

HB

600

COMMITTEE REPORT

1/16/76

HOUSE

Mr. Speaker:

Date April 9, 1976

The Committee on JUDICIARY has had HB 600

under consideration. A Majority of the members of the Committee

() recommends it DO PASS

() recommends it DO NOT PASS

() recommends it DO PASS WITH ATTACHED AMENDMENT(S)

() recommends it BE REPLACED WITH CS FOR _____ AND THAT

CS FOR _____ DO PASS

() "and" recommends it BE REFERRED TO THE _____

COMMITTEE

() reports it back WITHOUT RECOMMENDATION

() "other"

Members signing the Majority report:

_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Members NOT concurring in the Majority report:

Tom Gardiner recommends: NOREC

_____ recommends: _____

Tom Brown recommends: DO NOT PASS

_____ recommends: _____

_____ recommends: _____

Tom Gardiner Chairman



LAY MEMBERS
KENNETH L. BRADY
LEW M. WILLIAMS, JR.
ROBERT H. MOSS

LAW MEMBERS
MICHAEL A. STEPOVICH
MICHAEL M. HOLMES
JOSEPH L. YOUNG

CHAIRMAN, EX OFFICIO
ROBERT BOOCHEVER
CHIEF JUSTICE
SUPREME COURT

Alaska Judicial Council

303 K STREET
ANCHORAGE, ALASKA
99501

April 23, 1976

EXECUTIVE DIRECTOR
MICHAEL L. RUBINSTEIN

Rep. Terry Gardiner
House of Representatives
Pouch V
Juneau, AK 99811

RE: 1975 Felony Sentences for Violent Crimes

Dear Representative Gardiner:

On April 14, 1976, at a joint meeting of the Judiciary Committees of the Senate and House of Representatives, the House Rules Committee and the Alaska Judicial Council, the subjects of H.B. 600 and the Judicial Council's alternative proposal for a system of presumptive sentencing were discussed at some length. Requests were made of the Judicial Council and of the Administrative Director of Courts to provide the Legislature with data concerning persons who were convicted in 1975 of violent felonies and the sentences actually received by them.

Enclosed is a summary of our research compiled through a joint effort of the Administrative Director's office and the Alaska Judicial Council.

The attached figures include only cases both opened and closed in 1975. (This excludes cases filed in 1973 and 1974, but which did not come to final judgment until 1975.) This data encompasses the entire State of Alaska. There were only 59 individual defendants in the "violent felony" category. The following summary classifies these 59 by first offenses, prior misdemeanors, prior non-violent felonies, and prior violent felonies:

1. 28 defendants (47%) had no prior convictions of any kind.
2. 17 defendants (29%) had a record of convictions for misdemeanors only, but no prior felonies.
3. 8 defendants (14%) had a record of previous convictions for felonies of a non-violent nature.
4. 6 defendants (10%) had previously been convicted of one violent felony.

No defendant in the sample had more than one prior conviction for a violent felony. The greatest proportion by far (47%) were first offenders. The sentences for the 6 individuals with one previous conviction for a violent felony who were again convicted of a violent felony in 1975 were as follows:

* * *

<u>CRIME</u>	<u>SENTENCE</u>
Manslaughter	7 years; 15 years
Kidnapping	4 years
Rape	2 years
Assault with Dangerous Weapon	0 (1 year probation - suspended imposition of sentence)
Robbery	5 years

Of the 13 individuals convicted of Robbery in 1975, one had previously been convicted of a violent felony and received a 5 year sentence. Please note that only two robbers received probation, and both were first offenders. (Other first offenders were sentenced to imprisonment for periods of between 6 months and 5 years.) Sentences for robbers who had prior non-violent felony convictions were also quite severe. (6 years, 10 years and 15 years respectively.) Persons who were convicted of Assault with Intent to Commit Robbery received sentences ranging from probation to 15 years. The average sentence in this category was 6 years, and none had a prior violent felony conviction.

The Manslaughter convictions are particularly interesting because of the extreme range of penalties represented in the sentencing pattern: e.g., 30 days, 60 days, 7 years, 12 years, 15 years. (Two of these individuals had a prior violent felony conviction.) This may illustrate the problem inherent in using the common law crimes as a basis for mandatory sentencing legislation. Although I have not examined the individual case files supporting each of these sentences, it would be my guess that the circumstances leading to the death of a human being in each of these cases must have been extremely divergent to justify a sentence of 30 days in one case and 15 years in another, where neither defendant had

any prior felony convictions. Nevertheless, all these cases are "Manslaughters", regardless of the facts.

The Assault with a Dangerous Weapon category is especially interesting and is deserving of much more careful and detailed study. There were 23 convictions for Assault with a Dangerous Weapon. Thirteen defendants (56%) were placed on probation without being required to serve any jail time whatever. One of these defendants had a prior violent felony record. Only three of the 23 individuals received more than 6 months in jail.

Does this mean that our judges are particularly tolerant of interpersonal violence as long as no profit motive is involved?* Does it mean that most of these cases represent only "technical" assaults in which little or no actual injury was done? Does it mean that prosecutors are frequently "overcharging" in this crime category, so that most of these Assault with a Dangerous Weapon charges should have been filed as misdemeanors instead?** How many of these cases involved feuds between family members or altercations between close friends? How many of these situations involved defendants who were seriously provoked by their victims? Once more the question of the appropriate labeling of crime categories must be raised. I would submit that this data tends to illustrate that "Assault with a dangerous weapon" may be an infelicitous basis for a system of mandatory minimum sentencing. At the very least, the figures would strongly suggest the need for closer study.

* The Supreme Court of Alaska has held that Assault with a Dangerous Weapon is "among the most serious crimes" The court has expressly disapproved a sentence of probation for this offense where the defendant was a 23 year-old Army sergeant, a "model soldier," with no previous record of violence.

State v. Armantrout, 483 P.2d 696, 698 (Alaska 1971).


* * *

** AS 11.15.22 Assault with a dangerous weapon, provides for a double set of punishments: "by imprisonment in the penitentiary for not more than 10 years nor less than six months, or by imprisonment in jail for not more than one year nor less than one month, or by a fine of not more than \$1,000 nor less than \$100.

Thank you for giving us the opportunity to compile this interesting data. I believe that overall the statistical information is supportive of the proposition advanced by Chief Justice Boochever to the effect that the courts are not lenient with violent criminals. The extreme disparities reflected in some of the sentences, in particular within the category of Assault with a dangerous weapon, are indicative of the need for careful crime definition and more precise and accurate drafting than that reflected in H.B. 600.

On behalf of the Alaska Judicial Council I repeat our offer to study the entire question of sentence reform and to prepare a draft sentencing bill for your consideration prior to the next session of the Legislature.

Sincerely,

A handwritten signature in cursive script that reads "Michael L. Rubinstein". The signature is written in dark ink and includes a small flourish at the end.

Michael L. Rubinstein

CC: Chief Justice Boochever
Sen. Chancy Croft
Rep. Mike Bradner
House Judiciary Committee
Senate Judiciary Committee
House Rules Committee
Art Snowden II
Mel Martin
Keith Brown, Esq.
Brian Shortell, Esq.
Judicial Council Members
Avrum Gross, Esq.
Herb Pierson, Esq.
Peter Ring, Esq.

CT01 0003 10.54 CT03 0022 10.54 04/15/76
CT01

PLEASE DELIVER THE FOLLOWING AS SOON AS POSSIBLE TO MR. SNOWDEN.
HE MAY BE IN THE SUPREME COURT.

ART SNOWDEN

FOLLOWING IS THE ONLY DATA I CAN PROVIDE YOU ON A TIMELY BASIS

MEL

1973 FELONY SENTENCING FROM JUDICIAL COUNSEL SENTENCING STUDY.

CRIME CATEGORY	TYPE CONVICTION	SENTENCE		TOTAL
		2-5 YEARS	OVER 5 YEARS	
VIOLENT	FIRST	5%	13%	18%
	REPEAT	16%	15%	31%
ROBBERY	FIRST	22%	21%	43%
	REPEAT	-	65%	66%
PROPERTY	FIRST	3%	5%	8%
	REPEAT	14%	7%	21%
HARD DRUG	FIRST	33%	11%	44%
	REPEAT	-	20%	20%
SOFT DRUG	FIRST	1%	-	1%
	REPEAT	27%	-	27%
CHECK & FRAUD	FIRST	-	-	-
	REPEAT	8%	21%	29%
TOTAL	FIRST	5%	6%	11%
	REPEAT	13%	15%	28%

PLEASE ACKNOWLEDGE THIS MESSAGE.

LINDA/CT01

CT03 0020 10.59 CT03 0023 10.59 04/15/76

LINDA

MSG. RECEIVED TO MR. SNOWDEN.

CHARLES/CT03

PROPOSED

PWC

Original Sponsor: Rules Committee by
Request of the Governor

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 600

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 NINTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to ~~sentencing~~ sentencing."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 * Section 1. AS 11.05.150 is amended to read:

9 Sec. 11.05.150. IMPOSING LESS THAN PRESCRIBED PENALTY. Except
10 in a case of murder or rape, or a case of a violent felony for which
11 sentencing is imposed in accordance with AS 12.55.035(a)(2) or (3),
12 the court may, upon conviction, when in its opinion the facts and
13 circumstances make the minimum penalty provided in this title manifestly
14 too severe, impose a lesser penalty, either of a fine or imprisonment
15 or both. When less than the minimum penalty is imposed, the court
16 shall set out the reasons for its action on the record in the case.

17 * Sec. 2. AS 12.55 is amended by adding new sections to read:

18 Sec. 12.55.035. SENTENCING FOR VIOLENT FELONIES. (a) Every
19 person convicted of a violent felony shall be sentenced as follows:

20 (1) if the conviction for which sentencing is being rendered
21 is a violent felony and is the defendant's first violent felony convic-
22 tion, the court may sentence the defendant to a term of imprisonment,
23 within the limits provided by law, or in accordance with AS 33.15.230
24 or secs. 80 or 85 of this chapter;

25 (2) if the conviction for which sentencing is being rendered
26 is a violent felony and is the defendant's second violent felony con-
27 viction, the court shall sentence the defendant to a minimum term of
28 imprisonment,

29 (A) of 15 years, for first degree murder under AS

1 11.15.010 and AS 11.15.020;

2 (B) of 12 years, for second degree murder under AS
3 11.15.030;

4 (C) of 8 years, for manslaughter under AS 11.15.040;

5 (D) of 8 years, for negligent homicide under AS
6 11.15.080;

7 (E) of 10 years, for forcible rape as defined in AS
8 11.15.120;

9 (F) of 5 years, for mayhem under AS 11.15.140;

10 (G) of 5 years, for shooting, stabbing or cutting with
11 intent to kill, wound or maim under AS 11.15.150;

12 (H) of 5 years, for assault with intent to kill or
13 commit rape or robbery under AS 11.15.160;

14 (I) of 3 years, for assault while armed under AS
15 11.15.190;

16 (J) of 5 years, for poisoning under AS 11.15.210;

17 (K) of 3 years, for assault with a dangerous weapon
18 under AS 11.15.220;

19 (L) of 7 years, for robbery under AS 11.15.240;

20 (M) of 7 years, for kidnapping under AS 11.15.260;

21 (N) of 5 years, for first degree arson under AS 11.20-
22 .010;

23 (O) of 2 years, for assault on an officer in peniten-
24 tiary under AS 11.30.140;

25 (P) of 2 years, for assault on an officer in jail
26 under AS 11.30.160;

27 (3) if the conviction for which sentencing is being rendered
28 is a violent felony and is the defendant's third or subsequent violent
29 felony conviction, the court shall sentence the defendant to a minimum



1 term of imprisonment,

2 (A) of 20 years, for first degree murder under AS
3 11.15.010 and AS 11.15.020;

4 (B) of 15 years, for second degree murder under AS
5 11.15.030;

6 (C) of 12 years, for manslaughter under AS 11.15.040;

7 (D) of 12 years, for negligent homicide under AS
8 11.15.080;

9 (E) of 15 years, for forcible rape as defined in AS
10 11.15.120;

11 (F) of 7 years, for mayhem under AS 11.15.140;

12 (G) of 7 years, for shooting, stabbing or cutting with
13 intent to kill, wound or maim under AS 11.15.150;

14 (H) of 7 years, for assault with intent to kill or
15 commit rape or robbery under AS 11.15.160;

16 (I) of 5 years, for assault while armed under AS
17 11.15.190;

18 (J) of 7 years, for poisoning under AS 11.15.210;

19 (K) of 5 years, for assault with a dangerous weapon
20 under AS 11.15.220;

21 (L) of 10 years, for robbery under AS 11.15.240;

22 (M) of 10 years, for kidnapping under AS 11.15.260;

23 (N) of 7 years, for first degree arson under AS 11.20.-
24 010;

25 (O) of 5 years, for assault on an officer in a penitentiary
26 under AS 11.30.140;

27 (P) of 5 years, for assault on an officer in a jail
28 under AS 11.30.160;

29 (b) For purposes of this section, no prior convictions will be
considered when a period of 5 or more years has elapsed between the

1 date of discharge from disposition of the immediately preceding
2 offense and the date of the commission of the violent felony for which
3 sentencing is being rendered.

4 (c) For purposes of this section:

5 (1) a conviction in another jurisdiction which would amount
6 to a violent felony conviction under the laws of this state is considered
7 a prior violent felony conviction;

8 (2) two or more convictions arising out of the same incident
9 are considered a single conviction;

10 (3) "violent felony" means the crimes listed in (a)(2) and
11 (3) of this section.

12 (d) For terms of imprisonment required under (a)(2) or (3) of
13 this section

14 (1) imprisonment may not be suspended under AS 12.55.080
15 and probation or parole may not be granted;

16 (2) imposition of sentence may not be suspended under AS
17 12.55.085; and

18 (3) terms of imprisonment may not be reduced under AS
19 11.05.150.

20 (e) Nothing in this section limits the authority of the court to
21 impose fines for offenses, where authorized, in addition to the required
22 term of imprisonment.

23 Sec. 12.55.037. PROCEDURE FOR DETERMINING PRIOR CONVICTIONS. (a)
24 If it appears that a defendant has previously been convicted of a
25 violent felony and is subject to sentencing as a second or subsequent
26 offender under sec. 35 of this chapter, the district attorney shall
27 file a certified copy of the record of prior convictions with the
28 court before sentencing.

29 (b) If the defendant denies the truth of the certified copy of
the record of prior convictions, the court shall hold a hearing,

1 without a jury, on the matter before sentencing. At the hearing, the
2 only issues before the court are whether the record of prior convictions
3 is that of the defendant and whether the conviction occurred within
4 the period specified in sec. 35(b) of this chapter. The burden of
5 proof is on the state to establish beyond a reasonable doubt the fact
6 of prior convictions.

7 * Sec. 3. AS 12.55.060 is amended to read:

8 Sec. 12.55.060. PROCEDURE UPON DISCOVERY OF PRIOR CONVICTIONS.

9 (a) Before conviction or while sentence is effective, if it appears
10 that a person convicted of a crime in this state has previously been
11 convicted and has not been charged under sec. [SECS. 40 AND] 50 of
12 this chapter, the district attorney may file an information in the
13 superior court accusing that person of the previous conviction or
14 convictions. The court shall cause that person, whether confined in
15 prison or otherwise, to be brought before it and shall inform him of
16 the allegations contained in the information and of his right to be
17 tried as to the truth of the allegations, and shall ^{inquire of} ~~require~~ the
18 accused person ~~to say~~ whether or not he is the same person as charged
19 in the information. If the accused acknowledges or confesses in open
20 court, after being cautioned as to his rights, that he was previously
21 convicted of the crimes charged, or any of them, the court shall
22 sentence him as provided in sec. [SECS. 40 OR] 50 of this chapter, and
23 shall vacate the previous sentence, deducting from the new sentence
24 all time actually served on the sentence so vacated. If the accused
25 says he is not the same person, or refuses to answer, or remains
26 silent, the court shall examine the charge of previous convictions,
27 which shall be the only matter in issue.

28 (b) If it appears from the examination that there is sufficient
29 cause to believe the accused has been previously convicted as charged

1 in the information, the accused shall be committed to await the action
2 of the grand jury, which shall consider only the fact of previous
3 convictions of the accused. If the grand jury indicts the accused and
4 he says he is not the same person, or refuses to answer, or remains
5 silent, he shall be tried by jury in the superior court, and the only
6 issue before the jury shall be whether the accused was previously
7 convicted as charged. If the jury finds that the accused is the same
8 person previously convicted as charged, or if, after being cautioned
9 as to his rights, the accused acknowledges or confesses in open court
10 that he was previously convicted as charged, the court shall sentence
11 him as provided in sec. [SECS. 40 OR] 50 of this chapter, and shall
12 vacate the previous sentence.

13 (c) The accused may be admitted to bail either while awaiting
14 examination, action of the grand jury, or trial.


15 * Sec. 4. AS 33.15.180 is amended to read:

16 Sec. 33.15.180. PERSONS ELIGIBLE FOR PAROLE. (a) A state
17 prisoner other than a minor under age 18 [JUVENILE DELINQUENT], wherever
18 confined and serving a definite term or over 180 days or a term the
19 minimum of which is at least 181 days, and who is not confined as a
20 second or subsequent offender under AS 12.55.035, whose record shows
21 that he has observed the rules of the institution in which he is
22 confined, may, in the discretion of the board, be released on parole,
23 subject to the limitation prescribed in secs. 80 and 230(a,(1) of this
24 chapter.

25 (b) A state prisoner confined as a second or subsequent offender
26 under AS 12.55.035 may not be considered for parole.

27 * Sec. 5. AS 33.20.010 is repealed and re-enacted to read:

28 Sec. 33.20.010. COMPUTATION OF GOOD TIME. (a) Each prisoner
29 convicted of an offense against the state and sentenced to confinement

1 in a penal or correctional institution, whose record of conduct shows
2 that he has faithfully observe the rules of that institution and has
3 not been subject to discipline, is entitled to a deduction from the
4 term of his sentence of one day for every  days of good conduct
5 served.

6 (b) Good time earned in excess of 30 days is not subject to
7 forfeiture for a subsequent infraction, misconduct, or crime.

8 * Sec. 6. AS 12.55.040, 33.20.020 and 33.20.040 are repealed.

9 * Sec. 7. APPLICABILITY. (a) AS 12.55.035, as enacted in sec. 2 of
10 this Act, applies to sentencing upon convictions only for violent felonies
11 committed after the effective date of this Act. When sentencing for those
12 convictions, the court shall consider prior convictions for violent felonies
13 whether committed before or after the effective date of this Act.

14 (b) AS 33.15.180, as amended in sec. 4 of this Act, applies to
15 persons imprisoned for violent felonies committed after the effective date
16 of this Act.

17 (c) AS 33.20.010, as re-enacted in sec. 5 of this Act, applies
18 to all persons imprisoned in state institutions as of the effective date of
19 this Act, without retroactive application however.

20 * Sec. 8. INTENT. Section 2 of this Act is intended to strengthen
21 present imprisonment provisions rather than lower minimum terms required by
22 statute, especially those minimum terms provided in AS 11.15.010, 11.15.020
23 and 11.15.030. Under sec. 2 of this Act, a second or subsequent offender
24 does not have available to him provisions for reduction or suspension of
25 sentence.

1. XXXXXX
2. XXX
XXXXXX

DRAFT 3/16/76
Law

P R O P O S E D

Original Sponsor: Rules Committee by
Request of the Governor

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 600

3 IN THE LEGISLATURE FOR THE STATE OF ALASKA

4 NINTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to determinate sentencing."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 * Section 1. AS 11.05.150 is amended to read:

9 Sec. 11.05.150. IMPOSING LESS THAN PRESCRIBED PENALTY. Except
10 in a case of murder or rape, or a case of a violent felony for which
11 sentencing is imposed in accordance with AS 12.55.035(a)(2) or (3),
12 the court may, upon conviction, when in its opinion the facts and
13 circumstances make the minimum penalty provided in this title manifestly
14 too severe, impose a lesser penalty, either of a fine or imprisonment
15 or both. When less than the minimum penalty is imposed, the court
16 shall set out the reasons for its action on the record in the case.

17 * Sec. 2. AS 12.55 is amended by adding new sections to read:

18 Sec. 12.55.035. SENTENCING FOR VIOLENT FELONIES. (a) Every
19 person convicted of a violent felony shall be sentenced as follows:

20 (1) if the conviction for which sentencing is being rendered
21 is a violent felony and is the defendant's first violent felony conviction,
22 the court may sentence the defendant to a term of imprisonment,
23 within the limits provided by law, or in accordance with AS 33.15.230
24 or secs. 80 or 85 of this chapter;

25 (2) if the conviction for which sentencing is being rendered
26 is a violent felony and is the defendant's second violent felony
27 conviction, the court shall sentence the defendant to a term of imprisonment
28 of not less than one-half the maximum term authorized by law;

29 (3) if the conviction for which sentencing is being rendered

1 is a violent felony and is the defendant's third or subsequent violent
2 felony conviction, the court shall sentence the defendant to the
3 maximum term authorized by law.

4 (b) For the purposes of this section, no prior convictions will
5 be considered when a period of five or more years has elapsed between
6 the date of discharge from disposition of the immediately preceding
7 offense and the date of the commission of the violent felony for which
8 sentencing is being rendered.

9 (c) For the purposes of this section:

10 (1) a conviction in another jurisdiction which would amount
11 to a violent felony conviction under the laws of this state is con-
12 sidered a prior violent felony conviction;

13 (2) a conviction which authorizes a maximum term of imprison-
14 ment for life is considered as having a term of imprisonment of 99
15 years;

16 (3) "violent felony" means a violent crime against another
17 person or a violent crime which tends to endanger a person; "violent
18 felony" means only the following crimes:

19 (A) AS 11.15.010 -- first degree murder;

20 (B) AS 11.15.020 -- obstructing or injuring railroad
21 or aircraft;

22 (C) AS 11.15.030 -- second degree murder;

23 (D) AS 11.15.040 -- manslaughter;

24 (E) AS 11.15.080 -- negligent homicide;

25 (F) AS 11.15.120 -- rape;

26 (G) AS 11.15.140 -- mayhem;

27 (H) AS 11.15.150 -- shooting, stabbing or cutting with
28 intent to kill, wound or maim;

29 (I) AS 11.15.160 -- assault with intent to kill or

1 commit rape or robbery;

2 (J) AS 11.15.190 -- assault while armed;

3 (K) AS 11.15.210 -- poisoning;

4 (L) AS 11.15.220 -- assault with a dangerous weapon;

5 (M) AS 11.15.240 -- robbery;

6 (N) AS 11.15.260 -- kidnapping;

7 (O) AS 11.20.010 -- first degree arson;

8 (P) AS 11.20.080 -- burglary in a dwelling house;

9 (Q) AS 11.30.140 -- assault on officer in penitentiary;

10 (R) AS 11.30.160 -- assault on officer in jail;

11 (4) two or more convictions arising out of the same incident
12 are considered a single conviction.

13 (d) For terms of imprisonment required under (a) (2) or (3) of thi
14 section

15 (1) imprisonment may not be suspended under AS 12.55.080
16 and probation or parole may not be granted;

17 (2) imposition of sentence may not be suspended under AS
18 12.55.085;

19 (3) terms of imprisonment may not be reduced under AS
20 11.05.150.

21 (e) Nothing in this section limits the authority of the court to
22 impose fines for offenses, where authorized, in addition to the required
23 term of imprisonment.

24 Sec. 12.55.037. PROCEDURE FOR DETERMINING PRIOR CONVICTIONS.

25 (a) If it appears that a defendant has previously been convicted of a
26 violent felony and is subject to sentencing as a second or subsequent
27 offender under sec. 35 of this chapter, the district attorney shall
28 file a certified copy of the record of prior convictions with the
29 court before sentencing.

1 (b) If the defendant denies the truth of the certified copy of
2 the record of prior convictions, the court shall hold a hearing,
3 without a jury, on the matter before sentencing. At the hearing, the
4 only issues before the court are whether the record of prior convictions
5 is that of the defendant and whether the conviction occurred within
6 the period specified in sec. 35(b) of this chapter. The burden of
7 proof is on the state to establish, by a preponderance of the evidence,
8 the fact of prior convictions.

9 * Sec. 3. AS 12.55.050 is amended to read:

*habitual criminal
section*

10 Sec. 12.55.050. INCREASED PUNISHMENT FOR PERSONS CONVICTED
11 OF MORE THAN ONE FELONY. Except for a person sentenced for
12 a violent felony under sec. 35(a)(2) or (3) of this chapter,
13 a [A] person convicted of a felony in this state who has been
14 previously convicted of a felony in this state or elsewhere, if the
15 same crime elsewhere would constitute a felony under Alaska law, is
16 punishable as follows:

17 (1) If the person is convicted of a felony which would
18 be punishable by imprisonment for a term less than his natural life,
19 and has previously been convicted of one felony, then he is punishable
20 by imprisonment for not less than the minimum nor more than twice
21 the longest term prescribed for the felony of which that person is
22 convicted.

23 (2) If the person has previously been convicted of two
24 felonies, then he is punishable by imprisonment for not less than
25 the minimum nor more than twice the longest term prescribed herein
26 for a second conviction of felony.

