(a) The Least Restrictive Alternative Principle; the Preferability of Sentences Other Than Imprisonment; the Undesirability of Mandatory Sentencing Schemes

Deprivation of an individual's physical freedom is one of the most severe interferences with liberty that the state can impose. Moreover, imprisonment is harsh, frequently counter-productive, and costly. There is, therefore, a heavy burden of justification on the imposition of a prison sentence.

A suspended sentence with probation should be the preferred sentence, to be chosen generally unless the circumstances plainly call for greater severity. Moreover, if some form of present punishment is called for, alternatives to incarceration such as community service or other intermediate punishments should always be the preferred form of the penalty, unless the circumstances plainly call for a prison sentence.

The most appropriate correctional approach is re-integrating the offender into the community, and the goals of re-integration are furthered much more readily by working with an offender in the community than by incarceration.

Probation should be authorized by the legislature in every case and exceptions to the principle are not favored.

Probation is preferable to imprisonment for many reasons: Probation maximizes the liberty of the individual while at the same time vindicating the authority of the law and protecting the public from further violations of law. Assuming that rehabilitation is a feasible goal, probation may promote the rehabilitation of the offender by continuing normal community and family contacts. Probation avoids the alienation and negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the re-integration of the offender into the community, which is necessary sooner or later in practically all cases. Probation may minimize the impact of the conviction upon innocent family members of the offender. However, probation cannot accomplish these objectives unless sufficient resources are allocated to assure that proper supervision is available, which means that case loads must be limited far below the levels prevalent today.

For those reasons, the harsh, counter-productive, and costly sentence of imprisonment is strongly disfavored and carries a heavy burden of justification by the government.

Since the ACLU views incarceration as the penalty of last resort, to be imposed only when no less restrictive alternative is appropriate, the ACLU opposes mandatory sentencing schemes that do not allow for non-incarcerating options.

1/ This policy is intended to apply to sentencing in non-capital cases. Capital sentencing presents some unique issues. See Policy #239.

In order to avoid the deplorable effects of passion and prejudice and in order to avoid the appearance that the process has been affected by these improper influences, a sentence should not be enhanced by, and the sentencing judge should not be informed of or consider victim impact statements.[1] In cases of multiple-count charging papers in which the defendant pled guilty to fewer than all of the charges or in which the defendant was convicted at trial of fewer than all of the charges, the judge should not consider the facts underlying any charge which was dismissed or of which the defendant was acquitted. Any information to be presented to the court in connection with a sentencing proceeding, whether in the form of presentence report or otherwise, must be supplied to the defendant and defendant's counsel in sufficient time prior to sentencing to permit a meaningful opportunity to investigate and contest any allegation not previously adjudicated. Defendant shall have the right to confront and cross-examine adverse witnesses at the sentencing hearing, and the government shall retain the burden of proving, at least by clear and convincing evidence, any previously unproven allegation the government offers to enhance the sentence.

The court's reasons for the sentence shall be stated in open court and on the record, and the court shall enter findings of fact as to all matters contested at the sentencing hearing. The judge shall specify the extent to which the sentence was enhanced by each aggravating circumstance presented and the extent to which the sentence was reduced by each mitigating circumstance presented. Sentences shall be subject to appellate review at the sole behest of the defendant for excessiveness, accuracy, and fairness of process, and may not be enhanced on appeal.[2]

The sentencing process must contain safeguards to ensure that individuals are not penalized for exercising their constitutional rights to trial instead of pleading guilty, or for exercising their constitutional right to trial by jury instead of a bench trial.

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(d) Federal Sentencing Guidelines

In 1984, Congress enacted a Sentencing Reform Act, creating a federal Sentencing Commission and providing some principles for this commission to follow in formulating a new sentencing scheme for all federal offenses. The sentencing scheme first produced by the Commission conflicts with ACLU policy as articulated above in a number of ways. First, Congress and the Sentencing Commission took as their principal goal the elimination of disparity in

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1/ See report from special committee on victim's rights.

2/ See Policy #238a: Double Jeopardy.

sentencing. While this object is commendable, the guidelines unduly favor uniformity in sentencing over the equally important goal of treating individual defendants fairly. The guideline sentences, based almost exclusively on the nature of the offense and prior criminal history,1/ pay insufficient attention to individual offender characteristics (see §5H1.1-5H1.6) and unduly restrict judicial discretion to consider such characteristics, thereby denying due process of law to individual defendants.

