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 subjection 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 defendants 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 anamolous 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 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.

5/22/76

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

years;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) manslaughter under AS 11.15.040, 12 years;

(D) forcible rape as defined in AS 11.15.120, 10 years;

(E) mayhem under AS 11.15.140, 12 years;

(F) shooting, stabbing or cutting with intent to kill, wound or maim under AS 11.15.150, seven years;

(G) assault with intent to kill or commit rape or robbery under AS 11.15.160, eight years;

(H) poisoning under AS 11.15.210, seven years;

(I) assault with a dangerous weapon under AS 11.15.220, five years;

(J) robbery under AS 11.15.240, eight years;

(K) kidnapping under AS 11.15.260, 12 years;

(L) first degree arson under AS 11.20.010, seven years;

(M) burglary in a dwelling house under AS 11.20.080, five years;

(N) burglary in a dwelling house at nighttime under AS 11.20.080, six years;

(O) burglary in a dwelling house when occupied by another person under AS 11.20.080, seven years;

(P) assault on a correctional officer under AS 11.30.140 and AS 11.30.160, three years.

(b) For purposes of this section,

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

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

(3) two or more convictions arising out of the same transaction are considered a single conviction.

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

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

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

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

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

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

Sec. 12.55.036. PROCEDURE FOR DETERMINING PRIOR CONVICTIONS. (a) If it appears that a defendant has previously been convicted of a violent felony and is subject to sentencing as a second or subsequent offender under sec. 35 of this chapter, the district attorney shall file a certified copy of the record of prior convictions with the court and serve such copy or copies upon the defendant or his counsel before sentencing.

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

establish beyond a reasonable doubt the fact of prior convictions.

Sec. 12.55.037. FACTORS IN AGGRAVATION AND MITIGATION. (a) When a defendant has been found to have previously been convicted of a violent felony and is subject to sentencing as a second or subsequent offender under sec. 35 of this chapter (1) the court shall increase the minimum presumptive sentence to which the defendant is subject by 10 per cent of the applicable term for each factor in aggravation found by the court, or (2) the court shall decrease the minimum presumptive sentence to which the defendant is subject by 10 per cent of the applicable term for each factor in mitigation found by the court. Nothing in this section shall limit the authority of the court to impose any sentence in excess of that provided for in this SECTION up to the maximum term provided by law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) For purposes of this section

(1) "great bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of any body member or organ;

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

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

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

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

testimony to supplement the record before it.

(d) The three-judge PANEL may in the interest of justice sentence the defendant under any law applicable to the offense in question, notwithstanding the presumptive penalties provided in this chapter.

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

Sec. 12.55.060. PROCEDURE UPON DISCOVERY OF PRIOR CONVICTIONS. (a) Before conviction or while sentence is effective, if it appears that a person convicted of a crime in this state has previously been convicted and has not been charged under sec. [SECS. 40 AND] 50 of this chapter, the district attorney may file an information in the superior court accusing that person of the previous conviction or convictions. The court shall cause that person, whether confined in prison or otherwise, to be brought before it and shall inform him of the allegations contained in the information and of his right to be tried as to the truth of the allegations, and shall INQUIRE OF [REQUIRE] the accused person [TO SAY] whether or not he is the same person as charged in the information. If the accused acknowledges or confesses in open court, after being cautioned as to his rights, that he was previously convicted of the crimes charged, or any of them, the court shall sentence him as provided in sec. [SECS. 40 OR] 50 of this chapter, and shall vacate the previous sentence, deducting from the new sentence all time actually served on the sentence so vacated. If the accused says he is not the same person, or refuses to answer, or remains silent, the court shall examine the charge of previous convictions, which shall be the only matter in issue.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The Division of Corrections should examine existing rehabilitative programs and alternatives thereto to determine their applicability to prisoners sentenced under this Act.