27 (3) If the person has previously been convicted of three
28 or more felonies, then on the fourth conviction he shall be adjudged
29 an habitual criminal, and is punishable by imprisonment for not less

1 than 20 years nor more than the remainder of his natural life..

2 * Sec. 4. AS 12.55.060 is amended to read:

3 Sec. 12.55.060. PROCEDURE UPON DISCOVERY OF PRIOR CONVICTIONS.

4 (a) Before conviction or while sentence is effective, if it appears
5 that a person convicted of a crime in this state has previously been
6 convicted and has not been charged under sec. [SECS. 40 AND] 50 of
7 this chapter, the district attorney may file an information in the
8 superior court accusing that person of the previous conviction or
9 convictions. The court shall cause that person, whether confined
10 in prison or otherwise, to be brought before it and shall inform him
11 of the allegations contained in the information and of his right to
12 be tried as to the truth of the allegations, and shall require the
13 accused person to say whether or not he is the same person as charged
14 in the information. If the accused acknowledges or confesses in open
15 court, after being cautioned as to his rights, that he was previously
16 convicted of the crimes charged, or any of them, the court shall sentence
17 him as provided in sec. [SECS. 40 or 50 of this chapter, and shall
18 vacate the previous sentence, deducting from the new sentence all
19 time actually served on the sentence so vacated. If the accused says
20 he is not the same person, or refuses to answer, or remains silent,
21 the court shall examine the charge of previous convictions, which
22 shall be the only matter in issue.

23 (b) If it appears from the examination that there is sufficient
24 cause to believe the accused has been previously convicted as charged
25 in the information, the accused shall be committed to await the action
26 of the grand jury, which shall consider only the fact of previous
27 convictions of the accused. If the grand jury indicts the accused
28 and he says he is not the same person, or refuses to answer, or remains
29 silent, he shall be tried by jury in the superior court, and the only

1 issue before the jury shall be whether the accused was previously
2 convicted as charged. If the jury find that the accused is the same
3 person previously convicted as charged, or if, after being cautioned
4 as to his rights, the accused acknowledges or confesses in open court
5 that he was previously convicted as charged, the court shall sentence
6 him as provided in sec. [SECS. 40 OR] 50 of this chapter, and shall
7 vacate the previous sentence, deducting from the new sentence all
8 time served on the vacated sentence.

9 (c) The accused may be admitted to bail either while awaiting
10 examination, action of the grand jury, or trial.

11 * Sec. 5. AS 33.15.180 is amended to read:

12 Sec. 33.15.180. PERSONS ELIGIBLE FOR PAROLE. (a) A state
13 prisoner other than a juvenile delinquent, wherever confined and
14 serving a definite term of over 180 days or a term the minimum of
15 which is at least 181 days, and who is not confined as a second or sub-
16 sequent offender under AS 12.55.035, whose record shows that he has
17 observed the rules of the institution in which he is confined, may, in
18 the discretion of the board, be released on parole, subject to the
19 limitation prescribed in secs. 80 and 230(a)(1) of this chapter.

20 (b) A state prisoner confined as a second or subsequent offender
21 under AS 12.55.035 may not be considered for parole.

22 * Sec. 6. AS 33.20.010 is repealed and re-enacted to read:

23 Sec. 33.20.010. COMPUTATION OF GOOD TIME. Each prisoner convicted
24 of an offense against the state and confined in a penal or correctional
25 institution, whose record of conduct shows that he has faithfully ob-
26 served the rules of that institution and has not been subject to
27 punishment, is entitled to a deduction from the term of his sentence
28 of one day for every two days of good conduct served.

29 * Sec. 7. AS 12.55.040, 33.20.020 and 33.20.040 are repealed.

1 * Sec. 8. APPLICABILITY. (a) AS 12.55.035, as enacted in sec. 2 of
2 this Act, applies to sentencing upon convictions only for violent felonies
3 committed after the effective date of this Act. When sentencing for those
4 convictions, the court shall consider prior convictions for violent felonies
5 whether committed before or after the effective date of this Act.

6 (b) AS 33.15.180, as amended in sec. 5 of this Act, applies to
7 persons imprisoned for violent felonies committed after the effective date
8 of this Act.

9 (c) AS 33.20.010, as re-enacted in sec. 6 of this Act, applies
10 to all persons imprisoned in state institutions as of the effective date of
11 this Act, without retroactive application however.

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Members for HB 600

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SUPREME COURT

Alaska Judicial Council

303 K STREET
ANCHORAGE, ALASKA
99501

EXECUTIVE DIRECTOR
MICHAEL L. RUBINSTEIN

March 25, 1976

Hon. Terry Gardiner
House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Representative Gardiner:

On March 15, 1976 the Alaska Judicial Council met in Anchorage and unanimously resolved to express its strong opposition to any and all proposed criminal sentencing legislation based on mandatory minimum or so-called "flat-time" formulae. Legislation which purports to bind the conscience of the judge by compelling him to hand down a pre-ordained term of imprisonment to broad classes of persons without any regard either to the particular facts and circumstances surrounding the commission of the crime, or to the social and personal history of the defendant is productive of more injustice than the problem it is intended to remedy.

No judge should be placed in the position of being required by the law to blind himself to the actual facts and circumstances of the cases he is called upon to decide.

The mandatory minimum and "flat-time" bills now before the Legislature use the existing criminal laws as their foundation. To superimpose entirely new sentencing provisions upon our code--a code which was never intended by its draftsman to bear such a burden--will open the door to many unforeseen and anomalous results, some of which are likely to produce unintended injustice in individual cases.

The traditional common law classification of crimes into "felonies" and "misdemeanors", and the typically broad subclasses of felonies, such as "robbery", "rape", "burglary", etc. are quite general and encompass within each class many varying levels of harmfulness and culpability. Under the present system the totally unguided discretion of the sentencing judge is relied upon to take these differences

Hon. Terry Gardiner
March 25, 1976
Page Two

into account in each case. Many have considered that the exercise of this substantially unguided discretion by judges of widely differing personalities and predispositions has resulted in undue disparity and inequity. However, it may be well to point out that all the blame should not be placed on the judiciary for the disparity which exists. A distinguished federal jurist, Judge Marvin Frankel of the United States District Court for the Eastern District of New York commented, in his book Criminal Sentences: Law Without Order (1972):

[O]ur legislators have not done the most rudimentary job of enacting meaningful sentencing 'laws' when they have neglected even to sketch democratically determined statements of basic purpose. Left at large, wandering in deserts of unchained discretion, the judges suit their own value systems insofar as they think about the problem at all.

If we are not to rely upon the totally unguided discretionary decisions of diverse individual judges, it becomes encumbant upon the Legislature itself to consider each offense and to provide for a system of carefully graded levels of culpability based upon the actual social harm caused by the defendant's actions, the extent of his evil motivation if any, and such aggravating or mitigating circumstances as may have surrounded the commission of the act. Even if we totally put to one side any and all considerations of the defendant's age, race, sex, and socio-economic background, a just sentencing law must take into account, for example, that not all assaults with dangerous weapons are of equal culpability. Some produce serious harm and some do not. Some are the result of extreme provocation and others are totally unprovoked. Some forgers are compulsive alcoholics, and others are professional criminals. The broad categories of the existing law are simply insufficiently precise for mandatory sentencing.

Having prepared a comprehensive analysis and review of sentencing practices in Alaska, the Judicial

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Sentencing in Alaska: A Description of the Process and Summary of Statistical Data for 1973.

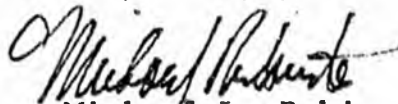
Hon. Terry Gardiner
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Page Three

Council is well aware of the need for reform. At this time, the Judicial Council has under consideration a proposal for basic structural changes in the sentencing process; it will report to the Legislature at the conclusion of the study. This sentencing plan, dubbed "presumptive sentencing", was recently formulated by a special task force of The Twentieth Century Fund in New York City. The task force study panel was chaired by former California Governor Edmund G. Brown, Sr. and was composed of distinguished jurists, law professors, a police chief, and other involved with the criminal justice process. Although the proposal is complex and sophisticated, complexity may well be required if we are justly to address a problem which is probably not amenable to simplistic solutions.

The enclosed New York Times article briefly describes the presumptive sentencing system. The details of this proposal, in the form of advance page proofs are now being reviewed by the Judicial Council. The final published report will not be released by the McGraw-Hill Book Company until April 13. Pursuant to our agreement with The Twentieth Century Fund, we may make available to you an advance copy of the page proofs, if you wish one.

In summary, the Judicial Council strongly urges you to defer any final legislative action in the area of sentence reform until such time as it completes its report on presumptive sentencing proposals and until adequate study of alternatives for structural reform can be explored.

Very truly yours,



Michael L. Rubinstein

cc: Judicial Council Members
Hon. Avrum Gross

LET THE PUNISHMENT FIT THE CRIMINAL

Indeterminate prison sentences, a major reform until recently, are now considered a mess, by liberals and conservatives alike.

By Alan Dershowitz

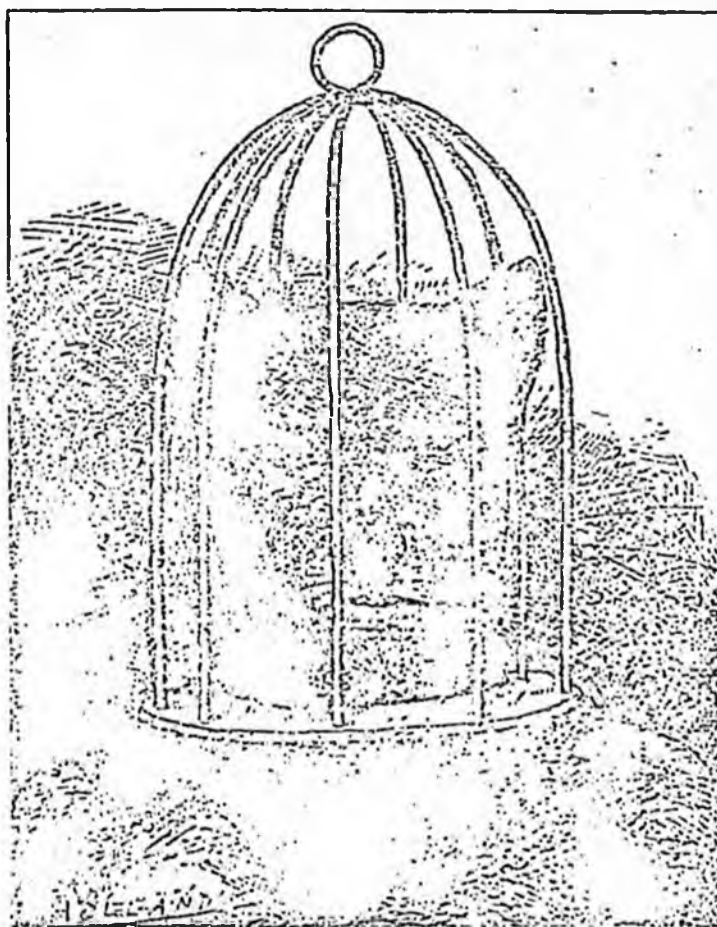
When President Ford was confronted with Lynette Fromme's loaded gun, he was on his way to address the California State Legislature on the subject of violent crime. Among the key themes of his speech was a criticism of our current sentencing laws, under which judges and parole boards exercise wide discretion in determining a convicted criminal's sentence. Pointing to the fact that "nearly 4 out of 10 persons using firearms to kill . . . or rob . . . are returned to the streets . . . without serving a prison sentence," the President called for the adoption of "mandatory sentences" in order to restore "the certainty of confinement that is presently lacking."

As the President was delivering his speech, its point was being dramatically highlighted in another part of town where law-enforcement officials were busily debating whether to charge Miss Fromme under Federal or state law. One primary consideration was, quite obviously, the kind of sentence she could receive if convicted. A glance at the relevant statutes concretely illustrates the pervasive lack of "certainty" under existing law: The Federal law against attempting to kill the President carries a sentence of "any term of years," while the applicable California statute would allow the judge to sentence her "to prison for six months to life, or in a county jail not exceeding one year, or by fine not exceeding five thousand dollars."

In other words, the judge who recently sentenced Miss Fromme to life in prison had the widest possible discretion to determine her sentence. "I have no guidelines to go by," Judge Thomas J. MacBride declared; indeed, he could also have imposed a sentence of probation, six months in jail, 20 years in prison—or even a fine.

This situation is not unique to California or the Federal system; nor is it limited to special crimes such

Alan Dershowitz, professor of law at Harvard, is coordinator of the Twentieth Century Fund's Task Force on Criminal Sentencing.



as attempted Presidential assassinations. Virtually every state vests considerable sentencing discretion in judges. Moreover, every state and the Federal Government now employ "indeterminate sentencing" for most serious crimes.

Indeterminate sentencing simply means that the amount of time a convicted criminal will actually serve is decided not by the legislature when it enacts the criminal statute, nor even by the sentencing judge when he formally imposes sentence, but rather by some administrative agency—generally called the "parole board" or the "adult authority"—during the time the prisoner is serving his sen-

tence. Both the legislature and the sentencing judge still have important roles to play in indeterminate sentencing: They generally set the outer limits of the confinement, but these limits are generally set very widely, and it thus becomes the responsibility of the parole agency to make the decision that really counts: When will the defendant get back on the street?

Indeterminate sentencing has emerged during this century as a major reform designed to substitute rehabilitation for retribution. Until this past decade, virtually every reformer advocated indeterminate sentencing as among the most important first steps toward humanizing the criminal law.

As recently as 1970, Rainey Clark—widely regarded as perhaps the most liberal person ever to occupy the Attorney Generalship—predicted that "the day of [increased reliance on] the indeterminate sentence is coming," since it gives "the best of both worlds—long protection for the public yet a fully flexible opportunity for the convict's rehabilitation."

Now, just five years later, it seems that the day of the indeterminate sentence is passing—and with few regrets. While law-and-order conservatives remain persuaded that indeterminate sentencing is just one more form of coddling criminals, prisoners and their defenders outside the walls are complaining that it has resulted in too much power for parole boards and longer stays in prison. Prison officials blame the system for overcrowding that has put new strain on their facilities. In short, a surprising consensus is emerging around the idea that it is time for a return to uniformity in sentencing.

The shifting attitude of reformers toward sentencing illustrates how widely the pendulum of reform is capable of swinging in a short period of time. What is proclaimed as panacea by one generation of reformers is denounced as anathema by the next. But the call for reform continues unabated, fueled by our collective frustrations over rising crime rates and staggering disparities in the sentences imposed under our present system.

In a recent study commissioned by the judges of the United States Court of Appeals for the Second Circuit, 30 Federal judges were given 20 identical files, drawn from actual cases, and asked what sentence they would impose on each defendant. The results showed "glaring disparity." In a case involving a middle-aged union official convicted on several counts of extortionate credit transactions, one judge imposed a sentence of 20 years' imprisonment plus a \$65,000 fine, whereas another judge imposed a 3-year sentence with no fine. In a case of possession of barbiturates with intent to distribute, one judge gave the defendant five years in prison, while another put him on probation.

These disparities cannot be explained by the (Continued on Page 20)

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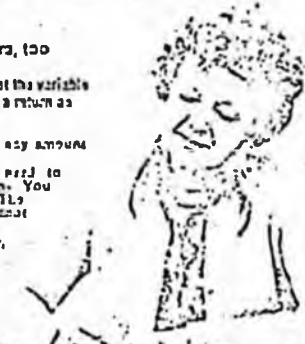
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Punishment

Continued from Page 7

fact that the judges in this experiment did not have "fresh and blood" defendants in front of them. Indeed, in an actual recent case, Judge Constantine Baker Bentley—one of the judges included in the study—sent shock waves through the legal community when she sentenced a second offender convicted of stock fraud to 10 years' imprisonment, despite his plea of guilty and his cooperation with the Government. This sentence was five times greater than that given by any judge in a stock-fraud case included in the study. A recent study in Ohio disclosed that certain judges imprison defendants four times as often as other judges in the same county for the same offense.

These disparities cannot be explained by reference to relevant differences among criminals. They are—as Federal Judge Marvin Frankel recently observed—more commonly a function "of the wide spectrums of character, bias, neurosis and daily vagary encountered among occupants of the trial bench."

There is mounting evidence, moreover, that a significant part of the disparity is a function of simple prejudice. To cite one striking, though by no means typical, example, a California judge, in imposing sentence on a teen-aged Mexican American who had been convicted of incest, made the following statement: "Mexican people, after 13 years of age, it's perfectly all right to go out and act like an animal. . . . You ought to commit suicide. . . . You are lower than animals and haven't the right to live in organized society—just miserable, lousy, rotten people. . . . Maybe Hitler was right. The animals in our society ought to be destroyed. . . ." An exhaustive study of sentences for larceny and assault disclosed that in state courts 74 percent of blacks convicted of larceny were sentenced to prison, while only 49 percent of whites with similar records were imprisoned.

Some of the blame for this kind of disparity can be attributed to indeterminate sentencing. Since the job of the legislature, under indeterminate sentencing, is only to set minimum and maximum sentences, debate—what little

there is about sentencing—tends to concentrate on unrealistic cases at the extremes. Instead of asking what a typical armed robber should generally get, the question becomes: "What is the most any armed robber should ever get?" Naturally, this kind of question focuses legislative attention on the most horrible cases imaginable, such as the thrill-seeker who terrorizes old people by cocking the hammer of his gun at their heads after he has robbed and beaten them. Likewise, the question, "What is the least any armed robber should ever get?" focuses attention on the most sympathetic cases, such as the father who nervously uses a toy gun in a desperate effort to rob enough money to pay for an operation needed by his child. Since there are vast differences between the most sympathetic and the most horrible cases under a given statute, the legislature generally sets the minimum very low (usually with no imprisonment) and the maximum very high (often at life imprisonment) for serious felonies.

This has contributed to the present situation in which we have among the highest and the lowest sentences for serious crimes of any civilized country in the world: More of our serious offenders go back to the street without any imprisonment, and more of those who are imprisoned receive extremely long sentences. Historically, it is clear that as states adopted indeterminate sentencing, the lengths of maximum sentences authorized by legislatures and imposed by judges skyrocketed. Some studies have also concluded—though the evidence here is not as compelling—that indeterminate sentences have increased the time actually served in prison.

Even if indeterminate sentencing were abolished, however, there would be considerable disparity, since different judges could still impose widely disparate indeterminate sentences for similar crimes. There are some who argue that the problem might be even worse. Today, when two judges impose radically different sentences for similar crimes, the parole board can employ its discretion to ameliorate the disparities.

The critical issue, therefore,

is not whether to abolish indeterminate sentencing while retaining judicial discretion—virtually everyone agrees that this would be a disaster. It is whether the present system of wide judicial discretion coupled with indeterminate sentencing should be replaced by legislatively fixed sentences. Two major reform proposals along these lines are currently receiving serious attention. The first, called "flat-time sentencing," simply means that the legislature would define one single sentence for each crime (or degree of crime); that sentence would be imposed by the judge in every case and would be served in full, with the only possible reduction being for "good time" or by executive commutation in an extraordinary case. This approach recently received added impetus from President Ford's 1975 message to Congress on crime in which he stated that "it may be time to give serious study to the concept of so-called flat-time sentencing in the Federal law," as a way of eliminating "wide disparities in sentencing for essentially equivalent offenses."

The other reform currently under active consideration is the "mandatory minimum sentence." This proposal, which is the half-brother of flat-time sentencing, simply eliminates all discretion to go below a certain minimum sentence that must be served for a given crime, regardless of the circumstances.

In an area that has been plagued as much with polarity as law enforcement, it is indeed surprising that a return to legislatively fixed sentences has commanded the support of so diverse a group on the criminal justice spectrum, especially since only a decade ago, support for indeterminate sentencing was equally unanimous. Justice Mitford, whose recent book on the California prison system asserts that "prisons are intrinsically evil and should be abolished," sees the elimination of the indeterminate sentence as an intermediate step. She agrees with President Ford—on this if perhaps on no other issue—that "flat-time sentencing" is preferable to indeterminate sentencing.

Nor are Mitford and Ford the only unlikely bedfellows. The Prisoners Union, a national organization controlled and staffed by ex-convicts, has made "the abolishment of the indeterminate sentence and all its ramifications" its

(Continued on Page 26)

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primary object. Its spokesman, Willie Holder, an ex-convict, argues that "criminals should be punished" rather than treated—and they should be punished "equally," without regard to their backgrounds or individual needs. If this kind of talk sounds as if it could be coming from an association of district attorneys, that is precisely because it could and it has: Many law-enforcement officials favor fixed sentencing because, as Evelle Younger—the tough Attorney General of California—recently put it: "Our records indicate [that under indeterminate sentencing, the adult authority is] releasing dangerous, violent people."

What is it that has changed so many minds so quickly? One important reason for the developing consensus is that the abolition of the indeterminate sentence and the return to legislatively fixed sentences means so many different things to so many different people. To many prisoners, it means the end of the tyranny of the parole board that determines the prisoner's fate under a veil of Kafkaesque secrecy. To President Ford, it means increased deterrence of crime on the streets. To the American Friends Service Committee, which recently called for legislatively fixed sentences, it means the end of privileges for white-collar criminals.

There are, of course, some special reasons that certain groups favor fixed mandatory sentences for particular crimes. Many conservative proponents of capital punishment favor the legislative enactment of mandatory death-penalty statutes for the simple reason that the Supreme Court has held that capital punishment cannot constitutionally be imposed in the discretionary manner in which it has been administered. Many liberal advocates of gun control favor legislation such as that recently enacted in Massachusetts, under which all persons convicted of illegal possession of handguns must serve a full year in prison, and, as the frequently broadcast TV ad says, "no one can get you out."

More fundamentally, however, there seems to be widespread agreement that the present system of sentencing simply has not worked—from any point of view. Nobody is happy about rising crime rates, increased prison violence, glaring disparities

and injustices. The entire criminal justice apparatus is under heavy attack from advocates of law and order as well as from civil libertarians. It is only natural that one of its most visible characteristics—individualized sentencing—should be a focus of this attack. For generations, however, the concept of individualized sentencing was a sacred cow among civil libertarians, a manifestation of the "rehabilitative ideal." It was assumed that this reverence for rehabilitation was shared by its consumers, the prison population. But the 1950's witnessed a dramatic infusion of new inmates into the prison population. A significant number of civil-rights marchers, antiwar activists and middle-class drug users were sent to prison. Although they remained for only brief periods of time—and generally only in the "best" prisons—they did establish communication with the more permanent prison population, which tends to be poorer, blacker and less articulate. Upon their release from prison, these middle-class "passers-through" managed to convey to the media the gripes of the "real" prisoners. And much to the surprise of many civil libertarians, the foremost gripes were directed against rehabilitation in general and indeterminate sentencing in particular. Indeed, the Attica Report concluded that "the operation of the parole system was a primary source of tension and bitterness within the walls."

The tension reflects a larger problem: Rehabilitation simply has not worked. A recent survey of more than 200 studies of rehabilitation came to the discouraging conclusion that we have "very little reason" to believe that recidivism can be reduced by any of the currently employed rehabilitative techniques. This is not to say that occupational and educational programs should not be provided to prisoners who choose to avail themselves of such opportunities; it is to suggest that such programs should neither be coercively imposed on prisoners nor used as a justification for added confinement.

There is also widespread agreement that there is a clear relationship between the fact that many defendants who are sentenced to prison today receive extremely long sentences, and the fact that many convicted serious criminals receive no imprisonment at all. The primary reason so many serious criminals avoid imprisonment today is



the severely overcrowded condition of most urban courts and places of confinement: The crowded court dockets force prosecutors to accept pleas of guilty in exchange for reduced charges or recommendations that result in probationary sentences; and the crowded prisons place pressure on the judges to use imprisonment as a last resort.

A recent New York Times study of prison populations in the South disclosed that in Florida, for example, prisons are so overcrowded that new prisoners are being locked into converted warehouses and herded behind Cyclone fences in Army tents. The average sentence for 803 young men (average age: 22) at one Florida correctional institution was 17½ years, with 177 of them serving life sentences. (In many parts of the world, the maximum permissible term of imprisonment is 15 years.) The consequence

of high sentences and overflow of prison populations is that judges and parole boards are putting more and more convicted felons "back onto the streets," simply because there is no more room for them in state facilities. In October of this year, the Georgia parole board—in a desperate attempt to defuse the "powder keg" of overcrowded prisons—simply cut one year off the sentence of most prisoners.

These conditions have given rise to a call for the imposition of some imprisonment on a larger number of serious offenders even if that requires that those who are imprisoned serve shorter terms. President Ford told Congress that in his view "certainty of confinement" is more important than severity or length of confinement. This view, shared by liberals and conservatives alike, is emerging as the key element in proposals for sentencing reform.

It is being recognized as fact of life that we simply cannot continue to impose prison sentences that are as long as those currently imposed and served and at the same time expect judges to imprison a larger number of serious felons. In order to have our cake and eat it too, there would have to be a significant increase in prison populations and a monumental expansion of prisons—which is unlikely to occur in the current state of our economy. There simply has to be a trade-off of some kind between the length of imprisonment and the certainty of imprisonment.

