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CRIMINAL LAW COMMENTS AND CASE NOTES

SENTENCING DISPARITY: CAUSES AND CURES

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Sentencing theories have fluctuated between two extremes: identical disposition of all persons convicted of the same offense,[1] and individualized disposition based on the character of the offender.[2] The rigidity and consequent harshness of uniform sentencing[3] applied without reference to aggravating or mitigating factors led to the development of the indeterminate sentence, parole, and other forms which took into account the personality of the offender and the circumstances of the offense. Individualized disposition as it exists today,[4] however, presents the possibility that the judge will abuse his discretion by imposing different sentences for the same offense without justification.[5]

Since the purpose of individualized sentencing is to base the punishment on the personality of the criminal as well as the gravity of the crime,[6] statistics should show differences in sentence for the same crime. Disparity, however, is unjustified if the rationale for these differences cannot be traced to relevant distinctions of character or behavior which bear a certain known relationship to the aims of punishment. Individualized sentencing is abused when the type and length of sentence depends on the identity of the particular trial judge exercising unchecked judicial discretion within a wide range of statutory sentencing alternatives.

In the United States the trial judge has no external legislative guidelines which delineate sentencing factors and their relative weight. Although most judges could point to factors which influence their choice of sentence, these factors lack objectivity. In another courtroom the same factors might be ignored or given different weight in the imposition of sentence. Subjectivity in sentencing, lack of proper guidelines, and virtual absence of limitations on the exercise of judicial discretion have produced unjustified disparity. This comment will suggest means to control the

[1] C. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (2d ed. English trans. 1769).

[2] B. RUSH, AN INQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS AND UPON SOCIETY (1787). Dr. Rush advocated that punishments be of indefinite duration according to the temper of the offender and the progress of his rehabilitation. The only limits on length should be kept secret, not disclosed to the prisoner.

[3] P. TAPPAN, CRIME, JUSTICE AND CORRECTION 430–31 (1960).

[4] The legitimate complaint has been made that the judge in some jurisdictions has very few alternatives to imprisonment since methods of punishment other than incarceration are highly underdeveloped. This comment in no way disagrees with the development of individualized sentencing techniques. But as these alternatives are authorized by legislatures, guidelines for their proper utilization must be developed and observed.

[5] George, *Comparative Sentencing Techniques*, 23 FED. PROB. 27 (1959).

[6] To individualize sentences properly the judge must first differentiate between the offender and others with regard to personality, character, socio-cultural background, the motivations of his crime, and his particular potentialities for reform or recidivism. Then he must determine which among a range of punitive, corrective, psychiatric, and social measures is best adapted to solve the individualized set of problems presented by that offender so his propensity for recidivist conduct is reduced. Glueck, *The Sentencing Problem*, 20 FED. PROB. 15 (Dec. 1956).

exercise of discretion while proper guidelines for sentencing are being developed.

The imposition of disparate sentences upon offenders with similar characteristics convicted of similar crimes hinders correctional methods. When an offender receives an unjustified sentence, his antagonism toward society is increased. He becomes a discipline problem,[7] and a barrier to rehabilitation is erected.[8] His family lives in an aura of injustice. Confidence in the administration of the legal system is shaken.[9] Not only does disparity harm the prisoner and the prison system, but it is contrary to the basic concept of equal treatment under the law embodied in the Fifth and Fourteenth Amendments to the Constitution.[11] Distinctions in treatment should be neither arbitrary nor unreasonable; they should be based on rational distinctions rooted in significant factual differences which have a substantial relation to a legitimate governmental purpose.

Few would challenge the need for a system of penal disposition based on individualization of punishment.[12] Yet the attempt to effectuate such a system has placed an enormous amount of unchecked power over individual liberty in the hands of the judiciary. Traditional notions of due process and equal protection must provide the legal framework for the development of individualized treatment of offenders based on the type of offense, the personality of the offender, and individual and societal needs for deterrence. Where the inadequacy of institutional resources[13] and insufficient knowledge about correctional goals and methods enlarge the difficulties of properly individualized sentencing, the type and length of penal disposition should be closely balanced by social and legal notions of equality.