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

DRAFT 3/16/76
Law

P R O P O S E D

3/23 Milton

Original Sponsor: Rules Committee by Request of the Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 600

IN THE LEGISLATURE FOR THE STATE OF ALASKA

NINTH LEGISLATURE - SECOND SESSION

A BILL

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

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 sentencing is imposed in accordance with AS 12.55.035(a)(2) or (3), 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 in 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) if the conviction for which sentencing is being rendered is a violent felony and is the defendant's first violent felony conviction, the court may sentence the defendant to a term of imprisonment, within the limits provided by law, or in accordance with AS 33.15.230 or secs. 80 or 85 of this chapter;

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

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

03-038

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

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

(c) For the purposes of this section:

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

(2) a conviction which authorizes a maximum term of imprisonment for life is considered as having a term of imprisonment of 99 years;

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

(A) AS 11.15.010 -- first degree murder;

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

(C) AS 11.15.030 -- second degree murder;

(D) AS 11.15.040 -- manslaughter;

(E) AS 11.15.080 -- negligent homicide;

(F) AS 11.15.120 -- rape;

(G) AS 11.15.140 -- mayhem;

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

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

commit rape or robbery

(J) AS 11.15.190 -- assault while armed;

(K) AS 11.15.210 -- poisoning;

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

(M) AS 11.15.240 -- robbery;

(N) AS 11.15.260 -- kidnapping;

(O) AS 11.20.010 -- first degree arson;

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

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

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

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

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

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

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

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

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

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

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

"beyond a reasonable doubt"

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

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

habitual criminal

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

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

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

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

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

Sec. 12.55.060. PROCEDURE UPON DISCOVERY OF PRIOR CONVICTIONS. (a) Before conviction or while sentence is effective, if it appears that a person convicted of a crime in this state has previously been convicted and has not been charged under sec. [SECS. 40 AND] 50 of this chapter, the district attorney may file an information in the superior court accusing that person of the previous conviction or convictions. The court shall cause that person, whether confined in prison or otherwise, to be brought before it and shall inform him of the allegations contained in the information and of his right to be tried as to the truth of the allegations, and shall require the accused person to say whether or not he is the same person as charged in the information. If the accused acknowledges or confesses in open court, after being cautioned as to his rights, that he was previously convicted of the crimes charged, or any of them, the court shall sentence him as provided in sec. [SECS. 40 or 50 of this chapter, and shall vacate the previous sentence, deducting from the new sentence all time actually served on the sentence so vacated. If the accused says he is not the same person, or refuses to answer, or remains silent, the court shall examine the charge of previous convictions, which shall be the only matter in issue.

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

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

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

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

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

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

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

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

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

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

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

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

file with committee

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

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.

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
Patrick W. Conheady
Legal Assistant

PWC:gm

Give copies to
Members for HB600

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 unforseen 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

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.

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 stuctural reform can be explored.

Very truly yours,

Michael L. Rubinstein

cc: Judicial Council Members
Hon. Avrum Gross

file bb600

Alaska State Legislature

SENATOR
ROBERT H. ZIEGLER, SR.
P. O. BOX 979
KETCHIKAN, ALASKA 99901

POUCH V
JUNEAU, ALASKA 99811

Senate

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 occured 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.

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

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.

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,

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 rearrested 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]

[illegible]—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.

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

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,

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]

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

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

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

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

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.

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-

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

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

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.

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 deprisonization 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

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

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

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-

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

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.

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.

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 forebearing. 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

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

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

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.

Shlomo and Reuel Shinnar have estimated the effect on

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-

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

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 ghettoes 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

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,

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.

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

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

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

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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Alaska Judicial Council
303 K STREET
ANCHORAGE, ALASKA
99501

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 complied 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:

* * *

CRIME	SENTENCE
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 disparaties 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/lk

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.

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

HB
604

"An Act relating to the Uniform Land Sales Practices Act."

COMMITTEE REPORT

3/4/76

HOUSE

Mr. Speaker: Date April 2, 1976

The Committee on JUDICIARY has had HB 604 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)

(X) recommends it BE REPLACED WITH CS FOR HB 604 AND THAT CS FOR HB 604 DO PASS

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

( ) reports it back WITHOUT RECOMMENDATION

( ) "other"

Members signing the Majority report:

Terry Sanford, Sen. Pro Tem
Sen. Pro Tem
Judiciary
Committee

Members NOT concurring in the Majority report:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

Terry Sanford, Chairman

House Judiciary Committee
March 30, 1976

The meeting was called to order by Chairman Gardiner at 1:15 p.m. Members present were Specking, Bradley, Parr, Gardiner and Cotten.

HB 604 UNIFORM LAND SALES PRACTICES ACT

HB 604

Larry Carrol, Commerce
John Tillinghast, AG:

Subdivisions of 50 or more lots must register with the department and submit for verification a public offering statement which accurately describes the land for sale. Directed at Boom towns as Valdez where land is being sold sight unseen to unsuspecting buyers. This will require full disclosure so buyer knows what he is getting into. An on sight inspection will be performed by department of commerce to see that public offering statement is accurate.