In addition, incarceration is usually the presumptive sentence for offenders under the guidelines. Probation, a desirable alternative for the reasons stated above, is rarely an available sanction under the guidelines. (See §5B1.1) The sentences of incarceration under the guidelines have generally been lengthened excessively.

Congress and the Commission have failed to provide an adequate mechanism for resolving disputes over factors made relevant under the guidelines. (See §6A1.3 and commentary.) Even if sentencing hearings with due process guarantees appropriate to the sentencing decision were provided, such hearings cannot substitute for a trial. The guidelines allow the sentencing process to be used to relieve the government of its burden of proving beyond a reasonable doubt what should have been elements of the crime charged (defendant's role in the offense, for example, is made a relevant factor in sentencing, see §§3B1.1-3B1.2), or to punish offenses not proven at trial (obstruction of justice during investigation or prosecution, for example, see §3C1.1).

Some of the factors made relevant to the sentencing decision should not be permissible considerations as framed. A defendant's acceptance of responsibility (see §3E1.1) is a permissible mitigating factor, but should be considered irrelevant to the extent that defendant's attitude is being judged on the basis of conduct protected by the Fifth Amendment guarantee against self-incrimination. The criminal livelihood provision (see §4B1.3), enhancing sentences of those who derive a "substantial portion of income" from a "pattern of criminal conduct," is objectionable as vague, as potentially discriminating against the poor, and as potentially leading to a disproportionate sentence for the crime charged.

Furthermore, the guidelines overly restrict defendants' ability to challenge their sentences. Defendants should have the right to seek revision of their sentences at any time.

The treatment of youthful offenders under the guidelines is also problematic. The elimination of the Youth Corrections Act

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1/ The few other factors considered relevant--defendant's "criminal livelihood," factors relating to the nature of the crime victim, public concern over the crime and defendant's acceptance of responsibility--are of questionable legitimacy, for reasons described infra.

stigmatizes youth, as does the aggravation of sentences on the basis of prior adjudications while defendant was a juvenile. See §4A1.2(d).

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(e) Fines or Restitution as an Alternative to Incarceration

The ACLU favors the use of fines or restitution[1/] as an alternative to incarceration. Because of the potential for discrimination on the basis of economic status inherent in the use of fines, restitution, or any other financial obligation imposed, however, their amount and terms of payment should be set according to a defendant's ability to pay. In addition, the imposition of the terms of incarceration for non-willful failures to pay fines should be prohibited and the use of community service should be encouraged as an alternative enforcement mechanism for willful non-payment.

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(f) Expenditures on Corrections; Creation of Community Based Programs; Restrictions Upon Construction of Prisons and Jails

The first priority of any expenditures on corrections should be the creation of community-based treatment programs (including, but not limited to drug and alcohol treatment programs, vocational training programs, counseling programs, and half-way houses.)

The priority in prison and jail construction must be the elimination of existing unconstitutional conditions; new prison and jail capacity should be added, if ever, only if:

1) such jail or prison construction furthers the compelling civil liberties interests of eliminating unconstitutional or unreasonably harsh conditions in existing facilities; and assuring that any new prisons or jails are placed in reasonable proximity to the home communities of the inmates;

2) all possible steps (short of new construction) have been taken to remedy conditions which are unconstitutional or unreasonably harsh in existing facilities;

3) the need for such additional capacity has been demonstrated in light of sentencing policies which would ensure that imprisonment be used only when alternatives, such as early release programs, the elimination of mandatory sentencing laws, the end of the current practice of returning persons to prisons for technical parole violations, and the greater use of

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1/ In addition, restitution should not be a civil penalty but should embrace the objectives of the criminal law and be consistent with the position to be adopted by the ACLU Special Committee on Victim's Rights in the criminal process.

* * *

(b) Restrictions Upon the Length and Severity of Sentences of Imprisonment

Prison sentences in the United States are imposed more frequently than necessary and are significantly longer than necessary in the vast majority of cases to serve any legitimate goal of punishment. The ACLU opposes excessive use of the option of incarceration and furthermore opposes sentences which violate principles of proportionality.

