They contribute to orderly prison administration, and can substantially reduce long sentences. As neither S. 1 nor Brown Commission contain any such provisions, their omission is not supported.

Comment. For reasons not made clear to us, neither S. 1 nor Brown Commission have any provisions for reduction of prison terms for good behavior in prison. We are not prepared to approve these omissions, on the basis of any facts known to us.

(33) Recommendation as to the death penalty. The Association takes no action either to support or to oppose the provisions for the death penalty for murder in §§ 2401, 2403, 3726, and 3841-42 of S. 1 and §§ 3601-4 of Brown Commission, since there are cases before the Supreme Court involving the constitutionality of the death penalty, and of procedures for its imposition. Until the opinions in these cases are studied, it is not possible to forecast what issues will remain for consideration.

Comment. Until there has been time to study the decisions of the Supreme Court in the 1974-75 term on the constitutionality of the death penalty and of procedures for its imposition, we are not prepared to recommend action by the House of Delegates either to support or to oppose the provisions for the death penalty in §§ 2401-2403, 3726 and 3841-42 of S. 1 and §§ 3601-4 of Brown Commission.

(34) Recommendation as to arrest of probationers. ABA Standards for Probation, § 5.2(b), provides: "Probation officers should not be authorized to arrest probationers." Section 3016 of S. 1 permits arrest of a probationer by an officer of the Federal Probation Service, and Brown Commission appears to have no provision on the matter. Neither draft is supported on this matter.

Comment. We believe the effectiveness of probation officers in their personal relationship with probationers will be increased if they are not given the power to arrest for violation of the terms of probation.

(35) Recommendation on pretrial release. Pretrial release provisions should be enacted which conform to ABA Standards for Pretrial Release. Sections 3502-3504 of S. 1, which restate the present law on this subject, lack the ABA Standards provisions in §§ 1.2(c) and 5.1 making the posting of monetary bail the course of last resort; in § 5.4 prohibiting the use of compensated sureties; in § 5.6 relating to conditions of release; in § 5.8 on revocation of release after commission of a serious crime while awaiting trial; in § 5.10 on accelerated trial for detained defendants; and in § 5.11 on prejudice at trial or sentence based on pretrial detention. The Brown Commission has no such provisions. Neither draft is supported on this matter. Note, however, that while §§ 3502-04 of S. 1 make no provision for forfeiture of monetary bail and its collection, the matter is dealt with at page 362 of S. 1 in Rule 46(e) of the Federal Rules of Criminal Procedure, which are reenacted in S. 1.

Comment. We do not approve the provisions of §§ 3502-3504 of S. 1, insofar as they fail to adhere to the ABA Standards for Pretrial Release. Section 3502, taken directly from existing law, reflects only partial compliance with §§ 1.2(c) and 5.3 of the ABA Standards relating to monetary conditions of release, which mandate that the posting of bail be designated the course of last resort. Existing law and the proposed Code fail to do this, placing bail on an apparently equal footing with other permissible conditions of release.

(36) Recommendation as to appellate review of sentences. ABA Standards for Appellate Review of Sentences provide for sentence review by an appellate court, with power to affirm, reduce or increase the sentence. The Association supports § 3725 of S. 1, which appears to be substantially in accord with the major provisions of the ABA Standards, but recommends procedural amendments to allow the court reviewing the sentence to correct an illegal sentence (which now can only be done by appeal on the merits), to limit the record on appeal to matters relevant to the sentencing decision, and to permit the defendant to integrate in one proceeding his appeal on the merits and a petition for sentence review. As so amended, there would still remain differences between the ABA Standards, which make no specific provision for appeal by the government (while § 3725(a) (2) of S. 1 does contain such a provision) and which authorize the reviewing court "to correct the sentence which is excessive in length" and to review "the propriety of the sentence ... and the manner in which the sentence was imposed" (while § 3725(c) requires only that the reviewing court determine whether "the sentence imposed is clearly unreasonable" and whether the findings leading to a sentence as a "dangerous special offender" under § 2302(b) "were clearly erroneous.") But these differences are not regarded as sufficiently substantial to bar support of § 3725 of S. 1, with the above amendments.

Comment. The provision of § 3725 of S. 1 providing for appellate review of sentences should be supported as carrying out the essential provisions of the ABA Standards for Appellate Review of Sentences, with certain procedural amendments. In a matter as complex and controversial as this is, we believe substantial compliance with the ABA Standards warrants support of § 3725 by the House of Delegates.

We do recommend that the section be amended to provide that the Court of Appeals need only review those portions of the record designated by the parties as relevant, instead of providing as it now does that the Court of Appeals must review the entire record in the case, and also to permit the reviewing court to change the sentence imposed, if it determines that it was imposed on improper or illegal grounds, and to allow both conviction and sentence to be reviewed in a single appeal, if the defendant wishes to appeal the conviction and either he or the government wishes to appeal the sentence.

While Brown Commission recommends an amendment to 28 U.S. Code § 1291 to grant the Courts of Appeal "the power to review the sentence and to modify it or set it aside for further proceedings," the Comment notes that this is "not a Commission recommendation as to its features."

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Therefore we cannot say that this section conforms to any provisions of the ABA Standards for Appellate Review as to scope and procedure on sentence review.

(37) Recommendation as to no presumption for parole. Except where there has been a sentence of parole ineligibility for a limited term, all prisoners should be eligible for parole after a relatively short period. But the analogy of a "presumption for probation" discussed in Recommendation (28) above should not apply to create a presumption for parole such as is found in § 3402(1) of Brown Commission. Accordingly, that section is not supported, and § 3831 of S. 1, which states the criteria for parole in a more neutral manner, is supported in its place.

Comment. There are no ABA Standards dealing with parole, and we do not believe that the "presumption for probation" in Recommendation (28) above should apply to create a "presumption for parole." Under § 3831 of S. 1, all prisoners become eligible for release on parole by the Parole Commission after completion of the first six months of imprisonment, unless a term of parole ineligibility was imposed by the sentencing court, as discussed in (31) above. Surely no presumption can be justified that all other prisoners, no matter how serious their crimes or how long their sentences, should be paroled at the completion of the first six months of their confinement. The more neutral statement of criteria for parole in § 3831 of S. 1 is much to be preferred to the presumption for parole found in § 3402 (1) of Brown Commission.

(38) Recommendation as to repeal of Federal Youth Corrections Act and Title II of Narcotic Addict Rehabilitation Act. Both of these acts are repealed by S. 1, although many of their provisions have been included at the appropriate places in the draft. The Association recommends that the extent of the changes made in S. 1 by these repeals should be studied in depth, and that until such a study has been made and the results evaluated, these repeals are not supported.

Comment. We can make no recommendation to the House of Delegates on the merits of these repeals, until a study in depth has been made of the extent of the changes made thereby in S. 1, and the justification for them.

(39) Recommendation as to espionage and related offenses. Espionage and related offenses should be codified in Title 18 in terms that do not go beyond present law, as interpreted by the Supreme Court of the United States. The judicial guidelines developed under present law have worked well in protecting the nation's true "national security" interests. To the extent that sections 1121-1128 of S.1 broaden the reach of the criminal offenses under present law, these sections are not supported.