HB 634 EMPLOYMENT OF MINORS

HB 634

Lee Leland, Labor, Wage and Hour division:

Would like an exemption for licensed premises so that young people can work in kitchens, gift shops, and as maids. Also want exemption for those over 16 who are drop outs so they can work steadily. Mr. Leland offered the attached amendment by the ABC Board.

Ron Lorensen, AG's office:

Minors may work on licensed premises with written permission of commissioner and parents. Problem has been with hotels and restaurants who cannot find people willing to work for lower wages, so like young people. But most of these are licensed premises. Department of Labor would like to be notified when a minor is being hired so they can check conditions, hours, wages etc.

HB 713 STUDENT REGENT

HB 713

Student regent must actually be a student, if drops out, governor must choose a replacement.

The meeting was adjourned at 2:45 p.m.

House Judiciary Committee
April 2, 1976

The meeting was called to order by Chairman Gardiner at 1:30 p.m. Present were Cotten, Specking, Bradley, Parr, Gardiner and Eliason.

HB 600 DETERMINATE SENTENCING

HB 600

Pat Conheady
Dan Hickey

Discussion of good time. As suggested by Fogel and Schueller good time should be vested after 30 days so that no more than 30 days good time can be lost. Will give the prisoners a better outlook and more reason to not misbehave.

Get rid of parole and get determinate sentencing. Need for statutory guidelines for mandatory minimums.

HB 634 EMPLOYMENT OF MINORS

HB 634

Section 1 was changed to agree with amendment suggested by Mr. Lee Leland of Wage and Hour Division of Dept. of Labor. Section 2 was deleted and 23.10.340 (b) was repealed.

HB 604 LAND SALES

HB 604

Cotten moved to change from 50 lots to 25 lots as trigger point. No objection, so ordered.

Mr. Parr wants the state to conform to the same guidelines and moved that 34.55.042(a)(6) be repealed. No objection, so ordered and a CS was ordered drawn up.

Mr. Cotten moved CS out of committee. No objection, so ordered.

The meeting was adjourned at 2:45 p.m.

file 604

STATE OF ALASKA

JAY S. HAMMOND
GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

OFFICE OF THE COMMISSIONER

POUCH D — JUNEAU 99811

April 5, 1976

Honorable Terry Gardiner
Chairman
House Judiciary Committee
Pouch V
State Capitol
Juneau, Alaska 99811

Dear Terry:

Re: CS HB 604

We received information late Friday afternoon that the House Judiciary Committee would consider HB 604 at 11:00 A.M. the next day, Saturday, April 3, 1976. However, we were apparently misinformed, because when Julius Brecht, the new Director of Banking, arrived to testify at that meeting, he was informed that the Committee had already considered the bill on Friday, and voted to send it to the House with two substantive changes, on which we would have liked to have commented. We are sorry we missed the committee meeting on Friday, however, we do have some comments on CS HB 604.

I shall briefly outline those comments at this time. First, the form of CS HB 604 reported out of the committee changed the cutoff for reporting intrastate subdivision offerings from 50 to 25. I feel that the cutoff should be left at 50. The purpose of this bill is certainly to protect potential buyers of subdivided land. But where small amounts of land are involved in the offering, e.g., 25 lots or roughly eight acres, the scope of the offering is usually extended to persons within a reasonable distance from the land. Therefore, these persons may make their own on-site inspection without difficulty. However, offerings of 50 lots or more tend to be made to a much larger group of interested buyers, a number of whom quite likely cannot afford the time or money to travel to the site to inspect the land prior to purchase. The intent of the Governor in proposing this bill was to cover the latter situation. Also, to reduce the cutoff to 25 will greatly increase the administrative burden on the Department of Commerce and Economic Development in processing the filings of offers containing 25 or more subdivisions. For these reasons, I feel the cutoff should be left at 50 and not changed to 25.

I also understand that the committee has amended HB 604 to require that sales of subdivided land by the state be expressly subject to the provisions of the bill. I understand that the committee believes that there are policy reasons for requiring the state, when offering subdivided land for sale, to follow a procedure similar to that set out in HB 604 for private businessmen. However, I do not believe that the administrative mechanism chosen by the committee, i.e. registration of those state