Legal structures make their singular contribution to the dilemma of the trial judge who must make and act on judgments where a lack of certainty about dispositional effectiveness makes the reliability and validity of such judgments questionable.[14] The existing system, although it offers a reasonable and desirable opportunity for individualized sentencing, fails to provide adequate standards for sentencing and sufficient checks upon the exercise of judicial discretion. It is this failure that has produced unjustified and harmful sentence disparity in the United States.

The Extent of Disparity

Sentencing statistics from the Federal Bureau of Prisons show widespread differences for sentence lengths and release times both in federal and in state prisons.[15] For example, with the same statutory alternatives, federal judges in North Carolina sentenced narcotics law violators to an average sentence of 77.6 months while federal judges in South Carolina sentenced others, convicted of identical crimes, to an average of 56.3 months. Forgers sentenced in the Federal District Court for the Western District of Texas received 43.0 month sentences, while similar offenders in the Southern District of Texas received 27.2 month terms. For the same number of forgery offenses the court in the Northern District of Indiana imposed sentences of 36.0 months, while

[7] A committee appointed in Connecticut to study the causes of prison unrest and riots noted the relationship between prisoner discontent and alleged inequality in sentences. Conn. Governor's Prison Study Committee, First Interim Report 1 (1956), quoted in Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 Yale L. J. 1453, 1460 (1960).

[8] "There is no factor more disturbing to institutional routine and discipline than the question of comparative justice. Prisoners finding themselves convicted of similar crimes, compare experiences and quickly make evaluations which lead to the conclusion that they were unfairly punished. This feeling is frequently found to be the germ of much rioting and disorder and the basis of many serious escapes and other crimes within institutions. Moreover, prisoners leaving our institutions, embittered and laboring under the feeling that they have been mistreated, return to the community and frequently pursue a career of crime with serious results to local communities." Flannagan, *Reasons for Creation of a Court of Sentence Adjustment* (unpublished report), quoted in Ploscowe, *The Court and the Correctional System*, in Contemporary Correction 57 (P. Tappan ed. 1951).

[9] Smith, *The Sentencing Council and the Problem of Disproportionate Sentences*, 11 Prac. Law 12, 13 (Feb. 1965).

[11] Due process is secured by laws operating on all alike, not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. Caldwell v. Texas, 137 U.S. 692 (1891). Laws may not be unreasonable, arbitrary, or capricious. The means chosen by the government must have a substantial relation to the object sought to be obtained. Nebbia v. New York, 291 U.S. 502 (1933).

[12] *But see* Lewis, *The Humanitarian Theory of Punishment*, 6 Res Judicatae 224 (1953).

[13] *See generally* The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections (1967).

[14] Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 Harv. L. Rev. 904, 927 (1962). *See* Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. Crim. L.C. & P.S 226 (1959).

[15] *See* U.S. Dept of Justice, Federal Bureau of Prisons, Statistical Report 46–47 (1966).

the court in the Southern District of Indiana handed down only 19.6 month sentences.[16]

Median times served by offenders released from state prisons indicate the same widespread differences.[17] Since these differences could be explained by judicial reaction to varying regional crime rates or by the variances in penal and probational facilities, or by factual differences in the circumstances of the crime, or the personality of the criminal, they do not prove that disparity is unjustified. Although the statistics do suggest an abuse of judicial discretion, other empirical studies of an intra-jurisdictional nature have shown that the identity of the trial judge is a factor which influences the severity of sentence.

An older study proceeded on the premise that a just and scientific exercise of discretion in a large enough sample of cases ought to be reflected in a certain uniformity of disposition.[18] The study found extreme disparity in disposition from judge to judge.[19] Common characteristics of the crime or criminal apparently carried different weight with each of the judges.[20]

[16] *Id.*

[17] U.S. DEPT OF JUSTICE, FEDERAL BUREAU OF PRISONS, STATE PRISON STATISTICS 52 (1964) Differences in state sentencing statistics may be partially explained by various statutes existing within each jurisdiction which set the limits of the sentence and which allocate the sentencing function between judge and parole board. *See* Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960).