Sentences should be based on the nature of the offense and on relevant personal characteristics and circumstances of the defendant. For this reason, the ACLU opposes mandatory sentences of imprisonment or any other sentencing scheme that unduly restricts the judge's ability to engage in individualized sentencing. At the same time, however, any sentencing scheme must also include some protection against the possibility of arbitrary or discriminatory sentencing that arises when judicial discretion is completely unfettered. The legislature or the courts[1] may address the problem of disparity by structuring judicial discretion in a number of ways: formulating sentencing guidelines or sentencing benchmarks, enunciating rosters of aggravating and mitigating factors, or providing for meaningful appellate review of sentences.[2] Attempts to structure judicial discretion in sentencing should not degenerate into an excuse for wholesale increase in the use of incarceration. A legislative choice of a sentencing scheme that leads to an increased use of incarceration or to generally longer sentences should be opposed.

The problem of disparity and need for individualized sentencing should not be addressed by conferring undue discretion upon parole authorities to select the date of release. Parole authorities are generally less subject to due process constraints than are judges. Therefore, in an indeterminate sentencing scheme, the ACLU favors a system in which the judge at sentencing sets a presumptive parole release date which can be postponed by parole authorities only when justified by a finding that the prisoner committed serious disciplinary infractions during the period of confinement, but which may be advanced by parole authorities in appropriate circumstances.

Whenever appropriate, a prison sentence should require only partial confinement, thereby allowing an offender to maintain community ties. If appropriate, a prison sentence should allow

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1/ Judicially created sentencing conventions should be generated by courts of sufficient authority that the problem of disparity in sentencing practices among neighboring localities is minimized.

2/ To allow a sentence to be increased on appeal would violate principles of double jeopardy. See Policy #238a.

offenders to find and maintain employment in the community. This is desirable because a cessation of employment may forever interfere with the offender's later reintegration into the community and because continued employment enables the offender to continue providing for his or her dependents. Accordingly, whenever appropriate, sentences of incarceration should either provide for work release during the period of confinement or for the confinement to take place only on those days of the week when the offender is not employed.

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(c) Procedural Safeguards in the Sentencing Process

Sentencing procedures must be designed to allow fair sentences based on accurate information, and to avoid sentences that are arbitrary, discriminatory or based on improper factors. Sentences should not be based on characteristics such as race, gender, sexual orientation, citizenship, religion, political beliefs or associational ties. The sentencing process should not penalize defendants for their poverty or lack of economic status, or enable an affluent member of the community to avoid a sentence that would have been imposed on a less affluent individual on the basis that the defendant has suffered a loss of prestige due to conviction.

A sentence should be determined at a sentencing hearing at which defendant must be permitted to present any and all aspects of his or her record and offense which she or he believes are mitigating, including but not limited to: lack of prior criminal activity; age of the defendant; employment history; effects of mental or emotional disturbance, mental disease or defect, or intoxication through alcohol or drug ingestion at the time of the offense; existence of circumstances which the defendant believed to provide moral justification or extenuation of the offense; the effects of duress or domination by another person at the time of the crime; and, in the case of an offense committed by more than one perpetrator, the fact that the defendant was an accomplice and played a lesser role than the principal perpetrator in planning or committing the crime.

A sentence should not be enhanced by, and the sentencing judge should not be informed of or consider, prior arrests, prior bad acts, or any charges that have not resulted in conviction. A fair sentence also should not be based on the characteristics of the victim, except as relevant to culpability,[1] or on the reactions of the victim or members of the public to the offense.

1/ Thus, for example, characteristics that render a victim extraordinarily vulnerable to the harm against which the statute is directed might be relevant in an appropriate case while the fact that a victim was a wealthy or prominent member of the community would never be relevant.

alternatives to incarceration, such as work furloughs, community release, and community-based residential correctional programs, will not suffice and which would furthermore ensure that imprisonment be used only where appropriate to the offense. [Board Minutes, March 4-5, 1978; January 26-27, 1985; January 26-27, 1991.]

(See also policy on Prisoners, Parolees, Probationers and Ex-Offenders.)