Comment. We believe that the present law on these matters has proved itself to embody a reasonable reconciliation of the need for secrecy for national security, and the public interest in the fullest responsible disclosure and maximum access to government information. As it has been interpreted by the Supreme Court in the Pentagon Papers and Watergate cases, it appears to have struck a successful and safe balance between this need for secrecy and the public interest in disclosure and access. We concur in the Law Student Division's disapproval in Report #114 of changes in the present law which would broaden the definition of "National defense information" so as to subject open and robust discussion of important national issues to a decided "chilling effect"; would limit the guarantees of the First Amendment of a free press and freedom from prior restraints; or would create a new crime of "receiving unauthorized government information." We recognize that consolidation of present law is needed here, and that changes in phraseology (particularly in redefining the necessary states of mind in terms other than "willfulness") must be made to conform present law to the format and language of S.1. These should, however, be made in such a way that its coverage is not extended beyond its present scope in the important areas of espionage and related crimes.

August, 1975

Reprinted from –

The CRIMINAL LAW REPORTER®

July 16, 1975 THE BUREAU OF NATIONAL AFFAIRS, INC. Volume 17, No. 15

THE PROPOSED FEDERAL CRIMINAL CODE

Shortcomings of the McClellan Bill, S.1

(analyzed and compared with the Brown Commission recommendations)

Louis B. Schwartz

Benjamin Franklin Professor of Criminal Law, University of Pennsylvania; Director, National Commission on Reform of Federal Criminal Laws

Introduction

S.1, 94th Congress, although falling short in many respects, embodies numerous improvements proposed by the bipartisan National Commission on Reform of Federal Criminal Laws headed by former Governor Pat Brown of California. The bill is the result of intensive study by the Senate Judiciary Committee and the Department of Justice over the past three years, and is a considerable advance over S.1 of the 93rd Congress. Its defects are nevertheless substantial. Desirable changes are listed below in two categories, indispensable and urgent.

The classification reflects distinctions of principle and practical importance, and in addition a distinction based on whether, as to a particular issue, S.1 actually regresses from current law or Brown Commission recommendations, or merely fails to adopt a desirable advance. It is unrealistic to expect advancement on every front simultaneously. Therefore a Code including a great many solid reforms might be acceptable even if it retained some bad features of existing law. Regressions must be viewed much more seriously. For example, the proposal to abolish the defense of insanity is retrogressive, and should be most vigorously opposed for that reason as well as the importance of preserving the principle of moral responsibility as the basis of criminal conviction. Virtually all the issues classified below as "urgent" rather than "indispensable" are issues on which S.1 merely takes a stand-pat position.

It can be said generally of the contrasts between S.1 and the Brown Commission proposals that S.1 expresses the view that the crime problem can and should be solved by extending government's power over individuals. This extension can take the form of wiretapping and other secret surveillance, of giving broad discretion to officials in decisions about punishment, of authorizing exceptionally severe sentences, or of restricting access to critical information about government operations. The other school of thought, represented by the Brown Commission, is skeptical about the gains in law enforcement that can be expected from such measures, and more concerned about impairing the quality of civic life by needless restraints on liberty.

Indispensable Amendments

1. *Sentencing*

A. *The Maximum terms are excessive.* See Secs. 2301-2 and the charts in the appendices beginning at p. 3211 below. The simplest partial remedy would be to make the maxima subject to a "mandatory parole component," reducing to that extent the period during which the prisoner can be actually detained under the sentence. Thus the parole component would be inside the statutory maximum rather than added on; that was the Brown proposal. Another way effectively to shorten maxima is through the provisions on "extended terms" for "dangerous special offenders". Secs. 2301(c) and 2302. S.1 makes the extended term an add-on to the regular maximum. The Brown Commission took the position that *the upper ranges within the ordinary maximum* were to be reserved for the dangerous special offenders. See Final Report Sec. 3202. Substituting the Brown Commission's proposal would tame the ferocity of S.1's maxima, and would comport with the obvious congressional intent expressed in existing maxima, namely that they go much higher than is appropriate for the ordinary offender.

B. *Probation discretion.* Sec. 2302 directs "consideration" of a fairly conventional list of factors, but fails to state that prison shall be resorted to only if the judge is satisfied that it is the more appropriate disposition, a position espoused by the Brown Commission, the American Law Institute and the American Bar Association Standards. This failure means that no judge has to face up to the crucial issue, and that different judges will operate on different assumptions as to where the "burden of proof" lies on the issue of imprisonment or probation. The failure is exacerbated, moreover, by excluding from appellate review (Sec. 3725) the refusal of a judge to grant probation, except where he imposes a long prison sentence.

The probation provisions are defective in two other important respects. Brown Sec. 3101 contains no exclusions from eligibility for probation. Sec. 2302 of S.1 excludes all Class A offenses, and Secs. 1823 (use of gun in crime) and 1811 (drugs) exclude those offenses from probation eligibility. The main effect of these provisions will be to transfer discretion from the judge to the prosecutor, who will make the effective decisions when selecting the specific charges to bring and the plea bargains to accept. Unlike Brown, S.1 emphasizes factors pointing towards the "need" for imprisonment for retributive or deterrent purposes. Sec. 2302(a)(2).

C. *Consecutive sentencing.* Sec. 2304 does not adequately restrain the practice. The Brown provisions (Sec. 3204) embody three important principles: consecutive sentences should be flatly precluded in certain instances;[1] even where permitted, there should be a low ceiling on the aggregate of consecutive sentences;[2] and the use of consecutive sentences should in any event be confined to cases where "exceptional features" provide justification, "for reasons which the court shall set forth in detail."

The provisions of Sec. 2304 do not adequately deal with any of these principles. A conspiracy sentence can be added to a sentence for the target substantive offense. A sentence for possessing a gun during the commission of a crime not only can but must be made consecutive, even though the crime itself carries a high maximum penalty, as in the case of robbery, because it commonly involved use of weapons.

D. *Parole discretion.* Sec. 3831(c). The Parole Board is required to make five difficult findings before parole "may" be granted: that release is not inconsistent with "just punishment"; that is "*would not fail* to afford adequate deterrence"; that there is no "undue risk" of further criminality; that it would not adversely affect institutional discipline; and, in effect, that further "correctional treatment" would not improve his "capacity to lead a law-abiding life." These criteria are certain to extend the periods of actual confinement towards the very long limits provided in S.1. They move towards a policy of pointlessly detaining many in prison because a few among them may be bad risks.

Where the Brown Commission took the position that release should be favored unless some public purpose was, in the opinion of the Parole Board, served by detention, S.1 bars parole unless a series of negatives is established by a preponderance of the evidence. Even where such proof is made, there is no direction from Congress; the Parole Board "may" then release. Proof of a negative is notoriously difficult; proof of *these* negatives verges on the impossible, for they involve such issues as what is "just punishment" or "adequate deterrence", and predictions of future behavior.