In the last analysis, however, it is extremely unlikely that either "flat-time" or "mandatory" sentencing will emerge as an acceptable general solution to the sentencing dilemma. Flat-time sentencing is simply too extreme a remedy; by eliminating

STATE OF ALASKA

DEPARTMENT OF LAW CRIMINAL DIVISION

*file with
Committee*

JAY S. HAMMOND, GOVERNOR

Pouch KC-Court Bldg.
Juneau, Alaska 99811

March 2, 1976

The Honorable Terry Gardiner,
Chairman
House Judiciary Committee
Pouch U
Juneau, Alaska 99811

Re: Sentencing Legislation

Dear Representative Gardiner:

At the recent hearings, Representative Parr and yourself raised two points regarding the Governor's determinate sentencing bill. Both points were oversights on my part and if deemed appropriate, the committee should consider the following amendments to rectify the problem.

(1) Representative Parr's point on granting parole under Subsection 33.15.180(b) -- Subsection 12.55.050(d)(1) should be amended to read as follows:

"(1) imprisonment may not be suspended under AS 12.55.080 and probation or parole may not be granted."

(2) Your point regarding what is half of a life sentence, defining it statutorily as 99 years seems appropriate. Even if the offender gets half and under the most liberal administration of good time (one for one) the offender would serve 25 years. An amendment should read:

Subsection 12.55.050(c)(3) a conviction which authorizes a maximum term of imprisonment of life shall be considered as having a term of imprisonment of 99 years.

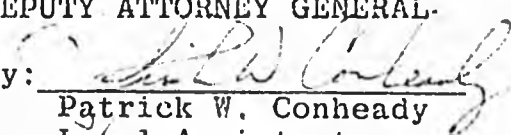
The Honorable Terry Gardiner
Page 2

If you have any further questions, please feel free to contact me.

Very truly yours,

AVRUM M. GROSS
ATTORNEY GENERAL

DANIEL W. HICKEY
DEPUTY ATTORNEY GENERAL

By: 
Patrick W. Conheady
Legal Assistant

PWC:gm



1. in
2. det
3. prot

AU Gross

1. 50% recidivism 87% Nationwide
2. Rehab doesn't work
grow older commit less crime

Why should judge send someone to jail
when they don't rehabilitate

iniquities of sentencing

indeterminate sentencing - Parole Board make sentences
conning of Parole Board

Sentencing in a deterrence

1. Sweden - drunk driving

6% committed 50% more offenses before 18
Small number of people commit majority of crimes

Det sentencing - not Mandatory - will get in
Rehab because he wants to for himself

What happens to Family House

Defer Prosecution on 2nd offense

Whats Most imp (1) Det sentencing - parole Board
(2) Mandatory Minimums

Sentencing is deterrence

1. Sweden - driving while intoxicated - ^{intentional} character though?

How about defining felonies in bill not all

Did you analyze affect on jail capacity?
what is our present rate of occupancy?

Did you analyze existing sentencing
to compare to your proposal?

448 - 545

GOVERNOR WALKER'S PROPOSED JUSTICE MODEL

An Analysis of Its Impact

by the

JOHN HOWARD ASSOCIATION
67 East Madison Street
Chicago, Illinois 60603

(312) 263-1901

July, 1975

INTRODUCTION

In announcing proposed revisions to the criminal justice system in Illinois on February 18, 1975, Governor Walker requested that the public as well as law enforcement, court and corrections personnel study and respond to his proposal. In light of this request, the John Howard Association would like to comment on three elements at the present time: Probation, Determinate Sentencing and Parole. Comments regarding other aspects of Governor Walker's recommendations will be forthcoming.

In general, the Association found the Proposal to contain many progressive and worthwhile recommendations. However, the Association is of the opinion that the proposal tends to be both somewhat idealistic and unrealistic in regard to the reality of prisons, parole and probation. For example, we cannot support the apparent assumption of increased effectiveness of the probation system due mainly to a change in its name to "mandatory supervision". In addition, some of the recommendations are inconsistent with the findings of sound correctional studies and reports, indicating limited research on some important issues. The following comments reveal more specifically what the Association believes to be the strengths and weaknesses of the proposal in regard to probation, determinate sentencing and parole.

PROBATION SERVICES

The Proposal recommends that:

1. Adult probation services be transferred to and administered by a newly created Bureau of Community Safety within the Illinois Department of Corrections.
2. Juvenile probation services and the preparation of adult pre-sentence investigation reports and juvenile court social studies be administered under the

through the establishment of circuit-wide departments of court

It is recommended that the judiciary establish merit criteria for employment and that the Supreme Court be given power to set training and educational requirements for all circuit court services employees.

3. The preparation of pre-sentence investigation reports in all felony cases and in misdemeanor cases involving a prison sentence in excess of 90 days be mandatory. Extensive record keeping and reporting requirements are also imposed.

It is evident from numerous studies that the probation services in Illinois are, in general, of poor quality, influenced by politics and a step-child of the criminal justice system. The need for improvements is obvious, and while Governor Walker's proposal represents a positive step toward that improvement, it is incomplete since the recommendations are not sufficiently comprehensive.

The John Howard Association, the National Council on Crime and Delinquency, the League of Women Voters, the Junior League of Evanston, and other interested organizations and individuals have long advocated statewide funding and administration of the adult and juvenile probation system in Illinois. This system would be an efficient and effective method to insure the development of uniform practices, standards of performance, criteria for hiring, standardized training, and adequate probation coverage throughout the state. The National Advisory Commission on Criminal Justice Standards and Goals, along with many other national standard setting organizations have recommended state administered probation services for these very same reasons.

The Governor's proposal would result in a fragmentation in the administration and funding of probation services and would create a "splitting" of pre-sentence investigation and probation supervision functions. Accordingly, it is the recommendation of the John Howard Association that such a program would be immeasurably strengthened by:

1. The establishment of a statewide system of adult and juvenile probation services, and
2. The new system of adult and juvenile probation services should be administered and funded by the Illinois Department of Corrections.

The John Howard Association strongly endorses Governor Walker's recommendation that pre-sentence investigation reports be mandatory in all felony and selected misdemeanor cases.

DETERMINATE SENTENCING - ABOLITION OF PAROLE

One of the most significant and far reaching aspects of the proposal is in the area of sentencing practices. The proposal offers to:

Abolish indeterminate prison sentences and replace them with fixed, flat-time penalties. Narrow the range of such sentences, so that all offenders receive roughly comparable sentences. Establish a range of longer, determinate sentences, to be employed in aggravated cases.¹

These recommendations were made in an attempt to correct significant problems: Inmates are "...not sentenced to a definite period of imprisonment..."² and "...perceived vagaries..." and arbitrariness "...of the paroling process contribute tension and unrest in our correctional facilities."³ These recommenda-

1/ Commentary on Determinate Sentencing - An Overview, Unpublished manuscript, Illinois Law Enforcement Commission, 1975, p. 43.

2/ Ibid., p. 2

3/ Ibid., p. 7

proposal to eliminate apparent abuses in sentencing: offenders
served wide-ranging periods of incarceration when similar
cases present similar conditions and circumstances.

The Howard Association recognizes that the proposal appropriately identifies several significant problems inherent in the sentencing of inmates. However, the Association sees major defects in the solutions offered to correct these problems.

Under the recommendations in the Governor's proposal, felony offenders would serve longer prison sentences than they do at present. Naturally, this would result in a substantial increase in the prison population, and it is the opinion of the Association that there are too many people currently held in Illinois prisons whose rehabilitation does not require or warrant imprisonment. It is a well-documented and almost universally recognized that the sentences imposed in the United States are the highest in the Western world. In addition, researched and reported evidence shows that longer prison terms do not lead to better parole performance.⁴

Also, if implemented, the Governor's proposal would, in all probability, require extensive expansion of existing facilities or the construction of new facilities because the rated capacity of Illinois prisons is, at present, 7,400 with the actual prison population being approximately 7,000.

Another weakness in the proposal's solution relates to cost. For instance, Illinois parolees released during 1971-1973 would have served approximately 6,400 man years of additional prison time over a three-year period if they had been sentenced according to the provisions contained in the Governor's proposal

4/ Gottfredson, D. M., M. G. Neithercutt, J. Nuffield, and V. O'Leary, Four Thousand Lifetimes: A Study of Time Served and Parole Outcomes, Davis, California: NCCD Research Center, June 1973.

... A 5,400 man-year increase in the ...
... same year period would cost taxpayers an additional
... amount does not include monies that may be required for new
... remodeling of existing facilities and facility expansion.

The proposal also recommends that we:

Abolish parole, but replace it with a good-time credit of one day off of his (inmate's) sentence for each infraction-free day he spends in custody, so that each offender becomes directly responsible for the consequences of his own behavior. Retain -- indeed strengthen and expand -- needed rehabilitative services, but divorce participation in them from the release process.⁶

The recommendation that parole be abolished is based upon the assumption that parole does not work, that parole is not an effective crime reduction and prevention device, and that the paroling process is capricious, vague and filled with uncertainties. With respect to the functioning of an individual parole board, the proposal may be correct. However, with respect to the proper functioning of parole, the proposal is, in our opinion, unsound.

The uniform Parole Report Program of the National Council on Crime and Delinquency has been following the outcomes of parolees throughout the United States since release year 1965. The statistics show that if the task of parole is to retain people in the community for a time, rather than return them to prison,

5/ According to figures furnished by the Illinois Department of Corrections, it cost approximately \$7,000 to maintain an inmate in an Illinois prison for one year.

6/ Op. Cit., Commentary on Determinate Sentencing - An Overview. p. 43.

Parolees released in 1972, followed to the end of
supervision or to their first anniversary of parole release,
"success" rate (success meaning no problems leading to parole violation.
Included all those who were not returned to prison, the success rate was
not only is this a high success rate, but it has climbed steadily. The
two-year follow-up success rate is 69%; it too, has risen regularly since 1968.
The three-year success rate is 66% for 1969, the last year on which data has
been published. This data suggests that the system works and is improving with
time.

With respect to Illinois, the Uniform Parole Reports indicate that the success
rate at the end of one year for parolees released in 1973 was 85%. For parolees
released in 1972, the success rate after one year was 83%. For parolees released
in 1972, the two-year success rate was 79%.

The proposal's contention that parole is not effective as a crime prevention
device,⁷ on either a state or national basis, must be exposed as being in-
consistent with factual evidence. On June 30, 1974, there were nearly 185,267
active parolees in the United States. If every one of these parolees had
committed an index crime in 1974, they would have accounted for only 2% of
the known index crimes. We are confident, and the data clearly established,
that over 70% of the parolees committed no new known crimes.

7/ Op. Cit., Commentary on Determinate Sentencing - An Overview, p. 11.

8/ "Number on Parole -- 1974," Newsletter, Uniform Parole Reports, Davis,
California: NCCD Research Center, p. 5.

Recommendation regarding Sentencing:

Sentencing in criminal cases in Illinois should conform to standards promulgated by the National Advisory Commission on Criminal Justice Standards and Goals. Specifically, Standard 5.2, Sentencing the Non-Dangerous Offender and 5.3, Sentencing to Extended Terms should be implemented. See attached copies of these Standards.

Standard 5.2, Sentencing the Non-Dangerous Offender, calls for the maximum sentence for any offender not specifically found to represent danger to others to a period not to exceed five years for felonies other than murder. No minimum sentence should be authorized by the legislature. The sentencing court should be authorized to propose a maximum sentence less than that provided by statute. It mandates the establishing of criteria for sentencing and suggests what the criteria should include.

Standard 5.3, Sentencing to Extended Terms, calls for a separate provision for sentencing offenders when, in the interest of public protection, it is considered necessary to incarcerate them for substantial periods of time. It identifies provisions to be included in the decision, e.g.,

- (a) Authority for judicial imposition of extended term of not more than 25 years for (1) a persistent felony offender, (2) a professional criminal, or (3) a dangerous offender.
- (b) Definition of a persistent felony offender.
- (c) Definition of a professional criminal.
- (d) Definition of a dangerous offender.
- (e) Authority for court to impose a minimum sentence to be served

prior to eligibility for parole not to exceed one-third of the maximum sentence imposed or more than three years.

2. A system be established within the judiciary to review all sentences of incarceration in order to ensure that sentences are fair and equitable.
3. Parole services not be abolished and that parole and other reintegration and aftercare services be made available to all released offenders.
4. A system for ensuring the early release of offenders be maintained in addition to that which is based upon the accumulation of good time credits.

APPENDIX A

STANDARD 5.2

SENTENCING THE NON-DANGEROUS OFFENDER

Penal code revisions should include a provision that the maximum sentence for any offender not specifically found to represent a substantial danger to others should not exceed five years for felonies other than murder. No minimum sentence should be authorized by the legislature.

The sentencing court should be authorized to impose a maximum sentence less than that provided by statute.

Criteria should be established for sentencing offenders. Such criteria should include:

1. A requirement that the least drastic sentencing alternative be imposed that is consistent with public safety. The court should impose the first of the following alternatives that will reasonably protect the public safety:
 - (a) Unconditional release.
 - (b) Conditional release.
 - (c) A fine.
 - (d) Release under supervision in the community.
 - (e) Sentence to a halfway house or other residential facility located in the community.
 - (f) Sentence to partial confinement with liberty to work or participate in training or education during all but leisure time.
 - (g) Total confinement in a correctional facility.
2. A provision against the use of confinement as an appropriate disposition unless affirmative justification is shown on the record. Factors that would justify confinement may include:
 - (a) There is undue risk that the offender will commit another crime if not confined.
 - (b) The offender is in need of correctional services that can be provided effectively only in an institutional setting, and such services are reasonably available.
 - (c) Any other alternative will depreciate the seriousness of the offense.
3. Weighting of the following in favor of withholding a disposition of incarceration:
 - (a) The offender's criminal conduct neither caused nor actually threatened serious harm.
 - (b) The offender did not contemplate or intend that his criminal conduct would cause or threaten serious harm.
 - (c) The offender acted under strong provocation.
 - (d) There were substantial grounds tending to excuse or justify the offender's criminal conduct, though failing to establish defense.
 - (e) The offender had led a law-abiding life for a substantial period of time before commission of the present crime.

...offender is likely to respond affirmatively to probation or
community supervision.

...offense was induced or facilitated its commission.

...offender has made or will make restitution or reparation to the
victim of his crime for the damage or injury which was sustained.

- (i) The offender's conduct was the result of circumstances unlikely to recur.
- (j) The character, history, and attitudes of the offender indicate that he is unlikely to commit another crime.
- (k) Imprisonment of the offender would entail undue hardship to dependents.
- (l) The offender is elderly or in poor health.
- (m) The correctional programs within the institutions to which the offenders would be sent are inappropriate to his particular needs or would not likely be of benefit to him.

APPENDIX B

STANDARD 5.3

SENTENCING TO EXTENDED TERMS

State penal code revisions should contain separate provision for sentencing offenders when, in the interest of public protection, it is considered necessary to incapacitate them for substantial periods of time.

The following provisions should be included:

1. Authority for the judicial imposition of an extended term of confinement of not more than 25 years, except for murder, when the court finds the incarceration of the defendant for a term longer than five years is required for the protection of the public and that the defendant is (a) a persistent felony offender. (b) a professional criminal, or (c) a dangerous offender.
2. Definition of a persistent felony offender as a person over 21 years of age who stands convicted of a felony for the third time. At least one of the prior felonies should have been committed within the five years preceding the commission of the offense for which the offender is being sentenced. At least two of the three felonies should be offenses involving the infliction, or attempted or threatened infliction, of serious bodily harm on another.
3. Definition of a professional criminal as a person over 21 years of age, who stands convicted of a felony that was committed as part of a continuing illegal business in which he acted in concert with other persons and occupied a position of management, or was an executor of violence. An offender should not be found to be a professional criminal unless the circumstances of the offense for which he stands convicted show that he has knowingly devoted himself to criminal activity as a major source of his livelihood or unless it appears that he has substantial income or resources that do not appear to be from a source other than criminal activity.
4. Definition of a dangerous offender as a person over 21 years of age whose criminal conduct is found by the court to be characterized by: (a) a patterns of repetitive behavior which poses a serious threat to the safety of others, (b) a pattern of persistent aggressive behavior with heedless indifference to the consequences, or (c) a particularly heinous offense involving the threat or infliction of serious bodily injury.
5. Authority for the court to impose a minimum sentence to be served prior to eligibility for parole. The minimum sentence should be limited to those situations in which the community requires reassurance as to the continued confinement of the offender. It should not exceed one-third of the maximum sentence imposed or more than three years.

Authority for the sentencing court to permit the parole board to sentence to a minimum term prior to serving the term upon request of the board of parole.

7. Authority for the sentencing court in lieu of the imposition of a minimum to recommend to the board of parole at time of sentencing that the offender not be paroled until a given period of time has been served.

APPENDIX C

Addendum
TABLE VIII
Uniform Parole Reports
Parole Performance Percentages
ONE Year Follow-up
1968-1973
Illinois Male

	<u>1968</u>	<u>1969</u>	<u>1970</u>	<u>1971</u>	<u>1972</u>	<u>1973</u>
Continued on Parole	68%	73%	80%	81%	83%	85%
Absconder	5%	5%	5%	3%	4%	4%
Return to Prison- Technical	22%	18%	11%	11%	9%	6%
Return to Prison-New Commitment	5%	5%	4%	5%	4%	5%
Total Cases	2,076	1,735	2,130	1,749	1,790	1,654

APPENDIX D

Appendum
TABLE IX
Uniform Parole Reports
Parole Performance Percentages
TWO Year Follow-up
1968-1972
Illinois Male

<u>Parole Outcome</u>	<u>1968</u>	<u>1969</u>	<u>1970</u>	<u>1971</u>	<u>1972</u>
Continued on Parole	62%	68%	74%	76%	79%
Absconder	4%	4%	4%	3%	4%
Return to Prison-Technical	27%	22%	15%	14%	11%
Return to Prison-New Commitment	7%	6%	6%	7%	6%
Total Cases	2,075	1,735	2,130	1,749	1,792



*file with
det sentencing*

LAY MEMBERS
KENNETH L. BRADY
LEW M. WILLIAMS, JR.
ROBERT H. MOSS

LAW MEMBERS
MICHAEL A. STEPOVICH
MICHAEL M. HOLMES
JOSEPH L. YOUNG

CHAIRMAN, EX OFFICIO
ROBERT BOOCHEVER
CHIEF JUSTICE
SUPREME COURT

Alaska Judicial Council

303 K STREET
ANCHORAGE, ALASKA
99501

EXECUTIVE DIRECTOR
MICHAEL L. RUBINSTEIN

January 20, 1976

Rep. Terry Gardiner
House of Representatives
Pouch V
Juneau, Alaska 99801

Dear Terry:

Enclosed is a report prepared under contract for the Alaska Judicial Council pursuant to a 1974 grant from the United States Department of Justice Law Enforcement Assistance Administration, (LEAA). This report was included as a follow-up to the Council's initial statistical study, Sentencing in Alaska: A Description of the Process and Summary of Statistical Data for 1973. (March 1975) The original, comprehensive study, was prepared to assist the Legislature by developing a data-base which could then be utilized in drafting criminal legislation. The enclosed follow-up study was requested because the possibility of racial disparity in sentencing was raised by the data analyzed in the original study.

Unfortunately, (or fortunately) there were only 42 cases in Anchorage in which defendants received sentences of five years or longer; not really enough cases for a good sample. For this reason, although as Chief Justice Boochever's letter to the judges indicates, "the reports give rise to an appearance of racial discrimination", they are not conclusive in this regard.

Sincerely,


Michael L. Rubinstein

MLR/mb
Enclosure



Alaska Judicial Council

303 K STREET
ANCHORAGE, ALASKA
99501

January 20, 1976

LAY MEMBERS

KENNETH L. BRADY
LEW M. WILLIAMS, JR.
ROBERT H. MOSS

LAW MEMBERS

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MICHAEL M. HOLMES
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CHAIRMAN, EX OFFICIO

ROBERT BOOCHEVER
CHIEF JUSTICE
SUPREME COURT

EXECUTIVE DIRECTOR
MICHAEL L. RUBINSTEIN

Hon. Monroe N. Clayton
District Court Judge
Fourth Judicial District
604 Barnette
Fairbanks, Alaska 99701

Dear Judge Clayton:

This letter is being written at the request of the Alaska Judicial Council. The Council was funded in 1974 by the United States Justice Department Law Enforcement Assistance Administration to conduct a study of the sentencing process in Alaska. A comprehensive statistical analysis of the 1973 superior court felony cases in Anchorage, Fairbanks and Juneau was completed. This report indicates that a disproportionate number of blacks and Alaskan Natives failed to receive probation and that blacks received higher sentences than other groups. A follow-up report was made in an endeavor to ascertain whether there was justification for the higher percentage of black defendants receiving sentences of five years or greater when compared with the low percentage of Caucasians receiving similar sentences. I am enclosing a copy of the analysis and conclusions of this later report. The other reports are on file in the office of the Alaska Judicial Council at Anchorage and will be made available for your study upon request.

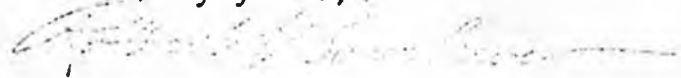
While the reports are not necessarily conclusive, they do give rise to an appearance of racial discrimination being involved in some sentencing procedures. The Council is confident that no Alaskan judge consciously discriminates against any group because of race, creed or color. As a result of the studies, however, there is concern that unconscious bias may creep into the sentencing process in certain instances. It is for this reason that I have been directed to write to each of the judges in the state advising

Hon. Monroe N. Clayton
January 20, 1976
Page Two

them of this situation so that they may consciously guard against any possible tendency toward such discrimination.

Knowing the high caliber of the Alaska judiciary, I am confident that all members seek to comply with their oath in upholding the Constitution of the State of Alaska, including art. I, sec. 1 which provides that "all persons are equal and entitled to equal rights, opportunities and protection under the law", and that every effort will be made to avoid discrimination or the appearance of discrimination in all judicial functions.

Sincerely yours,



Robert Boochever
Chairman, Ex Officio

Enclosure
cc: Supreme Court Justices

Part III - ANALYSIS AND CONCLUSIONS

This paper began with the purpose of focusing on two points: whether or not the persons who received long sentences in 1973 had committed "particularly serious offenses" or were "dangerous offenders", "professional criminals", or "the worst type of offenders"; and whether, given these criteria, the high percentage of Black defendants who received sentences of five years or greater was as deserving of these sentences as the low percentage of Caucasians. Many facts and circumstances have been set forth in the preceding pages in order that an analysis of these questions can be attempted.

It may be instructive first to look at the supreme court's sentencing criteria. Since the sentence appeal law was enacted, effective January 1, 1973*, over 60 defendants have appealed their sentences to the supreme court.¹³ (Approximately 70% of these appeals have resulted in affirmation of the lower court sentence, approximately 20% have been reversed on the grounds of excessiveness, and only 2 sentences, less than 4%, have been disapproved as too lenient.)¹⁴ In the various supreme court opinions explaining its decisions in these cases, guidelines for sentencing have been set forth.

As noted, the court has written that, in general, maximum sentences need not exceed five years, except for particularly serious offenses, dangerous offenders, and professional criminals, and that the maximum sentence for a crime ought to be given only to the worst type of offender.¹⁵ Regarding the definition of "serious offense", the court has noted in a

* AS 12.55.120

case in which it affirmed a rape sentence that "Forcible rape and robbery rank among the most serious crimes."¹⁶ In another case, where the defendant was convicted of assault with a dangerous weapon, (and in another very recent sentence affirmation for a rape case), the court has expressed the view that violent crimes involving physical injury to innocent people are to be regarded as the most serious offenses, and are not to be treated lightly.¹⁷

In several other cases the court has commented on the terms maximum sentence and "worst type of offender". In 1971 in affirming a maximum sentence, the court said a maximum sentence generally was not appropriate for a single violation of a law which was not surrounded by aggravating circumstances, such as a prior record or the defendant's having committed the offense while on bail, probation or parole.¹⁸ The court further said in Galaktionoff v. State, 486 P.2d 919, 924 (Alaska 1971), in overturning a maximum sentence for petty larceny, that the following factors should be considered in assessing whether the defendant was the worst type of offender: the defendant's age; the defendant's previous offenses, if any; whether the (multiple) offenses occurred within only a single criminal transaction; and the value of the property taken. The terms "dangerous offender" and "professional criminal" have not been defined by the supreme court.

As noted earlier in this report, most of the crimes of which the 42 defendants were convicted were quite serious

offenses, although not all were rape or robbery, and not all involved harm to victims. In fact, only 3 of the 42 were convicted of rape (7%) and 13 convicted of robbery (31%), for a total of 38%.

Many of the defendants were young. It already has been noted that over half, 26 defendants or 63%, were under age 25. Eighteen were only 21 or younger, fully 43%.

Many of these defendants did not have prior records or had records of very little consequence, such as traffic offenses or misdemeanor convictions that had not resulted in jail. Nineteen defendants, or 46%, fit this description.

Many defendants also were involved in only a single criminal transaction, although the single transaction often was very serious. Eighteen defendants, or 43%, committed only a single criminal act. However, it should be noted that eight of the defendants involved in only a single transaction in 1973 had prior felony records.

With regard to the fourth guideline, the value of property injured or stolen, most of the crimes for these 1973 defendants involved harm of some value (usually over \$50) if they involved harm to property.