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COMMITTEES

JUDICIARY, CHAIRMAN

House of Representatives

COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

THE HOUSE JUDICIARY COMMITTEE PRESENTS A PUBLIC HEARING ON MANDATORY SENTENCING

Thursday, September 10, 1992
140 Main Capitol
10:00 PM

Call to Order by the Acting Chairman
House Judiciary Committee

Honorable Joseph D. Lehman
Commissioner, Department of Corrections

Honorable Maurice B. Cohill, Jr.
U.S. District Court, Western District of Pennsylvania

Michael Eakin, Esq.
District Attorney, Cumberland County

Peter Rosalsky, Esq.
Defender Association of Philadelphia

Janet LeBan
Executive Director, Pennsylvania Prison Society

Thomas B. Schmidt, III, Esq.
PA American Civil Liberties Union

John Kramer
Executive Director, Pennsylvania Commission on Sentencing

Mary Beth Rhodes
Government Affairs Specialist
PA State Association of County Commissioners

The bottom line is I believe that efficacy of our mandatory sentencing policy ought to be evaluated based on its cost and benefits. To the extent possible it needs to be a policy framed on the basis of fact and not simply what we think is happening. That means asking and answering some tough questions.

I am certainly willing to sit down with any member of the General Assembly to take an objective look at whether or not it makes any sense to continue with these policies.

Thank you for the opportunity to testify. At this time I would be happy to respond to any question you may have of me.

leverage for them in plea bargaining. In terms of their workload this is a valid concern. A question that should be raised is whether or not there is perhaps another way, a better way, to assist prosecutors in achieving their ends without utilizing mandatory sentences as they are currently constructed.

• An equally important question has to do with the cost of today's sentencing policies including the mandatory sentence. What are the cost of mandatory sentences today? From an historical perspective we have a partial picture or answer.

- In the past 10 years the DOC's budget has nearly tripled, from $126.8 million in FY 1981/1982 to $460.8 million in FY 1991/1992.

- The DOC's FY 1992/1993 budget is $500 million, and that does not take into account the significant cost of operating our 7 new prisons that are scheduled to come on-line by fiscal year 1995.

- $1.3 billion is currently committed to support the most ambitious prison construction program ever undertaken in the commonwealth.

- Each of the 7 prisons that we have committed to build will cost the taxpayers of this commonwealth over 800 million dollars over the next twenty years. And even with these new prisons we will still be overcrowded.

• Looking at today's costs I believe that it is evident that we must not stop there. We need to ask the question of what the cost of these sentencing policies will be in the future? That question needs to be asked not only in terms of the real costs that the construction and operations of new prison will have but, just as important, we need to look at the lost opportunity costs associated with the impact of mandatory sentences. In other words, what are we going to give up in terms of our inability to fund other services such as health care, education, child care and the rebuilding of our infrastructure?

By the questions that I have framed I am sure that you can tell that I have some opinions as to the efficacy of mandatory sentences. I intentionally have not gone into any detail in responding to the questions at this time. I recognize the importance of this policy, and as I said earlier my primary purpose in appearing before you today is to encourage you to look into this very important policy matter.

Remarks of Joseph D. Lehman, Commissioner
Pennsylvania Department of Corrections
before the House Judiciary Committee
September 10, 1992

"The Effects of Mandatory Sentencing"

Good morning Mr. Chairman and members of the Committee. Reviewing the effects of mandatory sentencing is a timely issue, not only for Pennsylvania but for the country as well.

Essentially what we are dealing with is a phenomenon that arose during the early-to-mid 1980s as an outgrowth of a nationwide "war on crime" and "war on drugs."

What we need to do now is to step back and ask ourselves in a very objective and very reasonable way -- "what are the advantages and disadvantages of mandatory sentences"?

I have taken this opportunity to appear before you today to essentially encourage you to take on this task as awesome as it seems. I recognize that this is a very difficult and thorny policy issue. But, it is a very important one in relation to our notion of justice and fairness. Additionally, because of the price tag associated with a sentencing policy which ends up sending more and more offenders to prison, you the legislature are left with some very tough budget decisions to make.

Today I would simply offer you some suggestions of how we might approach this review. Put simply in reviewing the viability of mandatory sentences as an appropriate public policy there are several questions that we should examine:

- A basic and most important question that should be asked is whether or not mandatory sentencing has had a demonstrable effect on crime;

- A mandatory sentence is a legal requirement to impose a sentence of imprisonment based on a single criterion -- that being the offense for which the offender is charged and subsequently convicted. A question that should be addressed is whether or not a single criterion is in and of itself a sound basis for predicting the risk that an individual represents to public safety.

- Mandatory sentences by their very nature restrict judicial discretion in favor of prosecutorial discretion. I recognize that many prosecutors would say that it provides much needed