Accordingly, the parole provisions of S.1 present one of the central issues in the reform of the federal criminal law inasmuch as they bear on the length of prison confinement, the degree to which Congress will prescribe guidance for the most important yet unreviewable administrative decisions in government, [and] the fundamental principle that detention is not to be imposed or prolonged unless someone is satisfied that it serves a purpose (in contrast to S.1 which says it is to be prolonged unless someone is satisfied that it serves no purpose). The fundamental principle of equal justice is violated by the formula that parole "may" be granted but need not be, even when the difficult proof requirements are met, so that prisoner A stays in jail while indistinguishable prisoner B goes free.

E. *Appellate Review of Sentence, Sec. 3725.* Review on defendant's petition is improperly limited to felonies where the sentence (either fine or imprisonment) exceeds one fifth of the authorized maximum. This denies any review of misdemeanor sentences, which may involve several years of imprisonment, while permitting review of felony sentences involving fines only. It would also deny appeal from prison sentences as long as 6 years where the authorized maximum is 30 years. If a cut-off is necessary, it ought to be such as allows review of any sentence beyond a year. In addition, a defendant should be allowed review of the all-important decision against probation, even if he is not allowed to challenge the length of a sentence less than a year, especially since the government is granted review of any decision in favor of probation.

Review of sentence at the instance of the government is overly generous: whenever the trial judge puts defendant on probation, and whenever he sets a prison term below 3/5 of S.1's high maxima. This generosity is especially dangerous in view of the appellate court's power to *increase* a sentence under review upon petition of the government. It is clear that a threat by the prosecution to seek review of a sentence will be employed to discourage defendants from seeking review.

F. *Miscellaneous.* The foregoing criticisms call for extensive revision of S.1's sentencing provisions. In the course of that revision, other improvements should be sought. It would be helpful to incorporate into Sec. 2301(a) ("Sentence of Imprisonment — In General") a declaration of congressional policy that sentences (both legislative maxima and terms actually imposed) should be related to specified goals, e.g., pure deterrence for which short confinement suffices; rehabilitation, calling for intermediate sentences of a duration comparable to a course of secondary education; or incapacitation which may require long confinement, reflecting also some element of "just punishment". This would offer district judges some guidance in exercising their discretion. In addition, the concept, whether articulated in Sec. 2301 or not, would furnish a rationale for deciding how many classes of offenses to set up in the Code. Sec. 2301 provides *nine* classes, not counting a tenth that is in effect provided by dividing Class A felonies into capital and non-capital categories in Sec. 2401. There are simply not that many different useful categories of criminality from the point of view of sentencing. The Brown Commission proposed six categories, or only five if one sets apart the non-jailable "infraction".

[1] Included offenses, conspiracy, attempt, solicitation; crimes which differ only in that one is more specifically aimed at protecting the same interest; crimes which are part of the same course of conduct or involved substantially the same criminal objective.

[2] Generally one level higher if two or more offenses of the same class are committed.

Short-term imprisonment precludes any rehabilitation program, and there is no basis for believing that there is a significant deterrence differential between 30 days, six months, or a year. (Cf. S.1, Sec. 2301.) Accordingly, misdemeanor penalties should be sharply restricted except for "persistent misdemeanants". (Brown Sec. 3003). S.1 departs notably from the Brown recommendations by authorizing imprisonment for "infractions", i.e. it fails to make provision for any non-jailable petty violations.

2. *Insanity Defense.* Sec. 522 of S.1 represents an important regression from existing law and the Brown Commission recommendation. It admits insanity as a defense only if the insanity caused a lack of "the state of mind required as an element of the offense charged." This means, for example, that a defendant who cut his wife's throat would be acquitted if he was so crazy as to believe that he was merely slicing cheese, for then he would not have had the intent to kill which is required for murder. But if he insanely supposed that his wife was poisoning him, or that God required him to dispose of his wife, he would be convicted. Present law, approved not only by the Brown Commission, but also by the American Law Institute, and all the federal Courts of Appeal, acquits the defendant (with appropriate provision for civil constraint) if he "lacked substantial capacity to appreciate the character of his conduct or to control his conduct." To fail to accord such a defense is to ignore the relevance to guilt of moral responsibility and power to choose. It is to use the gravest sanctions of the system of deterrence we call the criminal law against people who are obviously undeterrable.

In effect, S.1 abolishes the defense of insanity, since lack of the required criminal intent would be a defense under the Code whether or not the defendant was insane. Thus S.1 treats the sane and the insane alike.

3. *Incursions on Freedom of Speech.* In at least four important respects S.1 unwisely and probably unconstitutionally curtails freedom of speech. This is brought about by severe provisions against disclosure of "classified information" (Sec. 1124); by an "expansive purview"[1] of espionage (Sec. 1121); by the linking of a loose conspiracy section with a loose sedition section, so as to reach subversive speech which does not imminently threaten violent revolution (Secs. 1002, 1003); and by a dangerously vague new Sec. 1301 relating to "impairing a government function".

Sec. 1124 makes it a felony for a person entrusted with "classified information" to "communicate it to a person who is not authorized to receive it." Any defense of improper classification is in effect precluded: the defendant must have exhausted elaborate administrative remedies to which he is supposed to resort in an effort to declassify the information; he must then carry the burden of proof that the information was "not lawfully subject to classification"; and even if he succeeds in that proof, he still has no defense if the information was "communicated to an agent of a foreign power" or if he received any consideration for disclosing the unclassifiable information. Even a disclosure to a congressional committee is felonious unless made "pursuant to a lawful demand" (subpoena?). All this is an enormous reversal of Congress' long-standing refusal to underwrite indiscriminately the proclivity for secrecy inside the federal bureaucracy. It also amounts to congressional connivance in innumerable future "cover-ups".

The espionage provisions proposed in Sec. 1121 are extremely loose. Compare in all respects with Sec. 1112 of the Brown Commission Report. As in existing law dating back to the spy hysteria of World War I, one can be guilty of the offense without any hostile intent against the United States if, even in peacetime, one "communicates" defense information to a "foreign power" (however friendly) to its "advantage" (however consistent with the interests of the United States). The communication need not be clandestine or revelatory; i.e. an article in a newspaper would appear to qualify as such a communication. So drastic a control on information flows might be acceptable if the definition of national defense information were limited to true military secrets. It is not. It embraces information available in any library or in the public press if that information has not been officially released. It embraces anything "relating to the military capability of the United States or of an associate nation", and, in time of war, "any other matter involving the security of the United States that *might* be useful to the enemy." In modern societies, there is virtually no information — industrial, social, fiscal — which could not be useful to an enemy. Recall that the offense does not require proof of communication to a foreign power or of any hostile intent against the United States. A concerned report of a strike in a defense supply facility, made to an allied country, would appear to be covered. Sec. 1121 makes espionage a class A felony, a capital offense under some circumstances (see Sec. 2401), not only in time of war but also during "a national defense emergency". National defense emergencies (see definition in Sec. 111) are usually declared by the President in order to invoke special regulatory powers — quite beside the point so far as penalties for espionage are concerned — and have a way of enduring for decades into peacetime.