These sentencing guides also can be compared along racial lines. (Only defendants in Anchorage are included in the following computations, as the desire to focus on racial comparisons arises from Blacks sentenced there.) Of all 12 Caucasians receiving sentences of five years or greater, 7 or 58% were 25 years old or younger, and 6 or 50% were 21 or

under. Of all 12 Blacks receiving sentences of five years or greater, 8 or 67% were 25 or younger; but only 4 or 33% were 21 or under. Thus more young Caucasians received long sentences than Blacks.

Four of the Caucasians (33%) had no prior record (or no prior record of any consequence). Eight of the Blacks (67%) had no prior record. Thus twice as many Blacks as Caucasians who had no prior record received long sentences.

Five of the Caucasians (42%) had been involved in only a single criminal transaction (including any offenses committed later while the defendant was on bail but had not yet been sentenced). Only 3 of the Blacks (25%) were involved in only one transaction.*

As noted previously (on p. 18), seven of the Caucasians (58%) did physical harm to a victim, while only one out of all 12 Blacks (the defendant who raped two women) could be said to have done physical harm to his victim. All of the homicides and aggravated assaults that resulted in long sentences were committed by Caucasian (or Native Alaskan) males.

* Some of the sentences appear to have been based on the judge's consideration that the defendant probably had committed other offenses and merely not been caught, although convicted of only one. However, the Supreme Court clearly has said that such consideration is not proper in sentencing. In *Galaktionoff v. State*, 486 P.2d 919, 924 (Alaska 1971), where the court was reviewing a judge's consideration that a defendant probably was guilty of more serious offenses than the one charged, the court said that the danger inherent in giving undue weight to such factors should be readily apparent to the judge, and that absent a conviction even an indictment is absolutely no evidence of guilty conduct.

The main offense which was committed most often by these Anchorage defendants, both Caucasian and Black, was robbery. Four of the Caucasians and 8 of the Blacks received their long sentence for robbery. All but one of the Caucasians receiving long sentences for robbery had prior felony records. Only one of the Blacks receiving a long sentence for robbery had a prior felony record.

In order to analyze whether these 7 Blacks received unduly harsh sentences, these sentences are compared below with other Anchorage sentences for robbery (that did not exceed 5 years). Although it would not be feasible to compare for each of the 42 defendants all other sentences meted out to other defendants for the same offense, it is possible to compare all of one kind of sentence for a select group of individuals. Because most of the Blacks in question were first offenders, the description below is of all 1973 defendants who committed robbery, who were first offenders or had no prior record of any consequence, but who did not receive sentences of 5 years or greater.

Firstly, it can be seen that 9 Caucasian first offenders received sentences of less than 5 years for robbery in 1973. Only 4 Blacks received such sentences. Moreover, only one of these Blacks was sentenced to less than 1-1/2 years in jail, whereas seven of the 9 Caucasians (78%) were sentenced to one year or less in jail. (Two were placed on probation.)

All defendants on Table IV, Caucasian and

TABLE IV

DEFENDANTS[‡] CONVICTED OF ROBBERY WHO RECEIVED
LESS THAN A FIVE-YEAR SENTENCE

(Anchorage only - no robbery convictions in Fairbanks or Juneau)

<u>SEX</u>	<u>RACE</u>	<u>AGE</u>	<u>PRIOR RECORD</u>	<u>SENTENCE</u>	<u>JUDGE</u>	<u>SPECIAL CIRCUMSTANCES</u>
F	Cauc.	20	One prior misdemeanor	Probation (3 years SIS)*	Carlson	Robbed victim of watch and \$50
M	Cauc.	21	No prior record	5 months (plus 5 years SIS)	Burke	Robbed person of watch and \$50 at gunpoint; repeat bail recidivist
M	Cauc.	19	No prior record	1 year (plus 2 suspended)	Kalamarides	Military; liquor store robbery at gunpoint; co-defendant of defendants #25-27, Table II
M	Cauc.	21	Less than 6 misdemeanors, no jail time	1 year (plus 2 suspended)	Occhipinti	
M	Cauc.	23	Less than 6 misdemeanors; never served more than 90 days	Probation (2 years SIS)	Burke	Robbed person of money with long-barreled gun; case dismissed in return for defendant pleading guilty to other cases; repeat bail recidivist.
M	Cauc.	18	Minor traffic record	2 years (plus 2 suspended)	Occhipinti	
M	Cauc.	19	No prior record	3 years	Kalamarides	Convicted of 2 counts of robbery, one armed, one against his mother
M	Cauc.	21	No prior record	1 year (plus 4 suspended)	Moody	Turned state's evidence; ordered to make \$240 restitution
M	Cauc.	23	Two prior felonies; never been sentenced to more than 90 days	115 days	Carlson	Stole \$435 after putting victim in fear with .22 calibre rifle; "Pled down" to petty larceny; drug-related

‡ Defendants with no prior criminal record, or a minor record only.

* Suspended imposition of sentence.

TABLE IV - Continued

<u>SEX</u>	<u>RACE</u>	<u>AGE</u>	<u>PRIOR RECORD</u>	<u>SENTENCE</u>	<u>JUDGE</u>	<u>SPECIAL CIRCUMSTANCES</u>
M	Nat.	25	Less than 6 misdemeanors; no jail time	4 years	Burke	
M	Black	20	Less than 6 misdemeanors; no jail time	1-1/2 years (plus 3-1/2 years suspended)	Buckalew	
M	Black	19	No prior record	60 days (plus 3 years SIS)	Carlson	Military; recidivated on bail; defendant's father (a military officer) appeared on his behalf
M	Black	23	No prior record	3 years (mandatory 1/3)	Occhipinti	Military; drove "get away" car
M	Black	21	No prior record	2 years (plus 3 suspended)	Burke	Military; alcohol treatment recommended

Black, were under age 25. All the Caucasians except one were 21 or younger, and all the Blacks except one were 21 or younger.

None of the Blacks on Table IV were noted as having used a weapon during the robbery (although the fact that the court files did not note a weapon does not necessarily preclude the possibility of their having been one). Five of the Caucasians (56%) were noted as having used a gun.

It thus appears that even among defendants receiving less than 5 years for robbery, Blacks may have been treated more harshly.

Comparing the 9 Caucasians on Table IV with the 7 Blacks (on Table II) who were also "first offenders" but received 5 years or greater, there are some factors possibly justifying apparent disparity. It can be noted that the Blacks were slightly older--one was over 25 and 3 were over 21. Moreover, of the 7 Blacks, 5 (71%) were noted as having used a weapon, compared to 56% of the Caucasians. Five of the 7 Blacks (71%) also were involved in more than one event, whereas only 4 of the Caucasians in Table IV (44%) were involved in more than one criminal transaction.

It should be pointed out that if the 3 young Black defendants (#25-27) who participated in the same liquor store robberies had not received sentences of 5 years or greater but had received lesser sentences, a bit more of the statistical disparity among Blacks and Caucasians on both Table II and Table IV would be removed. However, those three

Blacks did receive sentences of five years or greater. It should be further noted, with regard to those liquor store robberies, that Table IV shows a fourth co-defendant in those cases, who was a Caucasian male, also age 19 with no prior record, and who received a sentence of one year plus two years suspended. (This sentence was imposed by the same judge who sentenced 2 of the 3 Black defendants.) The following analyses of certain other sentencing phenomena may help to show whether the 1973 sentencing results shown in Tables I and II might be considered disparate.

Table V below shows the number and type of defendants who had a trial on the charge for which they received their long sentence, compared to those who accepted plea negotiations. It was noted in several of the preceding Anchorage sentencing narratives that the attorneys or the judge when sentencing a defendant took into account whether or not the defendant had gone to trial.

Out of 30 Anchorage defendants with long sentences, 8 had trials (27%). This figure far exceeds the figure of 6% of all convicted felony defendants who had trials in 1973.¹⁹

In Anchorage, none of the Caucasian males who received sentences of 5 years or greater went to trial. The first report showed the converse--that none of the Caucasian males who went to trial received sentences of 5 years or greater.²⁰ On the contrary, six of the Blacks who received sentences of 5 years or greater (50%) had gone to trial. The earlier study also reported that all Black males convicted

TABLE V
INCIDENCE OF TRIALS

<u>Fairbanks</u>		
	Number of Defendants Who Went to Trial	Percentage of Defendants
Caucasian Males	1	25%
Nat. Alaskan Males	1	33%
Males, Race Unknown	0	--
 <u>Juneau</u> The one defendant sentenced to five years in Juneau did have a trial.		
<u>Anchorage</u>		
	Number of Defendants Who Went to Trial	Percentage of Defendants
Cauc. Females	1	50%
Cauc. Males	0	--
Nat. Alaskan Males	1	25%
Black Males	6	50%

at trial in Anchorage received sentences of 5 years or
21
greater.

However, Table VI below shows that whether or not there was a trial, the majority of all sentences of 5 years or greater statewide, and most of the sentences of 5 years or greater given to Blacks in Anchorage, did not occur without the benefit of a presentence report. Statewide, presentence reports were prepared in 62% of the cases, although this figure varied according to type of defendant and area of the state. In Fairbanks presentence reports were prepared for 92% of defendants receiving long sentences, but for only 50% of the Anchorage defendants. A presentence report was prepared for the one defendant in Juneau.

Among the Anchorage cases, presentence reports were prepared for 75% of the Blacks but for less than 50% of the Caucasians, and for only 33% of the Caucasian males. It might be noted that the higher incidence of presentence reports among Blacks may reflect the fact shown earlier on p. 18 that sentences for Caucasians were "negotiated" more often. (It might also be called to mind that Table II showed that the judge followed the district attorney's recommendation for Caucasians three times, sentenced above it once, and sentenced below it once; and for Blacks the statistics were not very different, the judge following the district attorney's recommendation 4 times and sentencing below it twice.

Table VII shows another factor that could indicate

TABLE VI
INCIDENCE OF PRESENTENCE REPORTS

A. <u>Statewide.</u> 62% of defendants sentenced to 5 years or more in jail received pre-sentence reports.						
B. <u>Areas.</u>						
Race & Sex	Anchorage		Fairbanks		Juneau	
	No. of defendants for whom report prepared	% of defendants of this race & sex	No.	%	No.	%
Cauc. Female	1	50%	--	--	--	--
Cauc. Male	4	33%	6	100%	--	--
Nat. Alaskan Male	1	25%	3	75%	1	100%
Black Male	9	75%	--	--	--	--
Male, Race Unk.	--	--	1	100%	--	--
	15		10		1	

disparity, the incidence of a judge imposing a required mandatory minimum (usually one-third of the sentence imposed) to be served before parole eligibility.

Statewide, 18 out of the 42 defendants (43%) were required to serve a mandatory minimum. In Fairbanks only 2 defendants (17%) were required to serve a mandatory minimum. The one defendant in Juneau was not required to serve a mandatory minimum.

In Anchorage 60% of the defendants were required to serve a mandatory minimum. However, 67% of Caucasian males were required to serve a mandatory minimum, while only 42% of Black males were. As is noted on the chart, however, 2 of the Caucasian males succeeded in getting their mandatory minimum eliminated, and thus the final situations are not very different. Unfortunately, the earlier report did not contain statistics on what percentage of all defendants receiving jail sentences were required to serve a mandatory minimum.

Sentencing Criteria and Treatment

The very first sentence appeal decision handed down by the supreme court after the sentence appeal law was enacted, State v. Chaney,²² stated that a trial judge when imposing sentence should consider the following factors: the principles of reformation and the necessity of protecting the public, the objective of rehabilitation of the offender into a non-criminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender, deterrence of other

TABLE VII

INCIDENCE OF REQUIRED MANDATORY MINIMUMS

Fairbanks

Only two defendants in Fairbanks who received sentences of 5 years or greater were required to serve a minimum before parole eligibility. One was male, "race unknown," and one was a Caucasian male. One was required to serve one-half of a 30-year sentence before parole eligibility, which sentence is illegal,* and one was required to serve 2 years of a 10-year sentence (less than one-third of the sentence).

Juneau

In Juneau, the one defendant receiving a sentence of 5 years or greater was not required to serve a mandatory minimum.

Anchorage

	Number of Defendants Re- quired to Serve Mandatory One-Third Minimum	Percent
Caucasian Females	1	50%
Caucasian Males	8**	67%
Native Alaskan Males	1	25%
Black Males	5	42%

* At that date the judge was allowed to fix a mandatory minimum to be served before parole eligibility only if it did not exceed more than one-third of the sentence. AS 33.15.230(a)(1). See also Sentencing in Alaska, p. 27 and p. 168.

** 2 eliminated, plus one that was less than one-third.

members of the community who might possess criminal tendencies; and community condemnation of the individual, (also described as "reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.")²³ The court further noted in a later case that the trial judge must determine the priority and relationship of these objectives in any particular case.²⁴

In recent years there has been much debate over these criteria, with special focus on rehabilitation.²⁵ In the Anchorage sentencing narratives, the so-called "Chaney criteria" were alluded to in various ways by judges when imposing sentence. All of the "goals"--retribution and reaffirmation, deterrence of the offender and others, rehabilitation of the offender, and protections of society--were mentioned frequently as "purposes" of the sentence being imposed (as was punishment, however, which has not been set forth directly by the supreme court as a permissible basis for a sentence).

Although no tally has been made of those rationales for sentencing most frequently expressed by superior court judges, rehabilitation, deterrence, and protection of society were mentioned with regularity by the Anchorage judges.

The number of defendants recommended by the judge to receive rehabilitory treatment was discussed previously at pp. 8, 9, and 19. More defendants in Anchorage than in Fairbanks were recommended for treatment, and in Anchorage more Caucasians than Blacks were recommended for treatment. Both of the women and all 4 of the Native Alaskan males were

noted as having either an alcohol or drug problem, but only 2, both Native males, were recommended for treatment.

Although in the Anchorage narratives more Caucasians than Blacks were described as having specific problems that could be "treated", it is difficult to believe that there could be a single person who needed a 5-year sentence but who did not need "treatment", in some sense.

Occasionally a judge recommended a certain correctional institution as a place where treatment should be provided. However, eight times that a judge recommended, or attached as a condition of the sentence, a certain institution or rehabilitation house such as Family House, the defendant was not placed there (or in an equivalent facility) by the Division of Corrections (or the defendant left the institution voluntarily, as was the case with 3 or 4 defendants sent to Family House). In only two cases was there a proceeding to re-sentence the defendant or modify his sentence once it was clear that the recommendation was not going to be followed.

The supreme court has set the rehabilitation of offenders high on the list of criteria to be considered at the time of sentencing. However, one obvious problem was expressed very succinctly by Judge Hanson when he said that the legislature has realized that persons need treatment but has not set up any way for them to get it. Especially when a defendant is sentenced to a long jail term, as were the defendants in this report, the lack of correlation between the defendant's need for treatment, the judge's recommendation for treatment, and the defendant's actual receipt of treatment is extremely

burdensome not only to the courts and the defendant, but to society who must support these persons while confined and deal with them when they are released. (It might further be noted that 7 of the defendants who were sentenced to 5 years or greater to serve in 1973 are, in mid-1975, not even in jail or an institution. Two are on bail pending their appeals, and 5 have finished serving time and are on parole or probation.)

Recommendations

The supreme court has said on numerous occasions that mere disparity in sentencing is not undesirable, and that on the contrary, disparity helps to achieve the purposes of sentencing. Rather, the key word in analyzing disparity in sentencing is whether or not it is justifiable.²⁶ While the supreme court will not review most of the sentences that were discussed here it is the recommendation of this report that the supreme court actively utilize the sentence appeal process to further expound the criteria it has set forth previously. Five years have passed since the sentence appeal law was enacted, and even though the court has said that sentences greater than 5 years should be given only to "the worst type of offenders" or only for "particularly serious offenses, dangerous offenders, and professional criminals", these terms have not been well enough defined. It has been noted especially that the 7 Black first offenders in Anchorage who received long sentences for robbery did not possess remarkably different characteristics from the 9 Caucasian male first offenders who received sentences of far less than 5 years.

A second proposal resulting from this study is a recommendation for better coordination of correctional activity with the purpose of any long sentence meted out in court. The "treatment" that is to be afforded a defendant during his period of incarceration or isolation must be respected as an integral part of the decision of how long that period need be. Presently the Division of Corrections, not the judge, makes the decision regarding where and how a defendant is to be confined.²⁷ Although no recommendation is made that this decision should be taken away from the correctional authorities, it is urged that the judge better coordinate his judgment of sentence and treatment recommendation with that of the Division of Corrections (presentence reports now are mandatory for felonies). If the judge's final recommendation is not followed, the judge should be notified forthwith by the Division of Corrections (and not by the defendant, as happened so often in 1973). Upon the DOC's notifying the judge that it cannot follow his recommendations, there should be a mandatory resentencing, subject to the present rules governing sentence modification.

To render the judge's participation in the correctional decision meaningful, judges must have an awareness of programs at existing facilities in the state and of any new developments in the broad field of corrections. Although a certain amount of judicial attention to matters concerning rehabilitation can be focused through participation in seminars and conferences, genuine devotion to theories and practices of rehabilitation or reformation must, in the end, be up to

each individual judge. Committees on judicial qualifications and other persons involved in the selection of judges should be made aware that a judge's interest in and attention to matters of criminal rehabilitation are an important aspect of his judicial abilities.

03-010

DEPARTMENT OF LAW

Intra-Office

TO Long, William

FROM W. C. Conboy

Date 5/24/70

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| <input type="checkbox"/> Approval | <input type="checkbox"/> Note & Return |
| <input type="checkbox"/> Signature | <input type="checkbox"/> Initial & Return |
| <input type="checkbox"/> Comment | <input type="checkbox"/> Return As Requested |
| <input type="checkbox"/> Contact Me | <input type="checkbox"/> Return For Approval |
| <input type="checkbox"/> Prepare Reply | <input type="checkbox"/> Necessary Action |
| <input type="checkbox"/> For Your File | <input checked="" type="checkbox"/> Your Information |

Remarks:

I. OVERVIEW

The proposed committee substitute for CSHB 600 am is a comprehensive bill of limited application instituting a system of presumptive sentencing. The measure, which applies only to individuals convicted of two or more specific violent felonies, addresses one of the major shortcomings in the criminal justice system: just and equitable punishment.

Under the scheme encompassed in the proposed bill, an individual committing a violent felony for the first time is sentenced in accordance with existing law. Provisions for suspended terms of imprisonment, suspended imposition of sentence and probation would remain as alternatives to incarceration. For those sentenced to confinement, parole would be available upon completion of one-third of the sentenced term.

Only when the offender commits a second or subsequent violent felony within a prescribed period would the substantive sentencing provisions become applicable. From the nature of the offense and the offender's prior conduct, the system presumes the offender to be a danger to society, and attendently should be isolated therefrom for a minimum period. Neither the alternatives to imprisonment nor parole would be available to such an offender.

Prior to being sentenced, the offender is permitted to evidence certain circumstances which would mitigate against the presumptive term. For each of the specific factors established, the presumptive term would be automatically reduced by 10%. Similarly, the state can establish extraneous

factors which would be viewed as aggravating the crime committed. Each aggravating factor would automatically enhance the minimum presumptive term by 10%.

Recognizing that justice entails more than a mechanical scheme, the proposed bill gives the sentencing judge the discretion to certify that clear and manifest injustice would result from imposition of the presumptive term. Sentencing of the offender would then become the responsibility of a three-judge sentencing panel.

The three-judge panel would be composed of three superior court judges, designated as members, and two superior court judges, designated as alternates. The alternates would sit as members in the event of disqualification or disability. The panel would be appointed by the chief justice and would serve under rules established by the supreme court.

The panel is charged to consider all the relevant material, including trial transcripts and matters adduced at sentencing. In its discretion, the panel may also hear oral testimony. A majority of the panel would then sentence the offender to any term available under the law. Effectively, the offender is no longer subject to the dictates of presumptive sentencing.

The proposed bill also addresses the system of awarding good time in correctional institutions. The present scheme is an amalgam of statutory and meritorious good time which, at best, is confusing to administrators and prisoners alike. The proposed approach allows a prisoner to earn a one day reduction in his period of confinement for each day of

good behavior served. Further, the inmate could only forfeit a maximum of thirty days accrued good time for any one subsequent infraction.

II. SECTIONAL ANALYSIS

Section 1, AS 11.05.150, is a technical amendment to existing law precluding imposition of less than the prescribed penalty for those offenses subject to a presumptive sentence. The proposed substitute differs from CSHB 600 am only in the deletion of the words "et seq.", on line 12.

Section 2, AS 12.55.035(a) mandates minimum presumptive terms of imprisonment for conviction of certain violent felonies.

Subsection (1) allows complete discretion in sentencing for first violent felony offenders. The proposed substitute makes technical changes to the same section in CSHB 600 am as an offender cannot be sentenced "in accordance with" those referenced sections.

Subsection (2) mandates presumptive terms of imprisonment for second offenders. The proposed substitute adds three offenses to the list of violent felony offenses originally contained in CSHB 600 am. Subsections (2)(n) and (2)(o) are substantive crimes and were included as aggravating factors in CSHB 600 am. Subsection (2)(P) adds the additional offenses of assault on a correctional officer. The Division of Corrections felt these crimes should be subject to presumptive terms as a deterrent to prisoner assaults.

Subsection (3) is the same as subsection (2) except that the presumptive terms apply to third or subsequent offenders and the terms have been increased accordingly. In addition to the new subsections (3)(n), 3(o) and 3(p), discussed above, the proposed substitute adds technical language for consistency with subsection (2).

Subsection (b)(1) provides a statute of limitations for consideration of prior felonies. A period of five years must elapse between the date of

discharge from the disposition of the immediately preceding offense, i.e., that date when the offender is no longer subject to any probationary or parole supervision, and the date of the commission of the offense for which sentencing is being rendered. If that five year period has not elapsed, prior violent felony convictions occurring before the "immediately preceding offense" would be considered to make the defendant subject to a presumptive term as a third or subsequent offender.

The proposed substitute differs substantially from CSHB 600 am in this subsection. The latter version allowed the five year period to run until the date of conviction for the immediate offense. This type of language would encourage defendants who faced presumptive sentencing to delay, only for the purpose of avoiding presumptive terms.

Subsection (b)(2) provides for consideration of prior violent felonies committed in other jurisdictions.

Subsection (b)(3) provides that multiple convictions arising out of the same transaction would only be considered as a simple prior conviction. This avoids the situation where a defendant is convicted of two separate offenses, e.g., robbery and shooting with intent to kill, which occurred simultaneously, and he would automatically be sentenced as a second offender.

Subsection (c) is further clarification of the mandate of presumptive sentencing. Probation and parole would not be available to those sentenced as second or subsequent offenders.

Subsection (d) allows for judicial discretion in the area of fines, where authorized, and in imposing other conditions beyond the presumptive term when provided by law.

Subsection (e) defines violent felony as those crimes enumerated in subsections (a)(2) and (a)(3).

Except as otherwise noted, subsections (b), (c), (d) and (e) are identical in both the proposed substitute and CSHB 600 am.

Section 12.55.036 is an addition to the proposed substitute, setting up the procedure for determining prior convictions. It is similar to the section approved by the House Judiciary Committee in CSHB 600, except that it provides for separate notice.

A defendant who is subject to a presumptive term as a repeat offender would receive notice that the state will present his prior record. If the defendant denies that he is subject to a presumptive term, the court would hold a hearing on the issue, without a jury. Denial of subsection to a presumptive term is restricted to the issues of whether the prior convictions are those of the offender and whether the five year period provided in section 35(b)(1) has elapsed.

The state must prove these two issues beyond a reasonable doubt.

Section 12.55.037 in the proposed substitute sets out the procedure for considerations and determination of factors in aggravation and mitigation. Although CSHB 600 am contained a similar mechanism, significant substantive changes have been made.

Subsection (a) of the proposed substitute provides for a mandatory decrease or increase in the presumptive term at a rate of 10% for each factor found in mitigation or aggravation. CSHB 600 am allows a permissive adjustment to the term of up to 50% for factors in aggravation or mitigation.

This subsection in the proposed substitute also contains language, consistent with section 35, indicating a sentencing court still retains the

discretion to impose up to the maximum term. CSHB 600 am limited the ability to impose more than the presumptive term, plus 50% in aggravation, to a three-judge court.

Subsection (b) sets out the factors in aggravation.

Subsection (b)(1) makes it a factor in aggravation when a victim sustains great bodily injury. This is similar to the aggravating factor in section 35(a)(1) of CSHB 600 am, except that the proposed substitute requires the factor to be in aggravation to the crime, rather than being an aggravated crime, i.e., the injury is more than a necessary element of the crime. Under CSHB 600 am certain crimes are automatically aggravated and this should have been dealt with by increasing the presumptive term in section 35.

Subsection (b)(2) makes it a factor in aggravation when the offender's actions were deliberately cruel to another person. This is similar to subsection (a)(3) in CSHB 600 am.

Subsection (b)(3) makes it a factor in aggravation to discharge a firearm during the course of the offense and is similar to subsection (a)(2) in CSHB 600 am.

Subsection (b)(4) makes it a factor in aggravation when the offender led a criminal enterprise of three or more persons. It, too, is similar to subsection (a)(6) of CSHB 600 am.

