of the extraordinary practices in there——

I refer you back to George Bernard Shaw. Those without medical degrees are very frightened when you get rough with people.

Once you get a medical degree, the fetters are off. [Laughter.]

Mr. NAGEL. I think I should remind you that Patuxent was the product of Maryland legislature, that you seem to trust more than you do the rehabilitation model. That it went through 14 court cases, all of which upheld the constitutionality of it. And you seem to have so much faith in the court system.

It was only recently when a Federal court case entered into the picture that there has been a reversal.

I don't have the supreme faith that you seem to have in the legal processes. For 150 years in this Nation the handsoff attitudes of the American courts tolerated anything that happened in the American prison, including my own prison. And I have no more great confidence in the law than I do in other persons of good concern for human beings.

Mr. FOGEL. I just said I thought the legal way of doing things was safer. I don't have any supreme confidence in anything.

You can attack it better; you can make claims on it better.

But when somebody says you're sick and I'll tell you when you get better, it's a very hard thing to punch your way out of.

Most of the cons I know would much rather be bad than sick. Because they know how to change from being bad, but being sick somebody has to tell them and that could take a long time.

Senator BIDEN. I would much rather go to a Federal or State prison than a State mental institution and sit there for awhile.

Mr. FOGEL. Or prison as it pertains to people.

Senator BIDEN. Gentlemen, I appreciate your testimony.

I will, as I said, write you with some specific questions.

I have taken the liberty to let this wander and also inject myself in it more than I should have.

But I'll be sending these questions out to you if I may. And I'll warn you all that although you need not respond, we may be asking you to come back again.

This is the beginning of a series of hearings.

I'm not looking for any quick-hit solution. I don't know the answers. I know what my frustrations are. And I know what some of the frustrations being expressed to me are.

It seems to me that it's not inconsistent to continue to seek ways of rehabilitating people and at the same time dealing, in a certain manner, with people who we don't know how to rehabilitate at this point, and deal with them in a just, fair, and humane way.

If all that were done, society may not be any safer, but society would feel more certain and secure. Part of the unsafeness—if I can use that word—comes from the feeling of a lack of security.

We have become a nation under seige in our mentality. Probably there are considerably fewer crimes committed than we believe.

For example, I just got back from Eastern Europe. I'm on the Foreign Relations Committee.

People asked me questions after the formal meetings were over like: Are you familiar with New York City? I'd say: Yes. They think the two finest and greatest cities in the world every place I've ever gone—and I've been almost around the world—are New York and Paris. For different reasons. But they're the two places that are the most vibrant cities in the world.

They say: Do you have a bodyguard in New York City? I say: No. I go up to New York City quite often. They say: You don't walk in New York City, do you? You don't walk there at night ever, do you?

Or in my city—the city of Wilmington—there are muggings. There are murders. It does happen. But if you listen to the suburbanites who speak, you would assume that you could not walk anywhere in that city during the night. And I've walked it and crisscrossed it and gone up and down it. Sure it enhances my chances of getting mugged. But it's still a one in a million shot for it to happen to me.

That seige attitude that people have——

The fact that security systems have become a multibillion-dollar business in this country.

Mr. FOGEL. We now have more private police than public police.

Senator BIDEN. Exactly. It is really incredible.

I think that if nothing else, if we sought to deal with things in a more certain way, we at least would impact upon that.

I'm sure we're going to be here 5 or 10 years from now.

If either of my sons is ill advised to follow in my footsteps, he may be sitting here 15, 20, or 30 years from now; and I'm sure he'll still be discussing and arguing and debating what is the best system. Hopefully, we'll be refining it more.

But I can no longer dismiss, as I must admit I did in my college and lawschool days, and even when I was practicing law, I can no longer dismiss as being totally uninformed, ill advised, and prejudiced or racist the concern of those folks out there who are scared.

Whether they should or shouldn't be, I believe they genuinely are.

And when people are frightened, it produces results that tend not to be rational.

One of the functions that I think we all have is to provide some rational action out of—I don't know how any can deny—what is chaos. If not chaos, then a feeling of extreme concern.

Mr. FOGEL. I would just make a personal comment.

Two or three years ago I was before the full committee on S. 1.

I think this is probably one of the more informed discussions I've heard in these chambers—the one you just conducted.

Senator BIDEN. I'm flattered to hear you say that.

We're still on S. 1, by the way. We now call it the son of S. 1, which I'm not sure I like.

I'd like to end this by telling you a little story.

Dr. Nagel, you said you were mugged by one of your former inmates.

I was a public defender and a private defense attorney also. My first wife, who is now deceased, was having our second child.

The child was delivered late in the evening at the Wilmington Hospital, Memorial Division. The hospital is built on a hill, so that the maternity entrance is a ground level entrance, and yet the main entrance of the hospital is also ground level, but there are three floors in between. There's a wall that runs all the way up the side of that hill. So at one end the wall is 2 inches, and at the other end it's 20 or 30 feet.

I stayed late and broke the law—which I have not been unaccustomed to do—beyond the time I was supposed to stay in my wife's room. I hid under the bed when the nurse came in, and so they thought I was gone. And I stayed an extra 2½ to 3 hours.

So to get out without being noticed, I decided to sneak out the back entrance. It was a cold, clear February night.

I snuck out the back—the doctor's entrance—which takes you out in the middle of this courtyard which is midway in this wall. So you have to jump down 10 or 15 feet or walk up the wall. And my car was parked on that incline.

As I was trying to figure out whether to negotiate the wall, I heard the tinkle of glass. And I looked up, and there were these three guys breaking into my car. I yelled: "Hey, Jack. You've got the wrong automobile."

I started to run up the wall, hoping they'd run because had they stood there, I wouldn't have gone any farther.

As I got up, they just continued to go. They were obviously young kids. They just continued to stay about a half a block in front of me. They didn't think I was going to try to catch them, and they were right. But they weren't sure.

As I got up to my car to see—and they hadn't gotten in yet, because it turned out they had just broken the window—who was there, I heard one guy say to another guy: "Hey, I think that's my lawyer." [Laughter.]

The other guy yelled: "Hey, Joe boy, is that you?"

And I said: "Who's that?" He said: "Oh, Christ."

And that was the end of the discussion. He took off.

It turned out I knew who the kid was.

I was in court 2 days later defending him on another matter.

That proves my liberal credentials, doesn't it? [Laughter.]

I defended him after he broke into my car.

Mr. NAGEL. Mine was very similar in that I didn't get really hurt.

I was walking down the street along the waterfront in Jersey City on a foggy night, and I saw these two legs behind a signpost.

As I go close to the signpost, the two legs came out and the guy said: "Mr. Nagel."

[Laughter.]

Senator BIDEN. It was good to see you all here.

Thank you very much, gentlemen.

[Whereupon, at 2:25 p.m., the hearing was recessed.]

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END