The conspiracy-sedition point is this. The constitutional line between punishable inchoate revolution and non-punishable subversive speech is generally expressed in the formula that "clear and present dangers" may be dealt with. Sec. 1103, however, defines the offense of "instigating overthrow" in terms of an *intent* to bring about the government's downfall "*as speedily as circumstances permit*" plus incitement to act "*at some future time*" in a way that would "*facilitate*" the revolution. This cumulation of futurities and contingencies goes to the very verge, if not beyond, the constitutional limit of "*clear and present danger*". But what is quite clear is that the Constitution would be violated by superimposing the inchoacy of "conspiracy" (Sec. 1002) upon this structure. By that double-play, one could be indicted for agreeing with another person that at some time in the unlimitedly remote future they would "incite" in the Sec. 1103 sense. A similar abuse can occur by linking the "solicitation" provision (Sec. 1003) with sedition. One could be prosecuted for attempting to persuade another

[1] Report of the Senate Committee on the Judiciary on the Criminal Justice Codification, Revision, and Reform Act of 1974, Vol. II, p. 235.

to engage at some time in the indefinite future in seditious incitement which was itself a call for conduct only in the indefinite future. The Brown Commission explicitly precluded such abuses, and the defect can readily be remedied by amending Sec. 1004 (b). That section bars cumulative inchoate offenses, but arbitrarily limits that safeguard to offenses "outside this title".[2]

The controls over speech and information flows already summarized are dangerously augmented by Sec. 1031, which makes it a felony to "obstruct, impair, or pervert a governmental function by defrauding the government in any manner." The word "defrauding" suggests injury to the pecuniary interests of the government, but the background of this section, which derives from the existing conspiracy statute, makes it clear that *any dereliction in carrying out the duties of a federal office* would be reachable. That could well include breach of regulations forbidding disclosures to or contact with the press, quite apart from any official designation of the material as classified.

4. *Conspiracy.* Conspiracy is one of the most criticized and abuse-prone aspects of American law.[3] S.1, Sec. 1002 aggravates the problem by easing the "overt act" requirement, by inflating the penalty, and by cumulating the penalties for conspiracy and other offenses defined in terms of multi-party action.

Instead of requiring an "overt act" to demonstrate that the plotting has gone beyond mere talk, Sec. 1002 makes it sufficient that "any conduct" is engaged in with intent to effect an object of a criminal agreement. "Conduct" is defined in Sec. 111 to include "omission" and "possession". The Brown Commission, recognizing that even the present "overt act" requirement has been watered down by judicial decision, so that minimal acts without evidentiary significance suffice for proof of conspiracy, proposed an alternative in the comment to its conspiracy section (Sec. 1004), viz. that the overt act be "a substantial step . . . strongly corroborative of the actor's intent to complete commission of the crime."

S.1 raises the penalty for conspiracy to as high as 30 years, depending on the gravity of the target offense, from the current five year maximum. The Senate Committee Report erroneously asserts that this follows the basic recommendation of the Brown Report.[4] But apart from the fact that the highest conspiracy sentence allowed by the Brown Commission was only 15 years (subject to the Brown Commission's favorable parole provisions), the fundamental difference is that the Brown Commission precluded consecutive sentences for conspiracy and the substantive offense involved in the conspiracy. Brown Sec. 3204 (2) (b). S.1 does not. Indeed it is possible under S.1, to string together sentences for (1) a substantive offense involving the participation of "five or more persons" (gambling business, Sec. 1841); (2) an "extended term" based upon the offense having been committed "in a conspiracy of three or more" (Sec. 2302 (b) (3)); (3) an ordinary conspiracy charge under Sec. 1002, and a mandatory consecutive minimum of five years if a firearm or "destructive device" was "possessed" during the commission of the crime. The absurdity of this scheme is underlined when we recall that all serious underlying offenses carry long maximum punishment precisely to cover cases which are aggravated, e.g. by the use of firearms, by the extra danger associated with the association of accomplices. For example, the "ordinary" maximum for robbery is 15 years plus five years probation; and this can be "extended" to 25 plus 5 in the case of "dangerous special offenders", Sec. 2302 (b) (3).

It is no defense to such absurdities that there is a "well established principle that conspiracy is a separate offense that does not merge with the completed crime."[5] The occasion of the reform of the federal criminal law is precisely the time to get away from scholasticisms like "merger" and medieval principles that go back to a time when judges had unlimited discretion to punish all non-capital offenses.

5. *Homicide and Capital Punishment.* Sec. 2401 of S.1 mandates capital punishment for certain classes of treason, sabotage, and espionage whether the offense was committed in peacetime or wartime. However, murder will obviously be the most frequent occasion for death sentences, and it is therefore convenient to discuss the topics of homicide and capital punishment together. Capital punishment of murder is mandatory under Sec. 2401 (a) (2) of S.1, in a variety of special circumstances. The arbitrary character of these categories of capital murder is indicated by the following observations: (i) Murder is capital if committed in the course of espionage, kidnapping or arson, but not in the course of robbery, burglary, or rape. (ii) Murder is capital if committed in a "specially heinous, cruel or depraved manner"; whether or not this kind of choice among styles of killing can survive constitutional attack for vagueness, it clearly invites an unfettered discretion. (iii) Murder is capital if the defendant paid somebody to do it or was paid to do it; but murder for other pecuniary consideration, e.g. to rob someone or to realize the proceeds of life insurance or to inherit the property of deceased, is not. (iv) Murder is capital if the victim is the President, a "foreign dignitary", a revenue officer, a prison guard or a U.S. consul, but not if he is a Coast Guardsman, an Army psychiatrist, or an American ambassador shot by a fanatic in this country rather than abroad. It is fantastic to envision execution of the wife or mistress of a "foreign dignitary" slain in a crime of passion. The defects of this strenuous effort to legislate standards meeting the requirements of precision set out by the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972) should not be attributed to lack of skill in the draftsmen. It is inherent in the problem of selecting a few murderers for death out of a much larger number. Only a discretionary system can work, and any discretionary system will work badly.

Perhaps the chief vice of the so-called "mandatory"

[2] Report of the National Commission on Reform of Federal Criminal Laws (1971) § 1104 (4).

[3] See Johnson, The Unnecessary Crime of Conspiracy, 61 Calif. L. Rev. 1137 (1973); Developments in the Law: Criminal Conspiracy, 72 Harv. L. Rev. 920 (1959).

[4] Committee Report, Vol. II, p. 179.

[5] Committee Report, Vol. II, p. 180. Cf. Iannelli v. U.S., 95 S.Ct. 1284 (1975), sustaining by a vote of five-to-four consecutive sentences for conspiracy and conspiratorial racketeering.

capital punishment scheme, devised to by-pass the Supreme Court's constitutional bar against erratic selection of persons to be executed, is that no such scheme can in fact be mandatory under our system of criminal law. Instead, the selection of persons to be executed will pass from the open courtroom control of judges and jurors to two types of executive officials operating virtually beyond the scrutiny of the public: the President, exercising his power to pardon or commute sentence, and the prosecutors, exercising their power to select the charge to be brought and to engage in "plea bargaining" which will result in dropping a capital charge in exchange for defendant's plea of guilty to a non-capital charge. It is notorious that in England, where death used to be the mandatory sentence for murder, the actual choice to execute or not become a routine function of the Home Office. It is also well known that in this country, the enactment of statutes giving juries unbridled discretion with respect to capital punishment in first degree murder cases was a consequence of the systematic evasion of first degree convictions which then carried a mandatory death sentence.