Subsection (b)(5) makes it a factor in aggravation when the victim was incapable of resistance due to age or physical or mental infirmities. This is a "take your victim as you find them" standard from tort law and is similar to subsection (a)(7) of CSHB 600 am.

Subsection (b) (6) makes it a factor in aggravation when during the commission of first degree arson (a dwelling), the dwelling was occupied and the defendant knew or should have known that it was occupied. It is similar to subsection (a) (5) in CSHB 600 am.

Subsection (c) sets out the factors in mitigation.

Subsection (c) (1) makes it a factor in mitigation when the victim of the crime either induced or facilitated its commission. This factor is new to the proposed substitute.

Subsection (c) (2) makes it a factor in mitigation when the criminal act was principally accomplished by another and the defendant's conduct manifested extreme caution or concern for the victim. This provision is similar to subsection (b) (4) in CSHB 600 am.

Subsection (c) (3) makes it a factor in mitigation when the defendant did not substantially contribute to the commission of the crime although he would be responsible as an accomplice. It is similar to subsection (b) (3) of CSHB 600 am.

Subsection (c) (4) makes it a factor in mitigation when the defendant acted under a serious provocation from the victim. This differs from subsection (b) (2) of CSHB 600 am in making it applicable only to those crimes where malice is not a necessary element. Serious provocation is a factor in crimes requiring malice which mitigates the substantive offense.

Subsection (c) (5) makes it a factor in mitigation when a youthful defendant is influenced to commit the offense by another, more mature than the defendant. This factor is new to the proposed substitute.

Subsection (c) (6) makes it a factor in mitigation when the conduct of an elderly defendant was a product of physical or mental infirmities resulting from his age. This factor is likewise new in the proposed substitute.

CSHB 600 am contained additional factors in mitigation which are substantive defenses to crime under the law. To bring them in as factors in mitigation would allow a defendant two chances to prove a substantive defense and could result in anomalous results.

Subsection (d) of the proposed substitute allows the sentencing judge discretion, when from the nature and circumstances of the case, clear and manifest injustice would result, to certify this fact to a three-judge panel for sentencing.

This mechanism is provided for in CSHB 600 am but the proposed substitute allows the sentencing judge more discretion in finding clear and manifest injustice rather than vague "extraordinary circumstances" and clear and manifest injustice.

Subsection (e) provides for establishment of factors in aggravation or mitigation by clear and convincing evidence, at the sentencing hearing.

Subsection (f) provides for the making of a record of factors in aggravation or mitigation.

Subsection (g) defines two phrases used in the aggravation and mitigation factor subsections.

Section 12.55.038 provides the mechanism for creation of the three-judge sentencing panel. The panel would be a permanent body, rather than the ad hoc panel as proposed in CSHB 600 am. The chief justice would appoint the members of the panel, and two alternates, from the superior court bench.

The panel would have jurisdiction to sentence any defendant certified to it by a sentencing court. The panel could impose any sentence provided by law notwithstanding the presumptive terms set out.

Section 3; Section 12.55.060 is a technical amendment necessitated by the repeal of 12.55.040., and was omitted from CSHB 600 am.

Section 4; Section 33.15.180, amends existing law by precluding parole for those offenders sentenced to presumptive terms.

Subsection (b) is similar to subsection (b) of CSHB 600 am except it adds the requirement of providing post-release services to those sentenced to presumptive terms.

Section 5; Section 33.20.010 provides for a simple computation of good time on a one for one basis. This is similar to the provision in CSHB 600 am, except it deletes the phrase "and is subject to discipline."

This latter deletion now allows for the withholding of good time when a prisoners conduct is not in accordance with the rules of the institution. Under the language previously used, a prisoner had to be disciplined, not only to take away good time, but also to withhold it. As the disciplinary process became more complex and burdensome, withholding of good time did not justify the time and expense involved. The underlying purpose of good time was then defeated.

Disciplinary hearings would still be required for the forfeiture of earned good time.

Subsection (b) substitutes the language "for anyone" for "a" as it was unclear whether a prisoner would be subject to loss of more than thirty days good time for the entire period of confinement.

Section 6 repeals provisions of existing law no longer deemed necessary and in conflict with sections of this bill.

Section 7 (a) makes presumptive sentencing applicable to crimes committed after the effective date of the bill. Prior convictions however, will be considered whenever committed.

Subsection (b) makes the no parole provision applicable to persons sentenced under this act, after its effective date.

Subsection (c) makes the computation of good time section applicable to all state prisoners, with no retroactive application.

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For an Act entitled: "An Act relating to presumptive sentencing for certain violent felonies."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 11.05.150 is amended to read:

Sec. 11.05.150. IMPOSING LESS THAN PRESCRIBED PENALTY. Except in a case of murder or rape, or a case of a violent felony for which presumptive sentencing is imposed in accordance with AS 12.55.035, the court may, upon conviction, when in its opinion the facts and circumstances make the minimum penalty provided in this title manifestly too severe, impose a lesser penalty, either of a fine or imprisonment or both. When less than the minimum penalty is imposed, the court shall set out the reasons for its action on the record of the case.

* Sec. 2. AS 12.55 is amended by adding new sections to read:

Sec. 12.55.035. SENTENCING FOR VIOLENT FELONIES. (a) Every person convicted of a violent felony shall be sentenced as follows:

(1) for the first violent felony conviction, the court may sentence the defendant to any term of imprisonment, or other condition or disability and under such conditions as provided for by law;

(2) for the second violent felony conviction, the court shall impose sentence pursuant to the presumptive terms set out in this paragraph, subject to adjustment for aggravating and mitigating factors provided in sec. 37 of this chapter,

(A) for first degree murder under AS 11.15.010 and AS 11.15.020, 15 years;

(B) for second degree murder under AS 11.15.030, 12

1 years;

2 (C) for manslaughter under AS 11.15.040, eight years;

3 (D) for forcible rape as defined in AS 11.15.120, eight
4 years;

5 (E) for mayhem under AS 11.15.140, 10 years;

6 (F) for shooting, stabbing or cutting with intent to
7 kill, wound or maim under AS 11.15.150, five years;

8 (G) for assault with intent to kill or commit rape or
9 robbery under AS 11.15.160, five years;

10 (H) for poisoning under AS 11.15.210, five years;

11 (I) for assault with a dangerous weapon under AS 11.15.-
12 220, three years;

13 (J) for robbery under AS 11.15.240, six years;

14 (K) for kidnapping under AS 11.15.260, eight years;

15 (L) for first degree arson under AS 11.20.010, five years;

16 (M) for burglary in a dwelling house under AS 11.20.080,
17 three years;

18 (N) for burglary in a dwelling house at nighttime under
19 AS 11.20.080, four years;

20 (O) for burglary in a dwelling house when occupied by
21 another person under AS 11.20.080, five years;

22 (P) for assault on a correctional officer under AS
23 11.30.140 and AS 11.30.160, two years;

24 (3) for the third or subsequent violent felony conviction,
25 the court shall sentence the defendant to the presumptive terms set out
26 in this paragraph, subject to adjustment for aggravating and mitigating
27 factors provided in sec. 37 of this chapter, for

28 (A) first degree murder under AS 11.15.010 and AS 11.15.-
29 020, 20 years;

(B) second degree murder under AS 11.15.030, 15 years;

- 1 (C) manslaughter under AS 11.15.040, 12 years;
2 (D) forcible rape as defined in AS 11.15.120, 10 years;
3 (E) mayhem under AS 11.15.140, 12 years;
4 (F) shooting, stabbing or cutting with intent to kill,
5 wound or maim under AS 11.15.150, seven years;
6 (G) assault with intent to kill or commit rape or robbery
7 under AS 11.15.160, eight years;
8 (H) poisoning under AS 11.15.210, seven years;
9 (I) assault with a dangerous weapon under AS 11.15.220,
10 five years;
11 (J) robbery under AS 11.15.240, eight years;
12 (K) kidnapping under AS 11.15.260, 12 years;
13 (L) first degree arson under AS 11.20.010, seven years;
14 (M) burglary in a dwelling house under AS 11.20.080,
15 five years;
16 (N) burglary in a dwelling house at nighttime
17 under AS 11.20.080, six years;
18 (O) burglary in a dwelling house when occupied by
19 another person under AS 11.20.080, seven years;
20 (P) assault on a correctional officer under AS 11.30.
21 140 and AS 11.30.160, three years.

22 (b) For purposes of this section,

23 (1) no prior convictions will be considered when a period of
24 five or more years has elapsed between the date of discharge from
25 disposition of the immediately preceding offense and the date of the
26 commission of the violent felony for which sentencing is being rendered;

27 (2) a conviction in another jurisdiction of an offense, the
28 elements of which are substantially identical with those of any of the
29 crimes included in this section, shall be considered a prior violent
felony conviction;

1 (3) two or more convictions arising out of the same trans-
2 action are considered a single conviction.

3 (c) For conviction of a second or subsequent violent felony
4 under (a)(2) or (3) of this section.

5 (1) imprisonment may not be suspended under sec. 80 of this
6 chapter and probation or parole may not be granted;

7 (2) imposition of sentence may not be suspended under sec.
8 85 of this chapter; and

9 (3) terms of imprisonment may not be reduced under AS
10 11.05.150.

11 (d) Nothing in this section shall limit the discretion of the
12 sentencing judge in any manner except as specifically provided.

13 (e) In this section "violent felony" means the crimes listed in
14 (a)(2) and (3) of this section.

15 Sec. 12.55.036. PROCEDURE FOR DETERMINING PRIOR CONVICTIONS.

16 (a) If it appears that a defendant has previously been convicted of a
17 violent felony and is subject to sentencing as a second or subsequent
18 offender under sec. 35 of this chapter, the district attorney shall
19 file a certified copy of the record of prior convictions with the
20 court and serve such copy or copies upon the defendant or his counsel
before sentencing.

21 (b) If the defendant denies the truth of the certified copy of
22 the record of prior convictions, the defendant shall file with the
23 court and serve on the district attorney notice of denial within five
24 days prior to the date set for sentencing. The court shall hold a
25 hearing, without a jury, on the matter of prior convictions before
26 sentencing. At the hearing, the only issues before the court are
27 whether the record of prior convictions is that of the defendant and
28 whether the conviction occurred within the period specified in sec.
29 35(b)(1) of this chapter. The burden of proof is on the state to

1 establish beyond a reasonable doubt the fact of prior convictions.

2 Sec. 12.55.037. FACTORS IN AGGRAVATION AND MITIGATION. (a)

3 When a defendant has been found to have previously been convicted of
4 a violent felony and is subject to sentencing as a second or subsequent
5 offender under sec. 35 of this chapter (1) the court shall increase
6 the minimum presumptive sentence to which the defendant is subject by
7 10 per cent of the applicable term for each factor in aggravation
8 found by the court, or (2) the court shall decrease the minimum
9 presumptive sentence to which the defendant is subject by 10 per cent
10 of the applicable term for each factor in mitigation found by the
11 court. Nothing in this section shall limit the authority of the court
12 to impose any sentence in excess of that provided for in this ^{SECTION} up to
13 the maximum term provided by law.

14 (b) The defendant's conduct during the commission of the crime
15 for which sentencing is being rendered contained a factor in aggravation
16 when

17 (1) the victim or victims of the crime sustained great
18 bodily injury as a direct result of the defendant's conduct and the
19 injury is more than a necessary element of the offense; or

20 (2) the defendant's actions were deliberately cruel to
21 another person, beyond those which are inherent in the offense alone;
22 or

23 (3) the defendant discharged a firearm in the course of the
24 offense, either with intent to inflict injury or under circumstances
25 manifesting a reckless disregard for the lives or safety of others; or

26 (4) the defendant led a criminal enterprise consisting of
27 three or more persons who participated in the crime; or

28 (5) the victim or victims of the crime were incapable of
29 resistance due to age or physical or mental infirmity; or

(6) for a conviction for first degree arson under AS 11.20.010

1 the defendant knew or should have known that the dwelling was occupied
2 at the time the arson was committed.

3 (c) The defendant's conduct during the commission of the crime
4 for which sentencing is being rendered contained a factor in mitigation
5 when

6 (1) the victim of the defendant's criminal conduct induced
7 or facilitated its commission; or

8 (2) the criminal plan or act was principally accomplished by
9 another and the defendant's conduct manifested extreme caution or concern
0 for the safety or well-being of the victim; or

1 (3) the defendant, although responsible under the law as
2 an accomplice, did not substantially contribute to the commission of
3 the crime; or

4 (4) except in the case of a crime where malice is a necessary
5 element or in the case of manslaughter under AS 11.15.040, the defendant
6 acted under a serious provocation from the victim; or

7 (5) the conduct of a youthful defendant was substantially
8 influenced in the commission of the offense by the acts of another more
9 mature in age than the defendant; or

0 (6) the conduct of an aged defendant was substantially
1 a product of physical or mental infirmities resulting from his age.

2 (d) When in the discretion of the court clear and manifest injustice
3 to the defendant would result from the imposition of a minimum pre-
4 sumptive term, the court shall make written findings in the matter and
5 cause these findings to be certified to a three-judge ^{PANEL} for
6 sentencing under sec. 38 of this chapter.

7 (e) Factors in aggravation or mitigation shall be established
8 by clear and convincing evidence presented to the court at the time of,
9 but immediately preceding, imposition of sentence.

0 (f) In any case where the court increases or decreases the pre-

1 sumptive sentence under this section, the sentencing judge shall make
2 specific written findings with respect to any applicable aggravating or
3 mitigating factors.

4 (g) For purposes of this section

5 (1) "great bodily injury" means bodily injury which creates
6 a substantial risk of death or which causes serious permanent disfigure-
7 ment or protracted loss or impairment of the function of any body
8 member or organ;

9 (2) "serious provocation" means conduct sufficient to
10 excite an intense passion in a reasonable person in the defendant's
11 position, but does not include mere insulting words or gestures or
12 mere hearsay reports of provocative conduct by the victim or intended
13 victim.

14 Sec. 12.55.038. THREE JUDGE SENTENCING PANEL. (a) There is
15 created within the superior court a panel of five superior court
16 judges to be appointed by the chief justice in accordance with such
17 rules and for such terms as may be prescribed by the supreme court.
18 Three members of the panel shall be designated as members. The
19 remaining two superior court judges shall be designated as first and
20 second alternates to sit as members in the event of disqualification
21 or disability in accordance with such rules as may be prescribed by
22 the superme court.

23 (b) The three-judge panel shall sentence a defendant when a
24 sentencing court certifies under sec. 37(d) of this chapter that a
25 clear and manifest injustice would result from the imposition of a
26 minimum presumptive sentence.

27 (c) Sentencing shall be imposed only by a majority of the three-
28 judge panel after consideration of all pertinent files, records and
29 transcripts, including the findings and conclusions of the judge who
originally heard the matter. The three-judge *PANEL* may hear oral

1 testimony to supplement the record before it.

2 (d) The three-judge *PANEL* may in the interest of justice sentence
3 the defendant under any law applicable to the offense in question, not-
4 withstanding the presumptive penalties provided in this chapter.

5 * Sec. 3. AS 12.55.060 is amended to read:

6 Sec. 12.55.060. PROCEDURE UPON DISCOVERY OF PRIOR CONVICTIONS.

7 (a) Before conviction or while sentence is effective, if it appears
8 that a person convicted of a crime in this state has previously been
9 convicted and has not been charged under sec. [SECS. 40 AND] 50 of
10 this chapter, the district attorney may file an information in the
11 superior court accusing that person of the previous conviction or
12 convictions. The court shall cause that person, whether confined in
13 prison or otherwise, to be brought before it and shall inform him of
14 the allegations contained in the information and of his right to be
15 tried as to the truth of the allegations, and shall ^{INQUIRE OF [REQUIRE]} the
16 accused person ^[to say] whether or not he is the same person as charged
17 in the information. If the accused acknowledges or confesses in open
18 court, after being cautioned as to his rights, that he was previously
19 convicted of the crimes charged, or any of them, the court shall
20 sentence him as provided in sec. [SECS. 40 OR] 50 of this chapter, and
21 shall vacate the previous sentence, deducting from the new sentence
22 all time actually served on the sentence so vacated. If the accused
23 says he is not the same person, or refuses to answer, or remains
24 silent, the court shall examine the charge of previous convictions,
25 which shall be the only matter in issue.

26 (b) If it appears from the examination that there is sufficient
27 cause to believe the accused has been previously convicted as charged
28 in the information, the accused shall be committed to await the action
29 of the grand jury, which shall consider only the fact of previous
convictions of the accused. If the grand jury indicts the accused and

1 he says he is not the same person, or refuses to answer, or remains
2 silent, he shall be tried by jury in the superior court, and the only
3 issue before the jury shall be whether the accused was previously
4 convicted as charged. If the jury finds that the accused is the same
5 person previously convicted as charged, or if, after being cautioned
6 as to his rights, the accused acknowledges or confesses in open court
7 that he was previously convicted as charged, the court shall sentence
8 him as provided in sec. [SECS. 40 OR] 50 of this chapter, and shall
9 vacate the previous sentence.

10 (c) The accused may be admitted to bail either while awaiting
11 examination, action of the grand jury, or trial.

12 * Sec. 4. AS 33.15.180 is amended to read:

13 Sec. 33.15.180. PERSONS ELIGIBLE FOR PAROLE. (a). A state
14 prisoner other than a minor under age 18 [JUVENILE DELINQUENT], wherever
15 confined and serving a definite term or over 180 days or a term the
16 minimum of which is at least 181 days, and who is not confined as a
17 second or subsequent offender under AS 12.55.035, whose record shows
18 that he has observed the rules of the institution in which he is
19 confined, may, in the discretion of the board, be released on parole,
20 subject to the limitation prescribed in secs. 80 and 230(a)(1) of this
21 chapter.

22 (b) A state prisoner confined as a second or subsequent offender
23 under AS 12.55.035 may not be considered for parole but the state shall
24 make available to those offenders, upon release, such services as are
25 offered to parolees.

26 * Sec. 5. AS 33.20.010 is repealed and re-enacted to read:

27 Sec. 33.20.010. COMPUTATION OF GOOD TIME. (a) Each prisoner
28 convicted of an offense against the state and sentenced to confinement
29 in a penal or correctional institution, whose record of conduct shows
that he has faithfully observed the rules of that institution is

1 entitled to a deduction from the term of his sentence of one day for
2 every two days of good conduct served.

3 (b) Good time earned in excess of 30 days is not subject to
4 forfeiture for any one subsequent infraction, misconduct or crime.

5 * Sec. 6. AS 12.55.040, 33.20.020 and 33.20.040 are repealed.

6 * Sec. 7. APPLICABILITY. (a) AS 12.55.035, as enacted in sec. 2 of
7 this Act, applies to sentencing upon convictions only for violent felonies
8 committed after the effective date of this Act. When sentencing for those
9 convictions, the court shall consider prior convictions for violent felonies
10 whether committed before or after the effective date of this Act.

11 (b) AS 33.15.180, as amended in sec. 4 of this Act, applies to
12 persons imprisoned for violent felonies committed after the effective date
13 of this Act.

14 (c) AS 33.20.010, as re-enacted in sec. 5 of this Act, applies
15 to all persons imprisoned in state institutions as of the effective date of
16 this Act, ~~without retroactive application however.~~ *but is not retroactive in application*

17 * Sec. 8. INTENT. (a) Section 2 of this Act is intended to strengthen
18 present imprisonment provisions rather than lower minimum terms required by
19 statute, especially those minimum terms provided in AS 11.15.010, 11.15.020
20 and 11.15.030. Under sec. 2 of this Act, a second or subsequent offender
21 does not have available to him provisions for reduction or suspension of
22 sentence.

23 (b) The Division of Corrections should examine existing rehabili-
24 tative programs and alternatives thereto to determine their applicability to
25 prisoners sentenced under this Act.

26 (c) The Criminal ^{Law} Code Revision ^{Subcommission} Commission should study ^(and report to the Legislature) the
27 ^(feasibility and) ^(adoption of a system of) effects of presumptive sentencing for all offenses.

P R O P O S E D

3/28
Milton

Original Sponsor: Rules Committee by
Request of the Governor

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 600

3 IN THE LEGISLATURE FOR THE STATE OF ALASKA

4 NINTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to determinate sentencing."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 * Section 1. AS 11.05.150 is amended to read:

9 Sec. 11.05.150. IMPOSING LESS THAN PRESCRIBED PENALTY. Except
10 in a case of murder or rape, or a case of a violent felony for which
11 sentencing is imposed in accordance with AS 12.55.035(a)(2) or (3),
12 the court may, upon conviction, when in its opinion the facts and
13 circumstances make the minimum penalty provided in this title manifestly
14 too severe, impose a lesser penalty, either of a fine or imprisonment
15 or both. When less than the minimum penalty is imposed, the court
16 shall set out the reasons for its action on the record in the case.

17 * Sec. 2. AS 12.55 is amended by adding new sections to read:

18 Sec. 12.55.035. SENTENCING FOR VIOLENT FELONIES. (a) Every
19 person convicted of a violent felony shall be sentenced as follows:

20 (1) if the conviction for which sentencing is being rendered
21 is a violent felony and is the defendant's first violent felony convic-
22 tion, the court may sentence the defendant to a term of imprisonment,
23 within the limits provided by law, or in accordance with AS 33.15.230
24 or secs. 80 or 85 of this chapter;

25 (2) if the conviction for which sentencing is being rendered
26 is a violent felony and is the defendant's second violent felony
27 conviction, the court shall sentence the defendant to a term of imprison-
28 ment of not less than one-half the maximum term authorized by law;

29 (3) if the conviction for which sentencing is being rendered

1 is a violent felony and is the defendant's third or subsequent violent
2 felony conviction, the court shall sentence the defendant to the
3 maximum term authorized by law.

4 (b) For the purposes of this section, no prior convictions will
5 be considered when a period of five or more years has elapsed between
6 the date of discharge from disposition of the immediately preceding
7 offense and the date of the commission of the violent felony for which
8 sentencing is being rendered.

9 (c) For the purposes of this section:

10 (1) a conviction in another jurisdiction which would amount
11 to a violent felony conviction under the laws of this state is con-
12 sidered a prior violent felony conviction;

13 (2) a conviction which authorizes a maximum term of imprison-
14 ment for life is considered as having a term of imprisonment of 99
15 years;

16 (3) "violent felony" means a violent crime against another
17 person or a violent crime which tends to endanger a person; "violent
18 felony" means only the following crimes:

19 (A) AS 11.15.010 -- first degree murder;

20 (B) AS 11.15.020 -- obstructing or injuring railroad
21 or aircraft;

22 (C) AS 11.15.030 -- second degree murder;

23 (D) AS 11.15.040 -- manslaughter;

24 (E) AS 11.15.080 -- negligent homicide;

25 (F) AS 11.15.120 -- rape;

26 (G) AS 11.15.140 -- mayhem;

27 (H) AS 11.15.150 -- shooting, stabbing or cutting with
28 intent to kill, wound or maim;

29 (I) AS 11.15.160 -- assault with intent to kill or

1 commit rape or robbery

2 (J) AS 11.15.190 -- assault while armed;

3 (K) AS 11.15.210 -- poisoning;

4 (L) AS 11.15.220 -- assault with a dangerous weapon;

5 (M) AS 11.15.240 -- robbery;

6 (N) AS 11.15.260 -- kidnapping;

7 (O) AS 11.20.010 -- first degree arson;

8 (P) AS 11.20.080 -- burglary in a dwelling house;

9 (Q) AS 11.30.140 -- assault on officer in penitentiary;

10 (R) AS 11.30.160 -- assault on officer in jail;

11 (4) two or more convictions arising out of the same incident
12 are considered a single conviction.

13 (d) For terms of imprisonment required under (a) (2) or (3) of this
14 section

15 (1) imprisonment may not be suspended under AS 12.55.080
16 and probation or parole may not be granted;

17 (2) imposition of sentence may not be suspended under AS
18 12.55.085;

19 (3) terms of imprisonment may not be reduced under AS
20 11.05.150.

21 (e) Nothing in this section limits the authority of the court to
22 impose fines for offenses, where authorized, in addition to the required
23 term of imprisonment.

24 Sec. 12.55.037. PROCEDURE FOR DETERMINING PRIOR CONVICTIONS.

25 (a) If it appears that a defendant has previously been convicted of a
26 violent felony and is subject to sentencing as a second or subsequent
27 offender under sec. 35 of this chapter, the district attorney shall
28 file a certified copy of the record of prior convictions with the
29 court before sentencing.

1 (b) If the defendant denies the truth of the certified copy of
2 the record of prior convictions, the court shall hold a hearing,
3 without a jury, on the matter before sentencing. At the hearing, the
4 only issues before the court are whether the record of prior convictions
5 is that of the defendant and whether the conviction occurred within
6 the period specified in sec. 35(b) of this chapter. The burden of
7 proof is on the state to establish, (by a preponderance of the evidence)
8 the fact of prior convictions.

9 * Sec. 3. AS 12.55.050 is amended to read:

10 Sec. 12.55.050. INCREASED PUNISHMENT FOR PERSONS CONVICTED
11 OF MORE THAN ONE FELONY. Except for a person sentenced for
12 a violent felony under sec. 35(a)(2) or (3) of this chapter,
13 a [A] person convicted of a felony in this state who has been
14 previously convicted of a felony in this state or elsewhere, if the
15 same crime elsewhere would constitute a felony under Alaska law, is
16 punishable as follows:

17 (1) If the person is convicted of a felony which would
18 be punishable by imprisonment for a term less than his natural life,
19 and has previously been convicted of one felony, then he is punishable
20 by imprisonment for not less than the minimum nor more than twice
21 the longest term prescribed for the felony of which that person is
22 convicted.

23 (2) If the person has previously been convicted of two
24 felonies, then he is punishable by imprisonment for not less than
25 the minimum nor more than twice the longest term prescribed herein
26 for a second conviction of felony.

27 (3) If the person has previously been convicted of three
28 or more felonies, then on the fourth conviction he shall be adjudged
29 an habitual criminal, and is punishable by imprisonment for not less

1 than 20 years nor more than the remainder of his natural life.

2 * Sec. 4. AS 12.55.060 is amended to read:

3 Sec. 12.55.060. PROCEDURE UPON DISCOVERY OF PRIOR CONVICTIONS.

4 (a) Before conviction or while sentence is effective, if it appears
5 that a person convicted of a crime in this state has previously been
6 convicted and has not been charged under sec. [SECS. 40 AND] 50 of
7 this chapter, the district attorney may file an information in the
8 superior court accusing that person of the previous conviction or
9 convictions. The court shall cause that person, whether confined
10 in prison or otherwise, to be brought before it and shall inform him
11 of the allegations contained in the information and of his right to
12 be tried as to the truth of the allegations, and shall require the
13 accused person to say whether or not he is the same person as charged
14 in the information. If the accused acknowledges or confesses in open
15 court, after being cautioned as to his rights, that he was previously
16 convicted of the crimes charged, or any of them, the court shall sentence
17 him as provided in sec. [SECS. 40 or 50 of this chapter, and shall
18 vacate the previous sentence, deducting from the new sentence all
19 time actually served on the sentence so vacated. If the accused says
20 he is not the same person, or refuses to answer, or remains silent,
21 the court shall examine the charge of previous convictions, which
22 shall be the only matter in issue.

23 (b) If it appears from the examination that there is sufficient
24 cause to believe the accused has been previously convicted as charged
25 in the information, the accused shall be committed to await the action
26 of the grand jury, which shall consider only the fact of previous
27 convictions of the accused. If the grand jury indicts the accused
28 and he says he is not the same person, or refuses to answer, or remains
29 silent, he shall be tried by jury in the superior court, and the only

1 issue before the jury shall be whether the accused was previously
2 convicted as charged. If the jury find that the accused is the same
3 person previously convicted as charged, or if, after being cautioned
4 as to his rights, the accused acknowledges or confesses in open court
5 that he was previously convicted as charged, the court shall sentence
6 him as provided in sec. [SECS. 40 OR] 50 of this chapter, and shall
7 vacate the previous sentence, deducting from the new sentence all
8 time served on the vacated sentence.

9 (c) The accused may be admitted to bail either while awaiting
10 examination, action of the grand jury, or trial.

11 * Sec. 5. AS 33.15.180 is amended to read:

12 Sec. 33.15.180. PERSONS ELIGIBLE FOR PAROLE. (a) A state
13 prisoner other than a juvenile delinquent, wherever confined and
14 serving a definite term of over 180 days or a term the minimum of
15 which is at least 181 days, and who is not confined as a second or sub-
16 sequent offender under AS 12.55.035, whose record shows that he has
17 observed the rules of the institution in which he is confined, may, in
18 the discretion of the board, be released on parole, subject to the
19 limitation prescribed in secs. 80 and 230(a)(1) of this chapter.

20 (b) A state prisoner confined as a second or subsequent offender
21 under AS 12.55.035 may not be considered for parole.

22 * Sec. 6. AS 33.20.010 is repealed and re-enacted to read:

23 Sec. 33.20.010. COMPUTATION OF GOOD TIME. Each prisoner convicted
24 of an offense against the state and confined in a penal or correctional
25 institution, whose record of conduct shows that he has faithfully ob-
26 served the rules of that institution and has not been subject to
27 punishment, is entitled to a deduction from the term of his sentence
28 of one day for every two days of good conduct served.

29 * Sec. 7. AS 12.55.040, 33.20.020 and 33.20.040 are repealed.

1 * Sec. 8. APPLICABILITY. (a) AS 12.55.035, as enacted in sec. 2 of
2 this Act, applies to sentencing upon convictions only for violent felonies
3 committed after the effective date of this Act. When sentencing for those
4 convictions, the court shall consider prior convictions for violent felonies
5 whether committed before or after the effective date of this Act.

6 (b) AS 33.15.180, as amended in sec. 5 of this Act, applies to
7 persons imprisoned for violent felonies committed after the effective date
8 of this Act.

9 (c) AS 33.20.010, as re-enacted in sec. 6 of this Act, applies
10 to all persons imprisoned in state institutions as of the effective date of
11 this Act, without retroactive application however.

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STATE OF ALASKA

DEPARTMENT OF LAW CRIMINAL DIVISION

*file with
Committee*

JAY S. HAMMOND, GOVERNOR

Pouch KC-Court Bldg.
Juneau, Alaska 99811

March 2, 1976

The Honorable Terry Gardiner,
Chairman
House Judiciary Committee
Pouch U
Juneau, Alaska 99811

Re: Sentencing Legislation

Dear Representative Gardiner:

At the recent hearings, Representative Parr and yourself raised two points regarding the Governor's determinate sentencing bill. Both points were oversights on my part and if deemed appropriate, the committee should consider the following amendments to rectify the problem.

(1) Representative Parr's point on granting parole under Subsection 33.15.180(b) -- Subsection 12.55.050(d)(1) should be amended to read as follows:

"(1) imprisonment may not be suspended under AS 12.55.080 and probation or parole may not be granted."

(2) Your point regarding what is half of a life sentence, defining it statutorily as 99 years seems appropriate. Even if the offender gets half and under the most liberal administration of good time (one for one) the offender would serve 25 years. An amendment should read:

Subsection 12.55.050(c)(3) a conviction which authorizes a maximum term of imprisonment of life shall be considered as having a term of imprisonment of 99 years.

The Honorable Terry Gardiner
Page 2

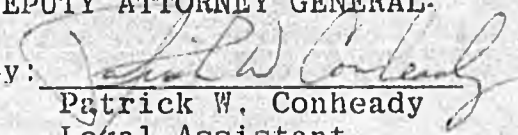
If you have any further questions, please feel free to contact
me.

Very truly yours,

AVRUM M. GROSS
ATTORNEY GENERAL

DANIEL W. HICKEY
DEPUTY ATTORNEY GENERAL.

By:


Patrick W. Conheady
Legal Assistant

PWC:gm



Give copies to
Members for HB600

LAY MEMBERS

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LEW M. WILLIAMS, JR.
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MICHAEL A. STEPOVICH
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JOSEPH L. YOUNG

CHAIRMAN, EX OFFICIO

ROBERT BOOCHEVER
CHIEF JUSTICE
SUPREME COURT

Alaska Judicial Council

303 K STREET
ANCHORAGE, ALASKA
99501

EXECUTIVE DIRECTOR
MICHAEL L. RUBINSTEIN

March 25, 1976

Hon. Terry Gardiner
House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Representative Gardiner:

On March 15, 1976 the Alaska Judicial Council met in Anchorage and unanimously resolved to express its strong opposition to any and all proposed criminal sentencing legislation based on mandatory minimum or so-called "flat-time" formulae. Legislation which purports to bind the conscience of the judge by compelling him to hand down a pre-ordained term of imprisonment to broad classes of persons without any regard either to the particular facts and circumstances surrounding the commission of the crime, or to the social and personal history of the defendant is productive of more injustice than the problem it is intended to remedy.

No judge should be placed in the position of being required by the law to blind himself to the actual facts and circumstances of the cases he is called upon to decide.

The mandatory minimum and "flat-time" bills now before the Legislature use the existing criminal laws as their foundation. To superimpose entirely new sentencing provisions upon our code--a code which was never intended by its draftsman to bear such a burden--will open the door to many unforeseen and anomalous results, some of which are likely to produce unintended injustice in individual cases.

The traditional common law classification of crimes into "felonies" and "misdemeanors", and the typically broad subclasses of felonies, such as "robbery", "rape", "burglary", etc. are quite general and encompass within each class many varying levels of harmfulness and culpability. Under the present system the totally unguided discretion of the sentencing judge is relied upon to take these differences

Hon. Terry Gardiner
Mar 25, 1976
Page Two

into account in each case. Many have considered that the exercise of this substantially unguided discretion by judges of widely differing personalities and predispositions has resulted in undue disparity and inequity. However, it may be well to point out that all the blame should not be placed on the judiciary for the disparity which exists. A distinguished federal jurist, Judge Marvin Frankel of the United States District Court for the Eastern District of New York commented, in his book Criminal Sentences: Law Without Order (1972):

[O]ur legislators have not done the most rudimentary job of enacting meaningful sentencing 'laws' when they have neglected even to sketch democratically determined statements of basic purpose. Left at large, wandering in deserts of unchained discretion, the judges suit their own value systems insofar as they think about the problem at all.

If we are not to rely upon the totally unguided discretionary decisions of diverse individual judges, it becomes encumbant upon the Legislature itself to consider each offense and to provide for a system of carefully graded levels of culpability based upon the actual social harm caused by the defendant's actions, the extent of his evil motivation if any, and such aggravating or mitigating circumstances as may have surrounded the commission of the act. Even if we totally put to one side any and all considerations of the defendant's age, race, sex, and socio-economic background, a just sentencing law must take into account, for example, that not all assaults with dangerous weapons are of equal culpability. Some produce serious harm and some do not. Some are the result of extreme provocation and others are totally unprovoked. Some forgers are compulsive alcoholics, and others are professional criminals. The broad categories of the existing law are simply insufficiently precise for mandatory sentencing.

Having prepared a comprehensive analysis and review of sentencing practices in Alaska, the Judicial

*

Sentencing in Alaska: A Description of the Process and Summary of Statistical Data for 1973.

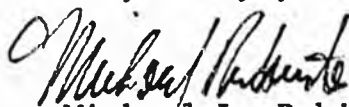
Hon. Terry Gardiner
March 25, 1976
Page Three

Council is well aware of the need for reform. At this time, the Judicial Council has under consideration a proposal for basic structural changes in the sentencing process; it will report to the Legislature at the conclusion of the study. This sentencing plan, dubbed "presumptive sentencing", was recently formulated by a special task force of The Twentieth Century Fund in New York City. The task force study panel was chaired by former California Governor Edmund G. Brown, Sr. and was composed of distinguished jurists, law professors, a police chief, and other involved with the criminal justice process. Although the proposal is complex and sophisticated, complexity may well be required if we are justly to address a problem which is probably not amenable to simplistic solutions.

The enclosed New York Times article briefly describes the presumptive sentencing system. The details of this proposal, in the form of advance page proofs are now being reviewed by the Judicial Council. The final published report will not be released by the McGraw-Hill Book Company until April 13. Pursuant to our agreement with The Twentieth Century Fund, we may make available to you an advance copy of the page proofs, if you wish one.

In summary, the Judicial Council strongly urges you to defer any final legislative action in the area of sentence reform until such time as it completes its report on presumptive sentencing proposals and until adequate study of alternatives for structural reform can be explored.

Very truly yours,



Michael L. Rubinstein

cc: Judicial Council Members
Hon. Avrum Gross

Alaska State Legislature

SENATOR
ROBERT H. ZIEGLER, SR.
P. O. BOX 979
KETCHIKAN, ALASKA 99801

POUCH V
JUNEAU, ALASKA 99811



Senate

file
bb600
CHAIRMAN
JUDICIARY
—
MEMBER
COMMERCE
LEGISLATIVE COUNCIL

April 26, 1976

Senator Chancy Croft
President of the Senate
Alaska State Senate
Juneau, Alaska

Dear Mr. President:

On April 23, 1976, you asked the Senate Judiciary committee to look into the sentencing brouhaha which had occurred in the case of Cleary v. State of Alaska (Supreme Court Opinion No. 1257, filed April 12, 1976; File No. 2623). I immediately communicated with Mr. Chief Justice Robert Boochever who has very cooperatively furnished the committee with the following documents:

1. The subject opinion;
2. The appellant's brief on appeal;
3. Memorandum of appellee's statement of the case;
4. Transcript of the sentencing proceedings;
5. Miscellaneous criminal complaints, excerpts of court proceedings, orders, etc.;
6. Order of judgment and commitment; and
7. Probation officer's report.

Copies of any or all these documents can be made available to any legislator requesting the same from me.

The investigatory guidelines are not delineated to any great degree. I am attaching a copy of the Chief Justice's letter of April 23, 1976 in which he refers to Canon 3A(6) of the Code of Judicial Conduct in effect in the State of Alaska. This canon prohibits judges from commenting publicly about a pending or impending proceeding in any court except that judges may make public statements in the course of their official duties and may explain for public information the procedures of a court. It therefore would seem improper for the Senate and House Judiciary committees to proceed with any type of hearing in the Cleary case at this time because the resentencing of the defendant is still pending.

It would therefore be our recommendation that we refrain from taking any action until the rehearing proceedings have been held.

Senator Chancy Croft
April 26, 1976
Page Two

However, I don't think we would be precluded from holding a hearing on sentencing procedures, for whatever that might be worth, as long as we did not delve into the facts in the instant case.

Very truly yours,

Robert H. Ziegler, Sr.
Chairman
Senate Judiciary Committee

enc.

cc - Chief Justice Robert Boochever
~~Representative Terry Gardiner~~



Supreme Court

State of Alaska

CHIEF JUSTICE
ROBERT BOOCHEVER

JUSTICES
JAY A. RABINOWITZ
ROGER G. CONNOR
ROBERT C. ERWIN
EDMOND W. BURKE

April 23, 1976

POUCH U
STATE COURT AND OFFICE BUILDING
JUNEAU, ALASKA
99811
907-465-3410

The Hon. Robert H. Ziegler, Sr.
Chairman, Senate Judiciary Committee
Pouch V, Capitol Building
Juneau, Alaska 99811

Dear Senator Ziegler:

You inquired about the case of Cleary v. State. As per your request, I am enclosing a copy of the majority opinion together with the dissent. In addition, I am enclosing a copy of appellant's and appellee's briefs, the transcript of proceedings and the record on appeal.

If we can be of any further assistance to your committee, do not hesitate to call upon us. In that regard, however, I wish to call to your attention the fact that we are limited in the extent to which we may comment upon this case since a petition for rehearing has been filed, and even without it, the opinion of the court remanded the matter for resentencing. Canon 3A(6) of the Code of Judicial Conduct in effect in the State of Alaska specifies:

A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

The Hon. Robert H. Ziegler, Sr.
April 23, 1976
Page 2

I also enclose a copy of an article entitled "Five Years of Sentence Review in Alaska" by Justice Erwin which appeared in 5 U.C.L.A.-Alaska Law Review as it contains interesting background material pertaining to cases in which there were appeals from sentences during the five-year period after the sentence appeal act became effective on January 1, 1970.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Robert Boochever".

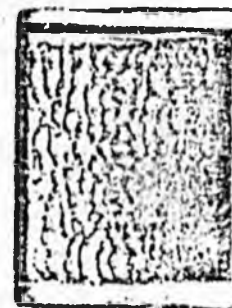
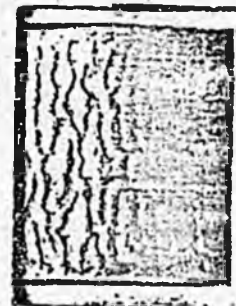
Robert Boochever
Chief Justice

cc: Justices
Arthur H. Snowden, II

Chapter 8

Courts and Corrections

MOST of the persons arrested for a serious crime have been arrested before. Indeed, one recent study estimates that over 87 per cent of those arrested will have been previously arrested—or, put a bit differently, the probability of being re-arrested is 0.87 chances in one, or close to a certainty.¹ The research by Marvin Wolfgang and his colleagues on ten thousand Philadelphia boys born in 1945 who lived in that city until they were at least eighteen years of age showed that, once a juvenile had been arrested three times, the chances of his being rearrested were over 70 per cent.² In their inquiry into New York City subway crimes, Jan M. Chaiken and his group at the Rand Institute conclude that, though there are hundreds of robberies on the subways each year, there could not be in the entire city of eight million more than *ten* persons who commit such robberies regularly and who have not been arrested at least once.³



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...the shame and burdens of arrest, even if no penalty follows, are a powerful deterrent. But the rearrest rates suggest that for others the mere fact of arrest is little or no deterrent. For such persons, who may commit the majority of all serious predatory crimes, the police are but a processing agency, inducting these arrestees once again into the familiar ritual of booking, making bail, arraignment, and pleading. Or as many police officers like to put it: "We operate the revolving door."

As crime became a popular and eventually a political issue, more attention was devoted to the police than to any other part of the criminal justice system. The frequency with which perpetrators of predatory crime are rearrested, however, should have alerted us to the possibility that, though the police need improvement, they are not the crucial agency in the system. Of far greater importance are those agencies that handle persons once arrested and that determine whether, how soon, and under what conditions they will be returned to the communities from which they came. These agencies are the criminal courts and the correctional institutions.

*Cts - role is
guilt or innocence
Adversary system
But 94% plead*

In theory, the function of the courts is to determine the guilt or innocence of the accused. In fact, it is to decide what to do with persons whose guilt or innocence is not at issue. Our judiciary is organized around the assumption that its theoretical function is its actual one—hence the emphasis on the adversary system, the rules of evidence, and the procedures and standards for testimony. In some jurisdictions, especially small ones with relatively few cases, the courts indeed act as theory would have it, and in all jurisdictions, even the big and busy ones, the courts will act that way some of the time. But most of the time, for most of the cases in our busier courts, the important decision concerns the sentence, not conviction or acquittal. In Manhattan, for example, only 3 per cent of the 13,555 persons indicted between July 1963 and July 1966 were convicted after a trial; almost 80 per cent pleaded guilty.⁴ Even in one middle-sized, nonmetropolitan county in Wisconsin, 94 per cent of the

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convictions were the result of a plea of guilty, and it made little difference whether the offender had a lawyer or not.⁵

Everyone involved in the criminal justice system knows this, and increasingly the public at large is aware of it—or at least is aware that Perry Mason-style courtroom drama is found only on television, not in courtrooms. But despite this knowledge, very little has been done to equip the courts to perform their essential function well. Indeed, there has been very little serious public discussion of what we even mean by a “good” or “bad” sentence. And only by deciding that question can we begin to think seriously about what other reforms are necessary in the criminal courts.

For example, one way of defining a good sentence is to say it is that disposition that minimizes the chance of a given offender's repeating his crime. Under that definition, we would not only expect but want disparities in sentences—one armed robber getting five years in prison and another getting probation—provided only that we had good reason to believe that each sentence was appropriate to each criminal's prospects for rehabilitation. On the other hand, if we believe that a good sentence is one which deters others from committing a crime, then we might wish to impose the same penalty on persons with very different prospects for rehabilitation, and to make that penalty sufficiently severe to discourage potential criminals, especially those who believe they might be regarded as good bets for rehabilitative—which is to say, lenient—treatment.

A crucial question in deciding what is a good sentence, then, is what effect any given sentence will have on actual or potential offenders. It is not the only crucial question: We also want, or ought to want, sentences to give appropriate expression to our moral concern over the nature of the offense and to conform to our standards of humane conduct. But these latter standards, though inevitably matters of controversy, are ones which, even if met, would still leave a substantial zone of discretion to the judge.

Persons will differ over how they would resolve these issues,

What is
a
good sentence



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but whatever definition of a good sentence one adopts, it is unlikely that it will be descriptive of what is in fact happening in our criminal courts today. It is not too much to say that many sentences being administered are, in the strict sense, irrational—that is, there is no coherent goal toward which they are directed.

For example, Martin A. Levin of Brandeis University found in a study of the Pittsburgh Common Pleas Court in 1966 that well over one-half the white males convicted of burglary, grand larceny, indecent assault, or possession of narcotics, and who had a prior record, were placed on probation; nearly one-half of the two-time losers convicted of aggravated assault were also placed on probation, as were more than one-fourth of those convicted of robbery.⁶ In Wisconsin, Dean V. Babst and John W. Mannering found that 63 per cent of the adult males convicted of a felony during 1954-1959 who had previously been convicted of another felony were placed on probation, and 41 per cent of those with two or more felony convictions were given probation for the subsequent offense.⁷ In Los Angeles, only 6 per cent of those charged with burglary, who had a serious prior record, were sent to prison; only 12 per cent of those charged with burglary who had already *been* in prison were sent back.⁸

Leniency - Irrationality

The judges did not seem to operate on either the deterrence or the rehabilitation theory of sentencing—the low proportion of jail sentences for persons convicted of serious crimes who had prior convictions suggests that the judges did not believe jail had a deterrent effect, and the fact that the men were convicted after an earlier offense implies that for them, at least, there had been no rehabilitation.

The treatment of persons in organized crime is even harder to reconcile with some theory of justice. Between 1963 and 1969, the number of persons arrested in New York State on felony narcotics charges (these typically were dealers, not merely users) increased by more than 700 per cent, and the number convicted more than tripled. But the number going to state prison re-

mained unchanged, and thus the proportion going to prison fell from 68 per cent of those convicted to less than 23 per cent.⁹ Being essentially businessmen (and businesswomen), members of organized crime are even less likely than youthful brawlers or addict thieves to be likely prospects for rehabilitation: They are acting, not out of passion or compulsion, but out of calculation. And in many jurisdictions those who can calculate best have seen the costs of their criminal ventures decline and the profits boom.

In Boston the average penalty in heroin cases fell during the 1960s—at the very time heroin abuse was rising. Between 1963 and 1970, the proportion of heroin cases before the Suffolk County (Boston) district and superior courts resulting in prison sentences fell from almost one-half to about one-tenth; meanwhile, the estimated number of heroin users rose from fewer than one thousand to almost six thousand. This pattern of sentencing can be explained by neither a deterrence nor a rehabilitation philosophy: Obviously the decrease in penalties did not deter heroin dealers, and the absence during most of this time of any treatment alternative to prison for heroin users meant that rehabilitation, if it were to occur at all, would have to occur spontaneously (which, of course, it did not).¹⁰

The reasons for the sentencing patterns in many courts have little or nothing to do with achieving some general social objective, but a great deal to do with the immediate problems and idiosyncratic beliefs of the judges. A few sentences can be explained by corruption, many more by the growing belief among some judges that since prisons apparently do not rehabilitate, it is wrong to send criminals to them, and most of all by the overwhelming need in busy jurisdictions to clear crowded court dockets.

When thousands of felony cases must be settled each year in a court, there are overpowering pressures to settle them on the basis of plea bargaining in order to avoid the time and expense of a trial. The defendant is offered a reduced charge or a lighter sentence in exchange for a plea of guilty. Though congested

*Reasons for
sentences*

*Plea
Barg.*

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dockets are not the only reason for this practice, an increase in congestion increases the incentives for such bargaining and thus may increase the proportion of lighter sentences. For those who believe in the deterrence theory of sentencing, it is a grim irony: The more crime increases, the more the pressure on court calendars, and the greater the chances that the response to the crime increase will be a sentence decrease.

But the use of probation and suspended sentences also reflects the belief of growing numbers of judges that the purpose of prisons is to rehabilitate, that the prisons have failed in this assignment, and that a criminal kept out of prison has at least as good or a better chance to stop stealing as one sent away. And there is some evidence to support this point of view. In a recent review of the studies of persons on probation, Levin concluded that they "all indicate that offenders who have received probation generally have significantly lower rates of recidivism (i.e., are less likely to be arrested for, or convicted of, a subsequent offense) than those who have been incarcerated." Furthermore, of those who are incarcerated, those receiving shorter sentences are somewhat less likely to become repeaters than those who have received longer sentences.¹¹

Perhaps the most comprehensive of these studies is one completed in California in 1970 by Ronald H. Beattie and Charles K. Bridges. It found that almost two-thirds of those offenders placed on probation had, one year later, no known subsequent arrest, while less than one-half of those sent to prison had been equally successful. These differences in "success" persisted even when one took into account the sex, age, race, offense, and prior record of the offender.¹²

The policy implications of such studies are not clear, however. Naturally probationers succeeded more than did prisoners—they were selected for probation precisely because the judges thought they would succeed. Putting more offenders now sent to prison on probation would not necessarily lead to better results; it would simply put the poorer risks on the street, with a consequent increase in the overall failure rate of probationers. If

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probation success rates now appear good, it is only because judges are good at guessing who will be successful.¹³

In fact, in New York, where the proportion of juveniles on probation has been going up, a *New York Times* survey in 1972 suggests that the failure rate has also been going up.¹⁴ And it might be going up even more if we knew for certain how many persons on probation were actually breaking the law, but we don't—we know only how many are caught breaking the law, and that is probably only a small fraction of the total.