6. *Drugs.* The most notable respects in which S.1 departs unwisely from the Brown Commission Report is in the continuance of prison penalties for petty marijuana offenses, and in the inordinate severity of penalties for hard drug offenses. As for marijuana, any possession of the slightest amounts for personal use entails liability to 30 days imprisonment, or 6 months in the case of a second offense. Sec. 1813 (c) (2). This runs counter to the recent movement among the states to reduce such offenses to the status of non-criminal, traffic-offense type infractions, and to the much wider practice of police departments against arrests of mere users. Growing, trafficking, import or export, of however petty amounts, carries 7 years, extendible to 14, Sec. 1812. The limits jump to 15 years extendible to 25 in the case of a transfer to a youth under 18; in this connection, no discrimination is made between engaging in the business of selling marijuana, and those who, merely as users, transfer small quantities of pot to other users. Since the federal statute will preempt the field, these extraordinary penalties will apply in federal enclaves within states, like Oregon, which have adopted less repressive measures.

Mandatory sentences of 5-10 years are prescribed for trafficking in heroin or morphine. This restricts the sentencing discretion of judges in a way disapproved not only by the Brown Commission, but also by the American Law Institute, the American Bar Association's Sentencing Standards, and the National Commission on Law Enforcement and the Administration of Justice. The over-reach of this harsh provision is illustrated by the fact that it would apply to a Mexican motorist leaving the United States with the slightest amount of the drug, and without the slightest suggestion that he was a pusher or other than a user.

Urgent Amendments

7. *Catastrophes.* S.1 includes no provision on this subject, which was covered by Brown Sec. 1704. A modern Code of a great industrial society must reflect the potential for vast disasters inherent in such technologies as nuclear energy or in the disposition of poisonous chemical wastes. The Brown Commission did that, authorizing specially severe penalties for intentionally causing a "catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison, radio-active material, bacteria, virus, or other dangerous and difficult-to-confine force or substance." It also penalized the wilful creation of risk of such a catastrophe. It penalized inexcusable failure of a person to prevent a catastrophe from happening, if any act of his, albeit non-culpable in itself, played a part in bringing on the prospect of a catastrophe. It applied not merely to situations where the actor "damages property", but also to other means of causing catastrophe, e.g. by tampering with controls or operating personnel.

8. *Civil Rights.* The civil rights sections of S.1, Secs. 1501 et seq., are on the whole satisfactory. They would be improved if amended to penalize threats of economic retaliation against the exercise of civil rights.

9. *Class Action Recovery in Criminal Cases.* S.1 should include provisions authorizing a sentencing judge to institute a class action for damages in favor of injured consumers or other victims of the crime. Such a provision appeared in the Brown Commission's Study Draft, Sec. 405 (1) (b), but was not carried into the Final Report "in view of the separate consideration which the 91st Congress was giving to class actions by consumers."[8] It is evident that independent legislative action on this subject is not imminent, and class actions under F.R.C.P. 23 have been narrowly circumscribed by recent Supreme Court decision.[9] Eisen v. Carlisle and Jacquelin, 94 Sup. Ct. 2140 (1974). Whatever can be said as to creating giant classes in private treble damage suits like Eisen, mainly on the initiative of private counsel in a pronounced conflict of interest position and with costs allocated to the defendant on the basis of a "mini-hearing" before final determination of the merits, such objections have no relevance to a publicly authorized action for restitution following a determination of guilt beyond a reasonable doubt.

10. *Complicity.* Sec. 401 (c) of S.1 makes a person guilty as a principal in any offense committed by any person with whom the defendant had conspired, if the offense was committed "in furtherance of the conspiracy". Since other provisions of the section adequately cover the ordinary bases of accomplice liability, the sole purpose of subsection (c) is to convict a person who did not aid, abet, or otherwise cause the offense, solely on the basis of the fact that in the past he had conspired with the actual offender, if the offender's conduct was "reasonably foreseeable". This codifies the absurd result, reached judicially under present law, that a man who has been in jail for some time and did not personally participate in committing a particular substantive offense, may nevertheless be convicted of that offense as well as for conspiring with the offender prior to imprisonment.

[8] Comment to §3007 of the Commission's Final Report.

[9] See also Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. Leg. Studies 47 (U. Chi. Law School, 1975), arguing on the basis of deterrence for a public class action in lieu of Rule 23 class actions.

As has been noted under point I (C) above, he will then be subject to consecutive sentences for conspiring and for doing. The "reasonably foreseeable" test means, also, that a person may be convicted, on the basis of negligence or stupidity, of very serious offenses that he never contemplated or agreed, either expressly or by implication, to have perpetrated.

11. *Double Prosecution.* S.1 fails to address the issue of repeated prosecution for the same misbehavior, either as related to multiple federal prosecutions or as related to duplicative prosecution by federal and state authorities. *Cf.* Brown Secs. 704-8.

12. *Entrapment.* The overriding issue in this field is whether the law of entrapment should tolerate the conviction of defendants for committing crimes which they were induced to commit by improper pressures of police agents. S.1 says "Yes", if the culprit was "predisposed" to such offenses. Under terms of Sec. 551, the culprit may have acted "*solely* as a result of *active* inducement by a law enforcement officer," but the prosecution will succeed if the culprit was "predisposed." The Brown Commission took the "predisposition" issue out of the case, and concentrated on the propriety of the police behavior. The police, under the Brown proposals, would be free to set up "opportunity to commit an offense," and free to offer to buy narcotics from one whom they suspect of being a seller; they would be forbidden only to use "means likely to cause normally law-abiding persons to commit the offense,"[10] without regard to the character or predisposition of the target.

The Commission's position commends itself on the following grounds: (i) It gives clear guidelines to the police as to what society will tolerate in the way of police "inducement"; it does not, as does S.1, say "You may go so far sometimes and much further at other times, viz. when the suspect is "predisposed", at the risk that a jury will later find that the suspect was not sufficiently predisposed. (ii) It avoids the perversion of criminal trials into an inquisition regarding the "predisposition" of the accused as manifested by his alleged participation in prior offenses not involved in the present charge. It is inconsistent with the whole tradition of Anglo-American law to try a man for his character, and to make conviction or acquittal of two defendants who have engaged in the same conduct with the same criminal intent, depend on their alleged criminal proclivities. (iii) Dealing with entrapment as a bar of prosecution on account of police impropriety rather than as an element of defendant's guilt is consistent with the handling of similar problems in the criminal law, e.g. exclusion of coerced confessions and illegally obtained evidence. (iv) Treating entrapment as a bar lightens the burden of proof *for the prosecution*, which will then not have to negative entrapment "beyond a reasonable doubt."