There have been very few efforts to put probation to the crucial test by assigning offenders randomly to probation and prison and then comparing the results. Perhaps the best known of these is the California Treatment Project (sometimes called the Warren study). President Johnson's crime commission singled out this experiment for special mention as evidence that rehabilitation was possible, especially if done in a community rather than institutional setting.¹⁵ Young offenders, classified by their level of "interpersonal maturity," were assigned directly to probation officers in small groups and exposed to intensive and individually tailored therapy programs. Warren reported, and the crime commission repeated, the claim that these youth were much less likely to commit additional crimes than a similar group sent through the regular detention facilities and then placed in conventional probation. Upon later and closer study, however, it became clear that the experimental group not only did not commit fewer offenses, they committed *more*. Probation officers assigned to the experimental group were not revoking probation when young people in that group committed new offenses, while probation officers assigned to the regular youth (the "control group") were revoking probation in the normal way whenever a new offense was committed. In short, the "treatment" program did not alter the behavior of the delinquents, it only altered the behavior of the probation officers.¹⁶

In any event, most judges do not have a California Treatment Program to which they can sentence offenders. In most courts the practical choices are between routine probation (involving

Probation vs Jail
no difference



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few services) and jail or prisons with varying degrees of security and amenity. And here the evidence seems quite clear: In general, different kinds of institutions do not make an appreciable difference in the prospects of rehabilitation.

Between 1966 and 1972, Robert Martinson reviewed, initially at the request of the New York State Governor's Committee on Criminal Offenders, 231 experimental studies on the treatment of criminals, including in this list *all* those from here and abroad that were available in print between 1945 and 1967 and that met various tests of methodological adequacy. Martinson's review came to a clear conclusion: "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have no appreciable effect on recidivism." ¹⁷ Studies done since 1967 do not provide grounds for altering that conclusion significantly.

It does not seem to matter what form of treatment in the correctional system is attempted—whether vocational training or academic education; whether counseling inmates individually, in groups, or not at all; whether therapy is administered by social workers or psychiatrists; whether the institutional context of the treatment is custodial or benign; whether the sentences are short or long; whether the person is placed on probation or released on parole; or whether the treatment takes place in the community or in institutions. Indeed, some forms of treatment—notably a few experiments with psychotherapy—actually produced an *increase* in the rate of recidivism.

The Martinson review is unique in its comprehensiveness but not in its findings. R. G. Hood came to much the same conclusion in a review published in 1967; ¹⁸ Walter C. Bailey, after examining 100 studies of the efficacy of treatment and especially the 50 or so that claimed positive results, concluded in 1966 that the "evidence supporting the efficacy of correctional treatment is slight, inconsistent, and of questionable reliability"; ¹⁹ Leslie T. Wilkins observed in 1969 that "the major achievement of research in the field of social psychology and treatment has been negative and has resulted in the undermining of nearly

No effect on recidivism

Studies with effect

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all the current mythology regarding the effectiveness of treatment in any form." 20

In retrospect, little of this should have been surprising. It requires not merely optimistic but heroic assumptions about the nature of man to lead one to suppose that a person, finally sentenced after (in most cases) many brushes with the law, and having devoted a good part of his youth and young adulthood to misbehavior of every sort, should, by either the solemnity of prison or the skillfulness of a counselor, come to see the error of his ways and to experience a transformation of his character. Today we smile in amusement at the naïveté of those early prison reformers who imagined that religious instruction while in solitary confinement would lead to moral regeneration. How they would now smile at us at our presumption that conversations with a psychiatrist or a return to the community could achieve the same end. We have learned how difficult it is by governmental means to improve the educational attainments of children or to restore stability and affection to the family, and in these cases we are often working with willing subjects in moments of admitted need. Criminal rehabilitation requires producing equivalent changes in unwilling subjects under conditions of duress or indifference.

Shouldn't expect much

Plight of judges

The plight of the criminal court judge is obvious. Should he sentence a person to an institution that does not have a demonstrable effect on his criminality, or place him on probation, not knowing whether that will have any effect either? Even more important, should he take into account the characteristics of the offender in deciding on his prospects for rehabilitation, giving those with the best prospects (as predicted from age, sex, race, and prior record) the shortest sentences and those with the worst prospects the longest ones?

A moment's thought on such issues leads one squarely into the philosophical problem with the rehabilitation theory of sentencing. If rehabilitation is the object, and if there is little or no evidence that available correctional systems will produce much rehabilitation, why should any offenders be sent to any institu-



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tions? But to turn them free on the grounds that society does not know how to make them better is to fail to protect society from those crimes they may commit again and to violate society's moral concern for criminality, and thus to undermine society's concept of what constitutes proper conduct.

Furthermore, if rehabilitation is the goal, and persons differ in their capacity to be rehabilitated, then two persons who have committed precisely the same crime under precisely the same circumstances might receive very different sentences, thereby violating the offenders' and our sense of justice. The indeterminate sentence, widely used in many states, is expressive of the rehabilitation ideal: A convict will be released from an institution, not at the end of a fixed period, but when someone (a parole board, a sentencing board) decides he is "ready" to be released. Rigorously applied on the basis of existing evidence about what factors are associated with recidivism, this theory would mean that if two persons together rob a liquor store, the one who is a young black male from a broken family, with little education and a record of drug abuse, will be kept in prison indefinitely, while an older white male from an intact family, with a high school diploma and no drug experience, will be released almost immediately. Not only the young black male, but most fair-minded observers, would regard that outcome as profoundly unjust.

In practice, the system does not work as its theory implies. But neither does it work well. The decision when to release a prison inmate is, in many states, given over to a parole board from which few if any appeals are possible. In New York State, for example, the twelve members of the board of parole have jurisdiction over all prisoners serving more than ninety days (a total well in excess of twenty thousand) and can, among other things, decide when to release a prisoner who is serving an indeterminate sentence. Supposedly the board examines all aspects of the prisoner's life and behavior to decide if he is "ready" for release. If it were capable of and had the time for such profound judgments, it might well behave in the way described in the

not be prime goal of sentencing

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liquor store example above. But of course no board can make profound judgments about the thousands of cases it hears every year, with the result that it adopts instead a rule of thumb: If a prisoner is thought to be "rehabilitated," he will be released when he has served one-third of his sentence or three years, whichever is less. The board decides who is rehabilitated and who is not by reviewing a file of reports and questioning the inmate for ten or fifteen minutes at an interview. If parole is denied, the inmate is not told the reason; if he objects, there is no appeal.

The Citizen's Inquiry on Parole and Criminal Justice in New York City prepared in 1974 a study of the results of this parole system. For a four-year period, the percentage of prisoners returned to prison within one year was calculated for those who were granted parole and those who, by being denied parole, were required to serve their full sentence. Overall, there was no statistically significant difference between the return to prison rates of those paroled and those not—about 10 or 11 per cent of each group went back to prison within the year.²¹ Clearly, the parole board was unable to guess who had been rehabilitated and who had not.

Now suppose we abandon entirely the rehabilitation theory of sentencing and corrections—not the effort to rehabilitate, just the theory that the governing purpose of the enterprise is to rehabilitate. We could continue experiments with new correctional and therapeutic procedures, expanding them when the evidence warrants. If existing correctional programs do not differ in their rehabilitative potential, we could support those that are least costly and most humane (while still providing reasonable security) and phase out those that are most costly and inhumane. But we would not do any of these things on the mistaken notion that we were thereby reducing recidivism.

Instead, we would view the correctional system as having a very different function—namely, to isolate and to punish. It is a measure of our confusion that such a statement will strike many enlightened readers today as cruel, even barbaric. It is not. It is

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merely a recognition that society at a minimum must be able to protect itself from dangerous offenders and to impose some costs (other than the stigma and inconvenience of an arrest and court appearance) on criminal acts; it is also a frank admission that society really does not know how to do much else.

Purpose

The purpose of isolating—or, more accurately, closely supervising—offenders is obvious: Whatever they may do when they are released, they cannot harm society while confined or closely supervised. ~~The gains from merely incapacitating convicted criminals may be very large.~~ (In the last chapter I refer to some tentative estimates of their magnitude.) If much or most serious crime is committed by repeaters, separating repeaters from the rest of society, even for relatively brief periods of time, may produce major reductions in crime rates. Yet we have pursued virtually the opposite policy. During the 1960s, while crime rates were soaring, there was no significant increase in the amount of prison space and there was an actual decline in the number of prisoners, state and federal, from about 213,000 in 1960 to 196,000 in 1970.²² In New York State the chances of the perpetrator of a given crime going to prison fell during this period by a factor of six.²³ To an astonishing degree, judges and prosecutors have used their discretion to minimize the incapacitative value of prisons. In Los Angeles County, for example, the proportion of convicted robbers with a major prior record who were sent to prison in 1970 was only 27 per cent.²⁴ It is no defense of this policy of deinstitutionalization to say that criminals, if sent to prison, would, on their release, merely resume the commission of crimes. Many no doubt would, but the gains to society from crimes not committed while they were in prison would be real and substantial, and if the policy of prison sentences were consistently followed, even with relatively short (one or two years) sentences, the gains would be enduring.

These gains would exist even if the prospect of going to prison deterred no one from committing a crime. And clearly that prospect has not deterred those who have already found their way into prison. But suppose the probability of imprisonment

were increased: Might there not be a reduction in crime owing to the greater deterrent value of prison as well as a gain resulting from its incapacitative effect?

Over the last few years, several efforts have been made to assess the deterrent effect of sentences. These efforts are not immune to criticism: They are based on police reports of crimes committed (which are in error to some degree), they are based on comparison of sentencing behavior among states (which are very large units within which much variation no doubt occurs), and they are not experimental studies (that is, they do not show what happens when one deliberately changes the pattern of sentencing while holding everything else constant). Nonetheless, since all the studies come more or less to the same conclusion, and since the statistical techniques used make it unlikely that the results could be due to chance, the general thrust of these studies is revealing.

George E. Antunes of Rice University and A. Lee Hunt of the University of Houston have reviewed several studies which estimate the effect on crime rates of the certainty and the severity of punishment. "Certainty" was measured by dividing the number of persons sent to prison in each state for a given crime in a given year by the number of those crimes reported to the police in that state in the preceding years. The larger the proportion of reported crimes resulting in imprisonment, the greater the certainty of punishment. "Severity" was the median length of a prison sentence (in months or years) imposed in a given state for a given crime. The longer the sentence, the more severe it is (capital punishment was ignored in these studies). All the studies suggested that the certainty of punishment has a significant deterrent effect on crime rates, while severity has such an effect only on murder.²⁵

Isaac Ehrlich of the University of Chicago has carried out the most detailed statistical analysis of the effects of criminal sanctions. For 1940, 1950, and 1960, he calculated the effect on the known rates of seven major crimes of the probability of imprisonment and the length of imprisonment. He controlled for the

Indications are that sentences are deter



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effects of such factors as family income and the percentage of a state's population that was nonwhite. Unlike the studies summarized by Antunes and Hunt, he concluded that *both* an increased certainty of a sentence and an increased length of sentence reduced the rate of reported crimes in the states.²⁶

It is not entirely clear whether the crime reduction associated with lengthy prison terms, found by Ehrlich, is the result of the deterrent effect of those terms on would-be criminals who are contemplating imprisonment, or the incapacitating effect of those terms on would-be recidivists who are languishing in prison. Ehrlich's data are also consistent with the view that punishment deters to some degree crimes of passion as well as crimes of profit.

Though Ehrlich's findings are not entirely consistent with those of others, at least with respect to the effects of severity of sentence, reconciling these various studies is less important, and perhaps less difficult, than persuading informed persons to take them seriously. What is remarkable is that so few knowledgeable persons, especially among the ranks of many professional students of crime, are even willing to entertain the possibility that penalties make a difference. We have become so preoccupied with dealing with the causes of the crime (whether the causes are thought to be social conditions or police inadequacies) that we have almost succeeded in persuading ourselves that criminals are radically different from ordinary people—that they are utterly indifferent to the costs and rewards of their activities, and are responding only to deep passions, fleeting impulses, or uncontrollable social forces.

There is scarcely any evidence to support the proposition that would-be criminals are indifferent to the risks associated with a proposed course of action. Criminals may be willing to run greater risks (or they may have a weaker sense of morality) than the average citizen, but if the expected cost of crime goes up without a corresponding increase in the expected benefits, then the would-be criminal—unless he or she is among that small fraction of criminals who are utterly irrational—engages in less

Deterrent
effect



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crime, just as the average citizen will be less likely to take a job as a day laborer if the earnings from that occupation, relative to those from other occupations, go down.

Most of us are prepared to accept the notion that effective application of penalties, even rather modest ones, will deter certain forms of behavior. Everyone who has traveled to Los Angeles from the East Coast observes with awe the extent to which routine traffic laws, including those against jaywalking, are obeyed. The explanation is obvious. For decades, the police have enforced those laws with sufficient vigor to make the average Angeleno feel that the risks of breaking the law are sufficiently great, and the costs of observing the law sufficiently small, to make it worthwhile to obey. The enforcement of laws against drunken driving in Scandinavia has reduced substantially the number of persons who drive after drinking. The passing of bad checks in various states was found in one study to be related to the vigor of enforcement efforts.²⁷

But while most of us are prepared to concede all this, many of us are reluctant to apply the same analysis to more serious forms of crime—apparently on the unstated assumption that traffic laws, jaywalking ordinances, and bad-check statutes are primarily enforced against middle-class people who are more “rational” than the lower-class people who commit “real” crimes. Obviously not all criminals are sensitive to costs and benefits. Some husbands will murder their wives though they are almost certain to be caught, some boys will steal cars in order to prove that they are not afraid of the police, and some madmen will plant bombs that destroy themselves as well as their victims. But this is not very different from observing that some men go on buying big, powerful cars even though the price of gasoline and auto repairs has skyrocketed and their resale value has plummeted. To understand such people, we might want to know whether they have large families, a need to prove their masculinity, or a desire to impress their neighbors. But however interesting we found this speculation, we would not for a moment doubt that, for most people most of the

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time, the cost of cars is an important factor in predicting their automotive purchases.

The deterrent capacity of criminal penalties is supported by statistical data for large numbers of offenses over long periods of time. Such a theory does not, however, purport to "explain" crime. As argued in Chapter 3, the intellectual process of explanation is not the same as that of policy analysis, and can lead to quite different results. For example, a hundred persons may confront equal prospective benefits (say, having \$1,000 stolen from a bank) and equal prospective costs (say, a one in five chance of imprisonment), but ninety-five will not seriously consider bank robbery, while five will pull a gun and march up to the cashier without a moment's hesitation. It is intellectually interesting to try to discover why the five steal and the ninety-five do not; no doubt it has much to do with their tolerance of risk or their values as shaped by family, friends, and media. From the point of view of public policy, however, such explanations are of little value, because government has no way of changing in any systematic fashion family backgrounds, deep-seated attitudes, friendship patterns, or media images. And even if government could do these things, the cost would be frightful—not only in money terms, because the programs would have to be directed at the ninety-five who are not likely to be criminal in order to be certain of reaching the five who are, but also in terms of those fundamental human values that would be jeopardized if government possessed the capacity to direct the inner life of the family or to mold the mental state of its citizens.

What the government can do is to change the risks of robbery and the rewards of alternative sources of income for those who, at the margin, are neither hopelessly addicted to thievery nor morally vaccinated against it, and to incapacitate, by prison or some other form of close supervision, those who rob despite the threats and alternatives society provides.

Several studies have suggested that property crime increases with increases in unemployment; this was the conclusion of Belton Fleisher after analyzing juvenile arrest rates and the find-



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ing of Phillips, Votey, and Maxwell using somewhat different data.²⁸ Isaac Ehrlich, in the most sophisticated statistical analysis of state crime rates made to date, showed that unemployment and various other measures of economic need tended to increase crime while the certainty of punishment tended to lessen it.²⁹ This suggests that simultaneously decreasing teenage unemployment and increasing the risks of youthful crime may be the most rational response society can make to property crime.

Even if increasing the certainty of a prison sentence is valuable both for its deterrent as well as for its incapacitative effect, we must still consider the problem of how long a sentence should be imposed. This is a complex question. Humanity and a sense of proportion require us to make the penalty commensurate with the gravity of the offense—ten years in jail for stealing five dollars would be clearly outlandish. Even so, one must concede that in any rational system of criminal justice it will always be necessary to have some very severe penalties, even if they have no deterrent effect on crime. In the first place, the moral horror of certain offenses is such that society would not—and probably should not—tolerate the imposition of small penalties even if larger ones do not increase the deterrent effect. As the English legal philosopher James Fitzjames Stephens observed in the nineteenth century, if murder could be prevented by the fine of one shilling, we could not without doing violence to the moral bonds of society settle for a one-shilling fine for murderers.³⁰

In the second place, there must always be a penalty that can be imposed on persons who, while serving the maximum existing penalty, commit another crime—for example, a convict serving a long prison sentence who kills a prison guard. Some ultimate penalty must always exist to help protect innocent persons from criminals who "have nothing to lose." Third, the threat of severe penalties is an important resource for investigators seeking to obtain criminal informers. If those who inform on a ring of heroin dealers risk death, while those who deal in

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heroin risk only one year in prison, few dealers will become police informers—avoiding a one-year sentence is not worth the chance of assassination. But if the sentence they avoid is five or ten years, many more pushers will be willing to run at least a reasonable risk of being murdered.

Finally, it is possible that in particular cases very severe penalties are a deterrent, though statistically, severity seems related only to the deterrence of murder.

But even if all of these arguments are correct, there are at least two considerations that should lead us to conclude that severe penalties cannot be the norm. First, except in unusual cases, severity is probably subject to rapidly diminishing returns. The difference between a one-year and a five-year sentence is likely to appear very great to a convict, but the difference between a twenty-year and a twenty-five-year sentence (or even a thirty-year sentence) is likely to appear rather small. Second, the more severe the penalty, the more unlikely that it will be imposed. To ensure a conviction, avoid an expensive trial, reduce the chances of reversal on appeal, and give expression to their own views of benevolence, prosecutors and judges will try to get a guilty plea, and all they can offer in return is a lesser sentence. The more severe the sentence, the greater the bargaining power of the accused, and the greater the likelihood he will be charged with a lesser offense. Extremely long mandatory minimum sentences do not always strengthen the hand of society; they often strengthen the hand of the criminal instead.

If this analysis is correct, what does it imply for the criminal court system? In an ideal world, it would imply something like the following:

First, the court system would be organized around the primary task of sentencing, not around the largely mythic task of determining guilt. Hearings and trials under strict standards of due process would still be held, of course, where the issue of guilt is in doubt, but (again, in the ideal world) this would occupy only a fraction of the courts' resources and perhaps be handled by judges who specialized in that work.

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Second, the sentencing process would be placed under central management, with uniform standards enforced by a presiding officer and applied under his direction.

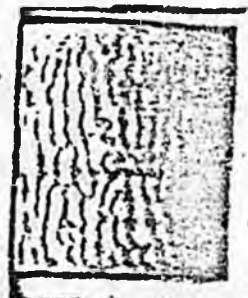
Third, every conviction for a nontrivial offense would entail a penalty that involved a deprivation of liberty, even if brief. For many offenses the minimum sentence might be as low as one week, and even that might be served on weekends. For most offenses the average sentence would be relatively short—perhaps no more than six months or a year—but it would be invariably applied. Only the most serious offenses would result in long penalties.

Fourth, "deprivation of liberty" need not, and usually would not, entail confinement in a conventional prison. After the deprivation of liberty is decided upon, a decision would be made as to whether it would involve confinement at night and on weekends, while allowing a person to work during the day; enrollment in a closely supervised community-based treatment program; referral to a narcotics treatment program; or confinement in a well-guarded prison. Judgment as to the form the deprivation would take would be based on the need to protect society and on the prospects of the offender for rehabilitation. But the prospects for rehabilitation should not be allowed to govern the length of sentence, nor whether there should be some deprivation of liberty: To permit the former would be unjust to the offender, to permit the latter would be unjust to society. Conventional probation—releasing an offender on the understanding that occasionally he would visit his probation officer—would be virtually abolished.

Fifth, conviction for a subsequent offense would invariably result in an increased deprivation of liberty. If the second offense were minor, the increase would be small; if grave, the increase would be substantial. Whatever the case, something would be done. Penalties would be primarily designed to fit the crime, with some (but not much) range for judicial discretion in order that mitigating and exacerbating circumstances might be taken into account.

First offender

2d



Courts and Corrections

Such proposals will be opposed by judges unwilling to surrender their authority to do as they please; by legislators who feel that it is necessary to pass bills requiring massive sentences that are rarely imposed; by taxpayers' groups that do not wish to foot the bill for the substantial additional expenditures required for new correctional facilities and more court and correctional personnel; and by those who feel that punishment does not work, or that, whether it works or not, it is wrong to apply it to criminals until society itself has been punished for "producing" criminals.

If the opposition of these groups could be overcome, there would be problems in administering the new system. If every offender knew that some penalty would befall him, he might have less incentive to plead guilty, and thus would demand a trial, thereby changing the mythic function of the courts into the real one, and so paralyzing them. (In fact, I would guess that many offenders would prefer the certainty of a relatively short sentence to the cost of a trial and the possibility of a longer or more confining sentence which might result from revelations during the trial of the full range of evidence against him and of the nature of his character.)

What in fact would happen could only be learned by experience, but the inertia of the present system coupled with the myopic view that judges and correctional officers are capable of transforming human character are, unfortunately, powerful impediments to our ever acquiring that experience. Formidable as these barriers are, there is an even greater one—namely, the widespread view that hiring more judges but giving them less discretion, and building more correctional facilities, albeit decent and humane ones, are at best a confession of social failure and at worst a blindly repressive act.

I regard these actions as neither. Our society has been, with individual exceptions, remarkably forbearing. We have preserved and extended the most comprehensive array of civil liberties to be found in almost any nation, despite a rising crime rate and (during the 1960s) periods of massive social disorder. No

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nation that can so value human liberty and be so willing to check governmental power, even at some substantial cost in domestic tranquillity, can be accused of placing convenience, privilege, and security over all other considerations. Arrests are far easier and trials less encumbered with evidentiary rules in most other nations, including those, such as Great Britain, which we acknowledge to be bastions of freedom. If we choose to have a comprehensive bill of rights, as I think we should, we should be willing to pay the price of that choice. That price includes a willingness to accept both a higher level of crime and disorder and a larger investment in the resources and facilities needed to cope with those who violate the law and, despite our procedural guarantees, are caught by its agents.

Nor can a greater investment in criminal justice facilities be thought repressive if one compares what is with what might be. Crowded, antiquated prisons that require men and women to live in fear of one another and to suffer not only deprivation of liberty but a brutalizing regimen are hardly preferable to modern facilities that insure a modicum of privacy and in which security can be insured. What is illiberal and ungenerous is either to preserve the status quo or to insist that all prisons be closed, whatever the price in increased victimization.

Chapter 10

Some Concluding Thoughts

THOSE who have read this far in hopes of finding, not merely a way of thinking about crime, but ways of ending it, have clearly been disappointed. I believe that our society has not done as well as it could have in controlling crime because of erroneous but persistent views about the nature of man and the capacities of his institutions. But I do not believe that, were we to have taken a correct view and as a consequence adopted the most feasible policies, crime would have been eliminated, or even dramatically reduced. Those who argue that we can eliminate crime if only we have the "will" to do so, whether by ending poverty (as the Left argues) or by putting more police on the street and more gallows in our jails (as the Right believes), seriously mistake what we are capable of under even the best of circumstances, and place the blame for our failings precisely where it should not be—on our will power, and by implication on our governing morality.

I argue for a sober view of man and his institutions that

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would permit reasonable things to be accomplished, foolish things abandoned, and utopian things forgotten. A sober view of man requires a modest definition of progress. A 20 per cent reduction in robbery would still leave us with the highest robbery rate of almost any Western nation but would prevent about sixty thousand robberies. A small gain for society, a large one for the would-be victims. Yet a 20 per cent reduction is unlikely if we concentrate our efforts on dealing with the causes of crime or even if we concentrate on improving police efficiency. Were we to devote those resources to a strategy that is well within our abilities—namely, to incapacitating a larger fraction of the convicted serious robbers—then not only is a 20 per cent reduction possible, but even larger ones are conceivable.

Most serious crime is committed by repeaters. What we do with first offenders is probably far less important than what we do with habitual offenders. A genuine first offender (and not merely a habitual offender caught for the first time) is in all likelihood a young person who, in the majority of cases, will stop stealing when he gets older. This is not to say we should forgive first offenses, for that would be to license the offense and erode the moral judgments that must underlie any society's attitude toward crime. The gravity of the offense must be appropriately impressed on the first offender, but the effort to devise ways of reeducating or uplifting him in order to insure that he does not steal again is likely to be wasted—both because we do not know how to reeducate or uplift and because most young delinquents seem to reeducate themselves no matter what society does.