13. *Federalism.* Where a federal fort or other federal enclave exists inside a state, Sec. 1863 makes that state's criminal law fully applicable to conduct not covered by the Code. State laws, many of them antequated, include a variety of bizarre and heavily punishable offenses not dealt with in the Code. The Brown Commission recognized that the federal Code must leave a large volume of local regulation applicable within such federal enclaves, but kept the "assimilation" of local law down to the misdemeanor level. If a felony sanction is to be imposed by authority of the federal Code, Congress should address itself to the issue in the Code rather than write a blank check for felonies such as one encounters in the state law on "grave desecration", carrying a life sentence.

The proposed federal Code has been misrepresented in some quarters as radically broadening the scope of federal intervention in law enforcement, whereas what it actually does is to expose, by clear drafting, the extent to which Congress has already moved into local law enforcement, especially in the vice fields. One of the unique contributions of the Brown Commission was to propose a sensible *curtailment* of federal involvement in petty local crime. Brown's Sec. 207 provided that federal law enforcement agencies should stay out of situations involving "no substantial federal interest", even if a technical basis for federal intervention exists, as when local mail is used in connection with a local fraud. The provision was precatory and could not have been availed of as a defense by any defendant against whom the federal agents chose to move.

14. *Gun Control.* S.1 offers the nation a poor exchange for the Brown Commission proposal to ban production, marketing and possession of handguns, except for military and police use. Instead, Sec. 1823 makes using or possessing a firearm in committing a crime a separate offense entailing penalties in addition to those provided for the underlying crime. Such a proposal might make sense in connection with a system that did not otherwise contemplate more severe treatment of armed offenders. But existing law, as well as all proposals before Congress, does grade offenses in ways that reflect the use of arms. The typical offenses where arms are employed carry heavy penalties precisely for the reason that they present danger to life: aggravated assault, kidnapping, robbery, rape. It is absurd to add a mandatory five-year penalty to a life sentence or to 10 or 20 years, and to suppose that this will have any noticeable effect on this use of weapons by individuals who have already demonstrated their defiance of much greater threatened punishment. In addition, a mandatory felony sentence for "displaying . . . an imitation of a firearm" in connection with any offense [impersonating a federal officer? violating the food and drug law?] manifestly and crudely overreaches the problem.

15. *Illegally Obtained Evidence.* Secs. 3713-4 incorporate provisions designed to make "voluntary" confessions admissible even if obtained by secret police interrogation in the absence of counsel and warnings prescribed in the Miranda case, and provisions designed to assure admissibility of eyewitness testimony regardless of prior police irregularities in suggesting identifications.

16. *Justifications and Excuses.* S.1 makes a beginning at codifying the circumstances under which conduct that would ordinarily be criminal becomes non-criminal, e.g. self-defense, law enforcement needs, reasonable mistake of fact. It purposely avoids resolving some sticky issues, e.g. whether an assailed person must take an available retreat rather than kill his assailant, when deadly force may be employed by law officers particularly whether

[10] Commission's §702.

superior officers must authorize shooting, e.g. in case of riots, whether a "trespasser" may be forcibly ejected without prior resort to non-violent means." Brown's proposal, Sec. 604(2), to excuse marginally hasty or excessive reaction to an emergency requiring defendant to act without adequate opportunity to appraise the situation has been dropped.

17. *Obscenity.* Without addressing larger issues, it should be observed that Sec. 1842 elevates this offense to a felony, and is not limited (as, for example, the prostitution provisions of the Code, Sec. 1843, are limited) to those who engage in a "business" of disseminating pornography for profit. Thus federal law enforcement may be invoked against the most trivial local transactions. It is no defense under the obscenity section of S.1 that the material in question might be lawfully produced and distributed under the relevant state laws; if the material is "moved across a state or United State boundary", or if "a facility of interstate or foreign commerce" is used, the federal standard of behavior governs. This contrasts with S.1's treatment of gambling in Sec. 1841(c), where it is made a defense that the gambling operation is legal in the state where it is carried on.

18. *Organized Crime; Racketeering.* The operation of large scale criminal enterprises on a continuing basis is a fit subject for special concern in a criminal code. The Brown Commission responded with a provision placing the operators of such enterprises in the category of "dangerous special offenders" for whom the upper ranges of authorized maximum sentences were reserved. See Commission's Sec. 3202. The Commission's Study Draft, Sec. 1005, fashioned an additional distinct offense of organizing or leading large scale criminal syndicates. Under this approach the size of the group rather than the particular type of "racket" became the main grading criterion. The disappearance of Study Draft Sec. 1005 from the Commission's Final Report was due to a last-minute compromise under which the liberal group of Commissioners deferred to the conservative group in accepting the complicated provisions of Sec. 3202 (derived from the Organized Crime Control Act of 1970) as a substitute for Study Draft Sec. 1005. There was no need for substitution; both principles are valid: that the leaders of criminal syndicates should be eligible for the upper ranges of sentences authorized for particular offenses, and that organization and management of a dangerous ongoing criminal business should itself be a distinct and severely punishable offense.

S.1 deals with the subject in Secs. 1801 et seq. The fundamental difficulty with the scheme is that it sweeps too wide a range of behavior into the concept of "racketeering" and then fixes a single very severe penalty (up to 30 years) without statutory distinction between types of behavior or size of the "syndicate". Two episodes of "theft" (which includes, under Sec. 1731, petty thievery punishable by less than 6 months), or two episodes of "aggravated battery" suffice to establish the critical "pattern of racketeering activity". Securities fraud, mail fraud, embezzlement — all these and more become potentially 30-year offenses for the person in charge when the involvement of five people in the operation turns it into a "criminal syndicate". Any person who "acquires an interest" in any enterprise through a two-episode "pattern" of fraud, perjury, bribery or any other of a long list of "racketeering activities" likewise is eligible for 30 years of imprisonment. Sec. 1802.

There is a section, 1803, making it an offense to invest the proceeds of racketeering in a lawful business. Although this section bears the colorful title "Washing Racketeering Proceeds", it is futile and perverse; futile because this offense cannot be established without proving other offenses [racketeering activity] already adequately punishable; perverse, because what is penalized is the transfer of capital from lawless to lawful activity. The potential criminal liability of legitimate businessmen who sell out to "racketeers" remains to be explored. The expansive provisions of S.1 on conspiracy and complicity should give them pause. Section 4101 of S.1 supplements these extraordinary criminal penalties with provision for a civil treble damage action based on violation of the racketeering laws.

19. *Purpose of Code.* A notable omission from S.1's statement of the General Purpose of the Code (Sec. 101) is Brown's stipulation that one of the purposes is "to safeguard conduct that is without guilt". Cf. Brown Commission's Sec. 102. The general tone of S.1, Sec. 101 stresses retribution as against other goals of criminal law.

20. *Regulatory Offenses.* S.1 abandons all effort to bring order to the chaos of penal provisions applicable to regulatory offenses. There is no provision corresponding to the Brown Commission's Sec. 1006, which graded these minor rule infractions according to whether they were non-culpable, willful, dangerous, or so repeated as to manifest a flouting of regulatory authority. The Commission's proposal was conservative enough: it would not have applied to myriads of existing regulatory offenses without later explicit congressional action incorporating Sec. 1006 into the particular set of regulations. The hope was to set a considered standard or pattern for later regulatory statutes, often passed on by agencies and congressional committees without much experience with criminal sanctions, and operating in disregard of each other's criminal policy. The hope is denied by S.1.

21. *Riot.* S.1 departs from the Brown Commission in making a felony of small-scale riots, down to the level of bar-room affrays involving five persons, and invoking very comprehensive federal jurisdictional involvement without Brown's provisions to avoid federal participation absent a substantial federal interest. Secs. 1831-4. S.1 omits two important safeguards found in Brown Secs. 1803-4: a declaration that "mere presence at a riot" shall not be held to constitute "engaging" in it; and provision that affirmative orders, to move and the like, be related to public safety and be issued on authority of a superior police officer before disobedience becomes punishable. A substantial minority of the Commission also favored explicit protection for the presence of news media and public officials observing events without interfering with public safety.

22. *Statute of Limitations.* Sec. 511 lengthens unnecessarily the allowable delay in prosecuting minor offenses, providing five years as compared with Brown's

[*] Cf. analysis in my memo on S. 1400, 13 CrL 3269 (1973).

three. It also provides that capital offenses (embracing under Sec. 2401 treason, sabotage, espionage, and murder) remain forever open to prosecution. The Brown Commission (Sec. 701) had recognized need for long (but not unlimited) periods for serious offenses, but qualified that with an incentive for action by the prosecution with reasonable dispatch after learning of the events. [It should be remembered that the only burden upon the prosecution is to file charges to keep the case alive against a defendant who need not by that time have been identified or apprehended.]

23. *Temporary Placement of Prisoners.* The Brown Commission did not deal with this subject. Sec. 3822 of S.1 carries over existing law which puts excessive constraints on gainful employment of prisoners outside the walls, with negative impact on one type of rehabilitation. Prisoner employment is prohibited in trades and communities where "there is a surplus of available gainful labor" or at rates below the prevailing wage. The country's grave unemployment problems will not be significantly affected by adopting a more flexible and constructive program of employment for prisoners. A requirement that temporary work by inexperienced prisoners by compensated at the prevailing rate amounts to a prohibition, since no employer will give equal pay to less productive workers. The proper concern to protect prisoners from exploitation and workers from unfair competition can be met by less onerous requirements. The law might set a maximum permitted percentage under prevailing rates, and prisoner earnings should be chargeable with part of the costs of his maintenance in prison. At the very least, the section should be modified to permit prisoners to work on public projects, at rates negotiated by the Bureau of Prisons in the light of rehabilitative goals, if the project is one which would not otherwise be economically feasible. The work release provisions must be correlated with the Half-Way House program presently administered by the Bureau of Prisons.

24. *Wire-tapping.* Secs. 3101 et seq. incorporate this controversial legislation from the 1968 Omnibus Crime Control and Safe Streets Act.

Conclusion

It is beyond the province of this memorandum to draw the appropriate balance between the claims of the two schools of thought represented by S.1 and the Brown Commission Report. Senator McClellan and his associates, the Department of Justice, and the Ford Administration have a stake in the enactment of some variant of S.1, and should be prepared to make concessions to achieve that. The forces organized around the Brown Commission Report cannot expect to prevail on every demand; and they too have made a great investment in reform of the federal criminal code. In the political bargaining that lies ahead, the parties must bear in mind that the opportunity for reform does not recur frequently, and that whatever is done here is likely to set the pattern for reform of the criminal codes of the several states. Yet reform of the federal code is to some extent independent of today's great concern with violent crime in the streets; it is state and local, not federal, law and law enforcement that directly affect the ordinary citizen's security from personal attack.

APPENDICES

The following sentencing charts and comparisons were prepared by Professor Peter Low for inclusion with these comments.

I. Brown Commission Sentencing Structure

I. Prison, Parole and Probation

Felonies	Maximum Supervision	Prison Component	Parole Component	Parole Eligibility	Probation Terms
A Reg.	20	Maximum supervision minus parole component	0-9 = 1/3 9-15 = 3 15 = 5	0-1/3 of imposed prison component	0-5
A Ext.	30				0-5
B Reg.	10				0-5
B Ext.	15				0-5
C Reg.	5			0	0-5
C Ext.	7			0	0-5
Misdemeanors					
A	1[1/2]		1/3 if sentence exceeds 6 mos.	0 if sentence exceeds 6 mos.	0-2
B	30 days	30 days	0	30 days	0-2
Infraction	0	0	0	0	0-1

II. Fines

	Individual	Organization
Class A or B felony	$10,000	$10,000
Class C felony	$ 5,000	$ 5,000
Class A misdemeanor	$ 1,000	$ 1,000
Class B misdemeanor	$ 500	$ 500
Infraction	$ 500	$ 500

Alternatively, for any offense, if pecuniary gain was directly or indirectly derived, or if personal injury or property damage or other loss was caused, a fine can be imposed that does not exceed twice the gross gain derived or twice the gross loss caused.

II. S.1 (94th Cong., 2d Sess.) Sentencing Structure

*I. Prison, Parole and Probation**

Felonies	Maximum Supervision	Prison Component	Parole Component	Parole Eligibility	Probation Terms
A	life	1/2-life	1-5	1/2 - 10	
B	16	0-10+1	1-5	1/2 - 7-1/2	1-5
C Reg.	21	0-15+1	1-5	1/2 - 3-3/4	1-5
C Ext.	31	15-25+1	1-5	1/2 - 6-1/4	
D Reg.	13	0-7+1	1-5	1/2 - 1-3/4	1-5
D Ext.	20	7-14+1	1-5	1/2 - 3-1/2	
E Reg.	9	0-3+1	1-5	1/2 - 3/4	1-5
E Ext.	12	3-6+1	1-5	1/2 - 1-1/2	
Misdemeanors					
A	6-1/4	1+1/4	1-5	1/2	0-2
B	1/2	1/2	0	1/2	0-2
C	30 days	30 days	0	30 days	0-2
Infraction	5 days	5 days	0	5 days	0-1

* The "maximum supervision" category is the total number of years of supervision authorized by S.1. It is derived for a Class B offense, for example, by adding the 10-year maximum sentence authorized by §2301 (b) (2) to the 5-year maximum parole term of §§2303 (a) and 3834 (b) and by adding also the 1-year contingent term of imprisonment of §2303 (b) (1). The "+1" number in the "prison component" category refers to the 1-year contingent term of imprisonment authorized by §2303 (b) (1) or, in the case of a Class A misdemeanor, the 90-day contingent term authorized by §2303 (b) (2). Periods are expressed in years unless otherwise noted.