After tracing the history of nearly ten thousand Philadelphia boys born in 1945, Marvin Wolfgang and his colleagues at the University of Pennsylvania found that over one-third were picked up by the police for something more serious than a traffic offense, but that 46 per cent of these delinquents had no further police contact after their first offense. Though a third started on crime, nearly half seemed to stop spontaneously—a good thing, because the criminal justice system in that city, already sorely taxed, would in all likelihood have collapsed. Out

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of the ten thousand boys, however, there were six hundred twenty-seven—only 6 per cent—who committed five or more offenses before they were eighteen. Yet these few chronic offenders accounted for *over half* of all the recorded delinquencies and about *two-thirds* of all the violent crimes committed by the entire cohort.¹

Only a tiny fraction of all serious crimes lead immediately to an arrest, and only a slightly larger fraction are ultimately "cleared" by an arrest, but this does not mean that the police function is meaningless. Because most serious crime is committed by repeaters, most criminals eventually get arrested. The Wolfgang findings and other studies suggest that the chances of a persistent burglar or robber living out his life, or even going a year, with no arrest are quite small. Yet a large proportion of repeat offenders, as the studies cited in Chapter 8 show, suffer little or no loss of freedom. Whether or not one believes that such penalties, if inflicted, would act as a deterrent, it is obvious that they could serve to incapacitate these offenders and thus, for the period of the incapacitation, prevent them from committing additional crimes.

We have a limited (and declining) supply of detention facilities, and many of those that exist are decrepit, unsafe, and overcrowded. But as important as expanding the supply and improving the decency of the facilities is the need to think seriously about how we wish to allocate those spaces that exist. At present, that allocation is hit or miss. A 1966 survey of over fifteen juvenile correctional institutions revealed that about 30 per cent of the inmates were young persons who had been committed for conduct that would not have been judged criminal were it committed by adults. They were runaways, "stubborn children," or chronic truants—problem children, to be sure, but scarcely major threats to society.² Using scarce detention space for them when in Los Angeles over 90 per cent of burglars with a major prior record receive no state prison sentence seems, to put it mildly, anomalous.

Shomo and Reuel Shinnar have estimated the effect on

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crime rates in New York State of a judicial policy other than that followed during the last decade or so. Given the present level of police efficiency and making some assumptions about how many crimes each offender commits per year, they conclude that the rate of serious crime would be only *one-third* what it is today if every person convicted of a serious offense were imprisoned for three years. This reduction would be less if it turned out (as seems unlikely) that most serious crime is committed by first-time offenders, and it would be much greater if the proportion of crimes resulting in an arrest and conviction were increased (as also seems unlikely). The reduction, it should be noted, would be solely the result of incapacitation, making no allowance for such additional reductions as might result from enhanced deterrence or rehabilitation.³

The Shinnar estimates are based on uncertain data and involve assumptions that can be challenged. But even assuming they are overly optimistic by a factor of two, a sizable reduction in crime would still ensue. In other countries such a policy of greater incapacitation is in fact followed. A robber arrested in England, for example, is more than three times as likely as one arrested in New York to go to prison. That difference in sentencing does not account for all the difference between English and American crime rates, but it may well account for a substantial fraction of it.

That these gains are possible does not mean that society should adopt such a policy. One would first want to know the costs, in additional prison space and judicial resources, of greater use of incapacitation. One would want to debate the propriety and humanity of a mandatory three-year term; perhaps, in order to accommodate differences in the character of criminals and their crimes, one would want to have a range of sentences from, say, one to five years. One would want to know what is likely to happen to the process of charging and pleading if every person arrested for a serious crime faced a mandatory minimum sentence, however mild. These and other difficult and important questions must first be confronted. But the cen-

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tral fact is that *these are reasonable questions* around which facts can be gathered and intelligent arguments mustered. To discuss them requires us to make few optimistic assumptions about the malleability of human nature, the skills of officials who operate complex institutions, or the capacity of society to improve the fundamental aspects of familial and communal life.

Persons who criticize an emphasis on changing the police and courts to cope with crime are fond of saying that such measures cannot work so long as unemployment and poverty exist. We must acknowledge that we have not done very well at inducting young persons, especially but not only blacks, into the work force. Teenage unemployment rates continue to exceed 20 per cent; though the rate of growth in the youthful component of the population has slowed, their unemployment shows little sign of abating. To a degree, anticrime policies may be frustrated by the failure of employment policies, but it would be equally correct to say that so long as the criminal justice system does not impede crime, efforts to reduce unemployment will not work. If legitimate opportunities for work are unavailable, many young persons will turn to crime; but if criminal opportunities are profitable, many young persons will not take those legitimate jobs that exist. The benefits of work and the costs of crime must be increased simultaneously; to increase one but not the other makes sense only if one assumes that young people are irrational.

One rejoinder to this view is the argument that if legitimate jobs are made absolutely more attractive than stealing, stealing will decline even without any increase in penalties for it. That may be true provided there is no practical limit on the amount that can be paid in wages. Since the average "take" from a burglary or mugging is quite small, it would seem easy to make the income from a job exceed the income from crime. But this neglects the advantages of a criminal income: One works at crime at one's convenience, enjoys the esteem of colleagues who think a "straight" job is stupid and skill at stealing is commendable, looks forward to the occasional "big score" that may make

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further work unnecessary for weeks, and relishes the risk and adventure associated with theft. The money value of all these benefits—that is, what one who is not shocked by crime would want in cash to forego crime—is hard to estimate, but is almost certainly far larger than what either public or private employers could offer to unskilled or semiskilled young workers. The only alternative for society is to so increase the risks of theft that its value is depreciated below what society can afford to pay in legal wages, and then take whatever steps are necessary to insure that those legal wages are available.

Another rejoinder to the "attack poverty" approach to crime is this: The desire to reduce crime is the worst possible reason for reducing poverty. Most poor persons are not criminals; many are either retired or have regular jobs and lead conventional family lives. The elderly, the working poor, and the willing-to-work poor could benefit greatly from economic conditions and government programs that enhance their incomes without there being the slightest reduction in crime—indeed, if the experience of the 1960s is any guide, there might well be, through no fault of most beneficiaries, an increase in crime. Reducing poverty and breaking up the ghettos are desirable policies in their own right, whatever their effects on crime. It is the duty of government to devise other measures to cope with crime, not only to permit antipoverty programs to succeed without unfair competition from criminal opportunities, but also to insure that such programs do not inadvertently shift the costs of progress, in terms of higher crime rates, onto innocent parties, not the least of whom are the poor themselves.

One cannot press this economic reasoning too far. Some persons will commit crimes whatever the risks; indeed, for some, the greater the risk the greater the thrill, while others—the alcoholic wife beater, for example—are only dimly aware that there are any risks. But more important than the insensitivity of certain criminal activities to changes in risks and benefits is the impropriety of casting the crime problem wholly in terms of a utilitarian calculus. The most serious offenses are crimes not

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simply because society finds them inconvenient, but because it regards them with moral horror. To steal, to rape, to rob, to assault—these acts are destructive of the very possibility of society and affronts to the humanity of their victims. It is my experience that parents do not instruct their children to be law abiding merely by pointing to the risks of being caught, but by explaining that these acts are wrong whether or not one is caught. I conjecture that those parents who simply warn their offspring about the risks of crime produce a disproportionate number of young persons willing to take those risks.

Even the deterrent capacity of the criminal justice system depends in no small part on its ability to evoke sentiments of shame in the accused. If all it evoked were a sense of being unlucky, crime rates would be even higher. James Fitzjames Stephens makes the point by analogy. To what extent, he asks, would a man be deterred from theft by the knowledge that by committing it he was exposing himself to one chance in fifty of catching a serious but not fatal illness—say, a bad fever? Rather little, we would imagine—indeed, all of us regularly take risks as great or greater than that: when we drive after drinking, when we smoke cigarettes, when we go hunting in the woods. The criminal sanction, Stephens concludes, “operates not only on the fears of criminals, but upon the habitual sentiments of those who are not criminals. [A] great part of the general detestation of crime . . . arises from the fact that the commission of offenses is associated . . . with the solemn and deliberate infliction of punishment wherever crime is proved.”⁴

Much is made today of the fact that the criminal justice system “stigmatizes” those caught up in it, and thus unfairly marks such persons and perhaps even furthers their criminal careers by having “labeled” them as criminals. Whether the labeling process operates in this way is as yet unproved, but it would indeed be unfortunate if society treated a convicted offender in such a way that he had no reasonable alternative but to make crime a career. To prevent this, society ought to insure that one can “pay one’s debt” without suffering permanent loss of civil rights,

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the continuing and pointless indignity of parole supervision, and frustration in being unable to find a job. But doing these things is very different from eliminating the "stigma" from crime. To destigmatize crime would be to lift from it the weight of moral judgment and to make crime simply a particular occupation or avocation which society has chosen to reward less (or perhaps more!) than other pursuits. If there is not stigma attached to an activity, then society has no business making it a crime. Indeed, before the invention of the prison in the late eighteenth and early nineteenth centuries, the stigma attached to criminals was the major deterrent to and principal form of protection from criminal activity. The purpose of the criminal justice system is not to expose would-be criminals to a lottery in which they either win or lose, but to expose them in addition and more importantly to the solemn condemnation of the community should they yield to temptation.

Anyone familiar with the police stations, jails, and courts of some of our larger cities is keenly aware that accused persons caught up in the system are exposed to very little that involves either judgment or solemnity. They are instead processed through a bureaucratic maze in which a bargain is offered and a haggle ensues at every turn—over amount of bail, degree of the charged offense, and the nature of the plea. Much of what observers find objectionable about this process could be alleviated by devoting many more resources to it, so that an ample supply of prosecutors, defense attorneys, and judges were available. That we do not devote those additional resources in a country obsessed with the crime problem is one of the more interesting illustrations of the maxim, familiar to all political scientists, that one cannot predict public policy simply from knowing popular attitudes. Whatever the cause, it remains the case that in New York County (Manhattan) there were in 1973, 31,098 felony arrests to be handled by only 125 prosecutors, 119 public defenders, and 59 criminal court judges. The result was predictable: of those arrested, only 4130 pleaded guilty to or were convicted on a felony charge.



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One wonders whether the stigma properly associated with crime retains much deterrent or educative value. My strong inclination is to resist explanations for rising crime that are based on the alleged moral breakdown of society, the community, or the family. I resist in part because most of the families and communities I know have not broken down, and in part because, had they broken down, I cannot imagine any collective action we could take consistent with our civil liberties that would restore a moral consensus, and yet the facts are hard to ignore. Take the family: Over one-third of all black children and one in fourteen of all white children live in single-parent families. Over two million children live in single-parent (usually father absent) households, almost *double* the number of ten years ago. In 1950, 18 per cent of black families were female-headed; in 1969 the proportion had risen to 27 per cent; by 1973 it exceeded 35 per cent. The average income for a single-parent family with children under six years of age was, in 1970, only \$3100, well below the official "poverty line."⁵

Studies done in the late 1950s and the early 1960s showed that children from broken homes were more likely than others to become delinquent. In New York State, 58 per cent of the variation in pupil achievement in three hundred schools could be predicted by but three variables—broken homes, overcrowded housing, and parental educational level. Family disorganization, writes Urie Bronfenbrenner, has been shown in thousands of studies to be an "omnipresent overriding factor" in behavior disorders and social pathology. And that disorganization is increasing.⁶

These facts may explain some elements of the rising crime rate that cannot be attributed to the increased number of young persons, high teenage unemployment, or changed judicial policies. The age of persons arrested has been declining for more than fifteen years and the median age of convicted defendants (in jurisdictions for which data are available) has been declining for the last six years.⁷ Apparently, the age at which persons begin to commit serious crime has been falling. For some



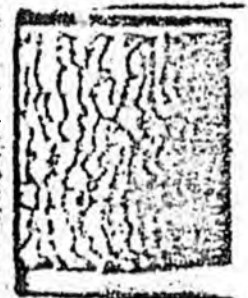
Some Concluding Thoughts

young people, thus, whatever forces weaken their resistance to criminal activity have been increasing in magnitude, and these forces may well include the continued disorganization of the family and the continued deterioration of the social structure of inner city communities.

One wants to be objective, if not optimistic. Perhaps single-parent families today are less disorganized or have a different significance than such families in the past. Perhaps the relationship between family structure and social pathology will change. After all, there now seem to be good grounds for believing that, at least on the East Coast, the heroin epidemic of the 1960s has run its course; though there are still thousands of addicts, the rate of formation of new addicts has slowed and the rate of heroin use by older addicts has dropped. Perhaps other aspects of the relationship among family, personality, and crime will change. Perhaps.

No one can say how much of crime results from its increased profitability and how much from its decreased shamefulness. But one or both factors must be at work, for population changes alone simply cannot account for the increases. Crime in our cities has increased far faster than the number of young people, or poor people, or black people, or just plain people who live in those cities. In short, objective conditions alone, whether demographic or economic, cannot account for the crime increases, though they no doubt contributed to it. Subjective forces—ideas, attitudes, values—played a great part, though in ways hard to define and impossible to measure. An assessment of the effect of these changes on crime would provide a partial understanding of changes in the moral structure of our society.

But to understand is not to change. If few of the demographic factors contributing to crime are subject to planned change, virtually none of the subjective ones are. Though intellectually rewarding, from a practical point of view it is a mistake to think about crime in terms of its "causes" and then to search for ways to alleviate those causes. We must think instead of what it is feasible for a government or a community to do, and then try to

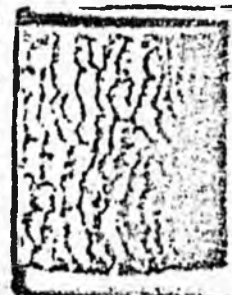
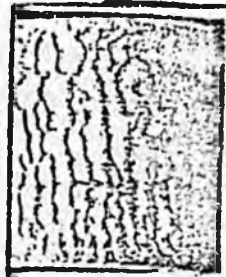


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discover, by experimentation and observation, which of those things will produce, at acceptable costs, desirable changes in the level of criminal victimization.

There are, we now know, certain things we can change in accordance with our intentions, and certain ones we cannot. We cannot alter the number of juveniles who first experiment with minor crimes. We cannot lower the recidivism rate, though within reason we should keep trying. We are not yet certain whether we can increase significantly the police apprehension rate. We may be able to change the teenage unemployment rate, though we have learned by painful trial and error that doing this is much more difficult than once supposed. We can probably reduce the time it takes to bring an arrested person to trial, even though we have as yet made few serious efforts to do so. We can certainly reduce the arbitrary and socially irrational exercise of prosecutorial discretion over whom to charge and whom to release, and we can most definitely stop pretending that judges know, any better than the rest of us, how to provide "individualized justice." We can confine a larger proportion of the serious and repeat offenders and fewer of the common drunks and truant children. We know that confining criminals prevents them from harming society, and we have grounds for suspecting that some would-be criminals can be deterred by the confinement of others.

Above all, we can try to learn more about what works, and in the process abandon our ideological preconceptions about what *ought* to work. Nearly ten years ago I wrote that the billions of dollars the federal government was then preparing to spend on crime control would be wasted, and indeed might even make matters worse if they were merely pumped into the existing criminal justice system.⁸ They were, and they have. In the next ten years I hope we can learn to experiment rather than simply spend, to test our theories rather than fund our fears. This is advice, not simply or even primarily to government—for governments are run by men and women who are under irresistible pressures to pretend they know more than they do—but to my



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colleagues: academics, theoreticians, writers, advisers. We may feel ourselves under pressure to pretend we know things, but we are also under a positive obligation to admit what we do not know and to avoid cant and sloganizing. The government agency, the Law Enforcement Assistance Administration, that has futilely spent those billions was created in consequence of an act passed by Congress on the advice of a presidential commission staffed by academics, myself included.

It is easy and popular to criticize yesterday's empty hopes and mistaken beliefs, especially if they seemed supportive of law enforcement. It is harder, and certainly most unpopular, to criticize today's pieties and pretensions, especially if they are uttered in the name of progress and humanity. But if we were wrong in thinking that more money spent on the police would bring down crime rates, we are equally wrong in supposing that closing our prisons, emptying our jails, and supporting "community-based" programs will do any better. Indeed, there is some evidence that these steps will make matters worse, and we ignore it at our peril.

Since the days of the crime commission we have learned a great deal, more than we are prepared to admit.⁹ Perhaps we fear to admit it because of a newfound modesty about the foundations of our knowledge, but perhaps also because the implications of that knowledge suggest an unflattering view of man. Intellectuals, although they often dislike the common person as an individual, do not wish to be caught saying uncomplimentary things about humankind. Nevertheless, some persons will shun crime even if we do nothing to deter them, while others will seek it out even if we do everything to reform them. Wicked people exist. Nothing avails except to set them apart from innocent people. And many people, neither wicked nor innocent, but watchful, dissembling, and calculating of their opportunities, ponder our reaction to wickedness as a cue to what they might profitably do. We have trifled with the wicked, made sport of the innocent, and encouraged the calculators. Justice suffers, and so do we all.

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LAY MEMBERS
KENNETH L. BRADY
LEW M. WILLIAMS, JR.
ROBERT H. MOSS

LAW MEMBERS
MICHAEL A. STEPOVICH
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CHIEF JUSTICE
SUPREME COURT

Alaska Judicial Council

303 K STREET
ANCHORAGE, ALASKA
99501

EXECUTIVE DIRECTOR
MICHAEL L. RUBINSTEIN

April 23, 1976

Rep. Charles Parr
House of Representatives
Pouch V
Juneau, AK 99811

RE: 1975 Felony Sentences for Violent Crimes

Dear Representative Parr:

On April 14, 1976, at a joint meeting of the Judiciary Committees of the Senate and House of Representatives, the House Rules Committee and the Alaska Judicial Council, the subjects of H.B. 600 and the Judicial Council's alternative proposal for a system of presumptive sentencing were discussed at some length. Requests were made of the Judicial Council and of the Administrative Director of Courts to provide the Legislature with data concerning persons who were convicted in 1975 of violent felonies and the sentences actually received by them.

Enclosed is a summary of our research compiled through a joint effort of the Administrative Director's office and the Alaska Judicial Council.

The attached figures include only cases both opened and closed in 1975. (This excludes cases filed in 1973 and 1974, but which did not come to final judgment until 1975.) This data encompasses the entire State of Alaska. There were only 59 individual defendants in the "violent felony" category. The following summary classifies these 59 by first offenses, prior misdemeanors, prior non-violent felonies, and prior violent felonies:

1. 28 defendants (47%) had no prior convictions of any kind.
2. 17 defendants (29%) had a record of convictions for misdemeanors only, but no prior felonies.
3. 8 defendants (14%) had a record of previous convictions for felonies of a non-violent nature.
4. 6 defendants (10%) had previously been convicted of one violent felony.

No defendant in the sample had more than one prior conviction for a violent felony. The greatest proportion by far (47%) were first offenders. The sentences for the 6 individuals with one previous conviction for a violent felony who were again convicted of a violent felony in 1975 were as follows:

* * *

<u>CRIME</u>	<u>SENTENCE</u>
Manslaughter	7 years; 15 years
Kidnapping	4 years
Rape	2 years
Assault with Dangerous Weapon	0 (1 year probation - suspended imposition of sentence)
Robbery	5 years

Of the 13 individuals convicted of Robbery in 1975, one had previously been convicted of a violent felony and received a 5 year sentence. Please note that only two robbers received probation, and both were first offenders. (Other first offenders were sentenced to imprisonment for periods of between 6 months and 5 years.) Sentences for robbers who had prior non-violent felony convictions were also quite severe. (6 years, 10 years and 15 years respectively.) Persons who were convicted of Assault with Intent to Commit Robbery received sentences ranging from probation to 15 years. The average sentence in this category was 6 years, and none had a prior violent felony conviction.

The Manslaughter convictions are particularly interesting because of the extreme range of penalties represented in the sentencing pattern: e.g., 30 days, 60 days, 7 years, 12 years, 15 years. (Two of these individuals had a prior violent felony conviction.) This may illustrate the problem inherent in using the common law crimes as a basis for mandatory sentencing legislation. Although I have not examined the individual case files supporting each of these sentences, it would be my guess that the circumstances leading to the death of a human being in each of these cases must have been extremely divergent to justify a sentence of 30 days in one case and 15 years in another, where neither defendant had

any prior felony convictions. Nevertheless, all these cases are "Manslaughters", regardless of the facts.

The Assault with a Dangerous Weapon category is especially interesting and is deserving of much more careful and detailed study. There were 23 convictions for Assault with a Dangerous Weapon. Thirteen defendants (56%) were placed on probation without being required to serve any jail time whatever. One of these defendants had a prior violent felony record. Only three of the 23 individuals received more than 6 months in jail.

Does this mean that our judges are particularly tolerant of interpersonal violence as long as no profit motive is involved?* Does it mean that most of these cases represent only "technical" assaults in which little or no actual injury was done? Does it mean that prosecutors are frequently "overcharging" in this crime category, so that most of these Assault with a Dangerous Weapon charges should have been filed as misdemeanors instead?** How many of these cases involved feuds between family members or altercations between close friends? How many of these situations involved defendants who were seriously provoked by their victims? Once more the question of the appropriate labeling of crime categories must be raised. I would submit that this data tends to illustrate that "Assault with a dangerous weapon" may be an infelicitous basis for a system of mandatory minimum sentencing. At the very least, the figures would strongly suggest the need for closer study.

* The Supreme Court of Alaska has held that Assault with a Dangerous Weapon is "among the most serious crimes" The court has expressly disapproved a sentence of probation for this offense where the defendant was a 23 year-old Army sergeant, a "model soldier," with no previous record of violence.
State v. Armantrout, 483 P.2d 696, 698 (Alaska 1971).

* * *

** AS 11.15.22 Assault with a dangerous weapon, provides for a double set of punishments: "by imprisonment in the penitentiary for not more than 10 years nor less than six months, or by imprisonment in jail for not more than one year nor less than one month, or by a fine of not more than \$1,000 nor less than \$100.

Thank you for giving us the opportunity to compile this interesting data. I believe that overall the statistical information is supportive of the proposition advanced by Chief Justice Boochever to the effect that the courts are not lenient with violent criminals. The extreme disparities reflected in some of the sentences, in particular within the category of Assault with a dangerous weapon, are indicative of the need for careful crime definition and more precise and accurate drafting than that reflected in H.B. 600.

On behalf of the Alaska Judicial Council I repeat our offer to study the entire question of sentence reform and to prepare a draft sentencing bill for your consideration prior to the next session of the Legislature.

Sincerely,

Michael L. Rubinstein
Michael L. Rubinstein *ek*

CC: Chief Justice Boochever
Sen. Chancy Croft
Rep. Mike Bradner
House Judiciary Committee
Senate Judiciary Committee
House Rules Committee
Art Snowden II
Mel Martin
Keith Brown, Esq.
Brian Shortell, Esq.
Judicial Council Members
Avrum Gross, Esq.
Herb Pierson, Esq.
Peter Ring, Esq.

CRIME & PRIOR RECORD

NUMBER OF PERSONS CONVICTED &
THE SENTENCE GIVEN

MANSLAUGHTER

No Prior Record	(1) 5 years
Misdemeanor Record	(4) 30 days; 4 yrs; 6 yrs; 12 yrs.
Non-Violent Felony Record	(1) 60 days
Violent Felony Record	(2) 7 yrs; 15 yrs.

NEGLIGENT HOMICIDE

No Prior Record	(0) None Convicted
Misdemeanor Record	(0) None Convicted
Non-Violent Felony Record	(1) Probation
Violent Felony Record	(0) None Convicted

KIDNAPPING

No Prior Record	(0) None Convicted
Misdemeanor Record	(0) None Convicted
Non-Violent Felony Record	(0) None Convicted
Violent Felony Record	(1) 4 years

RAPE

No Prior Record	(0) None Convicted
Misdemeanor Record	(0) None Convicted
Non-Violent Felony Record	(0) None Convicted
Violent Felony Record	(1) 2 years

SHOOTING WITH INTENT TO KILL

No Prior Record	(1) 3 years
Misdemeanor Record	(0) None Convicted
Non-Violent Felony Record	(0) None Convicted
Violent Felony Record	(0) None Convicted

ASSAULT WITH INTENT TO COMMIT HOMICIDE

No Prior Record	(0) None Convicted
Misdemeanor Record	(1) 4 months
Non-Violent Felony Record	(0) None Convicted
Violent Felony Record	(0) None Convicted

ASSAULT WITH INTENT TO COMMIT RAPE

No Prior Record	(3) 6 months; 1 yr; 1 yr.
Misdemeanor Record	(0) None Convicted
Non-Violent Felony Record	(0) None Convicted
Violent Felony Record	(0) None Convicted

ASSAULT WITH INTENT TO COMMIT ROBBERY

No Prior Record	(3) 2 yrs; 5 yrs; 10 yrs.
Misdemeanor Record	(2) 3 yrs; probation
Non-Violent Felony Record	(1) 15 yrs.
Violent Felony Record	(0) None Convicted

ASSAULT WITH A DANGEROUS WEAPON

No Prior Record	(13) 60 days; 79 days; 90 days; 10 sentenced to probation
Misdemeanor Record	(7) 30 days, 125 days; 150 days; 18 months; 4 yrs; 2 sent. to prob.
Non-Violent Felony Record	(2) 4 months; 10 years
Violent Felony Record	(1) probation

ROBBERY

No Prior Record	(7) 6 months; 1 yr; 2 yrs; 3 yrs; 5 yrs; 2 sentenced to probation
Misdemeanor Record	(2) 1 yr; 5 yrs.
Non-Violent Felony Record	(3) 6 yrs; 10 yrs; 15 yrs.
Violent Felony Record	(1) 5 yrs.

1st DEGREE ARSON

No Prior Record	(0) None Convicted
Misdemeanor Record	(1) 2 years
Non-Violent Felony Record	(0) None Convicted
Violent Felony Record	(0) None Convicted