II. Fines

	Individual	Organization
Felonies	$100,000	$500,000
Misdemeanors	$ 10,000	$ 10,000
Infractions	$ 1,000	$ 1,000

Alternatively, for any offense, if pecuniary gain was directly or indirectly derived, or if personal injury or property damage or other loss was caused, a fine can be imposed that does not exceed twice the gross gain derived or twice the gross loss caused.

(Appendix No. III, Maximum Sentence Illustrations, has been deleted for purposes of economy. Copies of this Appendix are available on request. Ed.)

IV. Comparison of present law, Brown Commission recommendations, and S.1 (94th Cong., 1st Sess.) on selected sentencing issues.

I. *Criteria for granting probation*

Present law: For offenses not punishable by death or life imprisonment, the court may grant probation "when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby."

Brown: For all offenders, "the court shall not impose a sentence of imprisonment . . . unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant, it is satisfied that imprisonment is the more appropriate sentence for the protection of the public because:

(a) there is undue risk that during a period of probation the defendant will commit another crime;

(b) the defendant is in need of correctional treatment that can most effectively be provided by a sentence to imprisonment . . .; or

(c) a sentence to probation . . . will unduly depreciate the seriousness of the defendant's crime, or undermine respect for law."

S.1: Except for Class A offenses and particularly designated offenses (trafficking in opiates; use of gun in any felony or misdemeanor), probation may be granted. In determining whether to impose probation, its length and its conditions, the court "shall consider:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant; and

(2) the need for the sentence imposed:

(A) to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes by the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

II. *Criteria for imposing fines*

Present law: None, within limits specified.

Brown: Within specified limits, "the court shall not sentence a defendant to pay a fine . . . which will prevent him from making restitution or reparation to the victim . . . or which the court is not satisfied that the defendant can pay in full within a reasonable time. The court shall not sentence the defendant to pay a fine unless:

(a) he has derived a pecuniary gain from the offense;

(b) he has caused an economic loss to the victim; or

(c) the court is of the opinion that a fine is uniquely adapted to deterrence of the type of offense involved or to the correction of the defendant."

S.1: Within specified limits, "the court . . . shall consider:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed:

(A) to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense; and

(B) to afford adequate deterrence to criminal conduct; and

(3) the ability of the defendant to pay the fine in view of:

(A) the defendant's income, earning capacity, and financial resources;

(B) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent on the defendant;

(C) the likelihood of the defendant making direct restitution or reparation to the victim of the offense; and

(D) any other pertinent equitable consideration."

III. *Consecutive sentence criteria*

Present law: There are neither criteria nor limits. The issue is left entirely to the discretion of the judge. E.g., mailing 50 letters to effect a scheme to defraud constitutes 50 separate offenses, each punishable by 5 years with a theoretical maximum thus of 250 years.

Brown: The judge may impose consecutive sentences if he specifically so provides, but "a defendant may not be sentenced consecutively for more than one offense to the extent:

(a) one offense is an included offense of the other;

(b) one offense consists only of a conspiracy, attempt, solicitation or other form of preparation to commit, or facilitation of, the other; or

(c) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct."

In addition, consecutive sentences cannot exceed the maximum term of the most serious felony involved unless two or more felonies of the same class were "committed as part of a different course of conduct or each involved a substantially different criminal objective," in which case they can be cumulated to the next higher class of offense. Misdemeanor sentences cannot exceed 1 year, except that two or more of the most serious class of misdemeanors can be cumulated to the maximum for the lowest class of felonies within the principle quoted above.

In addition, the court cannot impose a consecutive sentence unless it believes "that such a term is required because of the exceptional features of the case, for reasons which the court shall set forth in detail."

S.1: The issue of how many offenses a single transaction can produce is dealt with in part by the definitions of offenses. E.g., the mail fraud scheme illustrated above would constitute only one offense. But differently defined offenses can still produce a number of convictions. E.g., two people who commit an armed bank robbery are guilty of three offenses: conspiracy, robbery and use of a gun to commit a crime.

The judge may impose a consecutive sentence if he complies with the criteria quoted above under the heading "criteria for granting probation." The aggregate limit of consecutive sentences is the maximum for an offense one grade higher than the most serious offense for which the defendant is convicted.

IV. *Appellate review of sentences*

Present law: Sentences are not reviewable by appellate courts, with two exceptions. There are a few cases in which a circuit court has been so outraged at a sentence

that it reviewed the sentence, even acknowledging the fact that there is no power to do so. There is one "dangerous special offender" statute that authorizes an extended sentence for offenders who meet stated criteria (essentially recidivists and organized crime offenders). Appeal of the sentence imposed after a special proceeding to determine whether the criteria are met is open to both the government and the defendant.

Brown: It is recommended that there be appellate review of sentences in the federal system, but the details are not specified.

S.1: The defendant may appeal any sentence that is longer than one-fifth of the maximum term. He may not appeal the probation-imprisonment decision.

The government may appeal any sentence that is shorter than three-fifths of the maximum term. It may appeal the decision to put a defendant on probation.

V. *Criteria for granting parole*

Present law: Parole may be granted once the parole eligibility date has passed if it appears to the parole board "that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society." The Board has recently developed guidelines for itself for the making of the parole decision.

Brown: Each sentence has a prison component and a parole component. The parole decision is divided into four stages:

(1) For the first year of imprisonment, the defendant "shall not be released," "except in the most extraordinary circumstances."

(2) Thereafter, the prisoner "shall be released on parole, unless the Board is of the opinion that his release should be deferred because:

(a) there is undue risk that he will not conform to reasonable conditions of parole;

(b) his release at that time would unduly depreciate the seriousness of his crime or undermine respect for law;

(c) his release would have a substantially adverse effect on institutional discipline; or

(d) his continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date."

(3) If the defendant is still imprisoned after the passage of the longer of 5 years or 2/3 of his prison component, "he shall be released on parole, unless the Board is of the opinion that his release should be deferred because there is a high likelihood that he would engage in further criminal conduct."

(4) If the defendant is still imprisoned at the expiration of his prison component, he must then be paroled.

Parole eligibility is immediate for all offenders, except that the judge may postpone eligibility for not more than 1/3 of the maximum prison component imposed for a Class A or a Class B felony.

S.1: The offender can be released on parole after the first 6 months of his sentence. The Board "may" grant parole if it is of the opinion that:

"(1) his release at that time would not unduly depreciate the seriousness of the offense, undermine respect for law, or prevent the administration of just punishment for the offense;

(2) his release at that time would not undermine the affording of adequate deterrence to criminal conduct;

(3) there is no undue risk that he will commit further crimes or otherwise fail to conform to such conditions of parole as would be warranted under the circumstances;

(4) the continued provision of educational or vocational training, medical care, or other correctional treatment that he is receiving at the prison facility will not substantially enhance his capacity to lead a law-abiding life; and

(5) his release at that time would not have a substantially adverse effect on institutional discipline."

If the offender is still imprisoned at the expiration of his maximum sentence, he is then released to serve a parole term with a maximum of 5 years.

Parole eligibility is immediate for all offenders, except that the judge may postpone eligibility for all felonies for a period not to exceed the lesser of 10 years or 1/4 of the authorized maximum term.

END