[18] Gaudet, Harris, and St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L.C. & P.S. 811 (1933); Gaudet, *The Differences between Judges in the Granting of Sentences of Probation*, 19 TEMPLE L. Q. 471 (1946).

[19] Gaudet, Harris, and St. John, *supra* note 18, at 816.

Percentage of Sentences Imposed

Sentence	Judge A	Judge B	Judge C	Judge D	Judge E	Judge F
Jail	35.6	33.6	53.3	57.7	45.0	50.0
Probation	28.5	30.4	20.2	19.5	28.1	32.4
Fine	2.5	2.2	1.6	3.1	1.9	1.9
Suspended Sentence	33.4	33.8	24.3	19.7	25.0	15.7
Number of Cases	1235	1693	1869	1489	480	676

[20] *Accord*, Somit, Tanenhaus, & Wilke, *Aspects of Judicial Sentencing Behavior*, 21 U. PITT. L. REV. 613 (1960). The New Jersey study has been criticized, however, for insensitivity to the type of crime, the number of acts charged, the circumstances surrounding the crime, and the past criminal record of the offender. E. GREEN, JUDICIAL ATTITUDES IN SENTENCING 17 (1961).

A Texas study attempted to determine the influence on sentences of variables in the administration of the criminal process and the personal characteristics of the offender.[21] The statistical method used permitted a determination of the relative impact on sentence severity of each factor while all other known variables were held constant. The relative impact of these variables on sentence severity was measured in terms of units of increasingly severe disposition ranging from fine through incarceration to death. If any differences in sentence were to be justified, two hypotheses had to be verified: 1) Variations within a relevant individual characteristic ought to be reflected in a difference in impact on predicted sentence severity. 2) Variations in a factor representing an element in the administration of the criminal system or an irrelevant individual characteristic ought to have no significant impact on the severity of the disposition.[22]

The sample showed that the identity of the trial judge had a statistically significant impact on the severity of the sentence. These differences were attributed to conflicts in the judges' penal philosophies, judicial personalities, social backgrounds, and temperaments.[23] Other factors in the administration of the criminal process, whether the defendant was freed on bail or detained, whether counsel was retained or appointed, had a measurable impact on sentence severity.[24] Among factors representing relevant individual characteristics of offenders, sentence severity was affected only by variations in the offense charged, prior felony convictions, and sex; variations in age, marital status, and educational level, although considered relevant were not statistically significant.[25]

A study of the Philadelphia Court of Quarter Sessions also showed sentence disparity based

[21] Comment, *Texas Sentencing Practices: A Statistical Study*, 45 TEXAS L. REV. 471 (1967).

[22] *Id.* at 483.

[23] *Id.* at 489–90.

[24] *Id.*, at 485–87. The authors of the Texas study found no statistically significant differences in sentences whether the defendant pleaded guilty or was convicted at trial. *Contra*, Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780, 784 (1956).

[25] Comment, *supra* note 21, at 499. Statistical analysis of individualized sentencing is exceedingly difficult since by definition there is no specific set of variables operating within each case. Because the particular facts of each case serve as the basis for the sentence, it is difficult to pinpoint these factors and control for them.

on the choice of the judge.[26] It was the most pronounced in moderately serious cases, tapering off gradually as the cases approached the extremes of mildness or seriousness. The author attributed instances of disparity to differences in judicial personality and to ambiguity in perception of the relevant factors about the circumstances of the crime or criminal.

Other evidence indicates that disparity can be attributed to the identity of the sentencing judge, whose subjective judgments enter the process of individualization. Since 1958, Sentencing Institutes have been held for the purpose of studying and formulating sentencing objectives and criteria for the federal courts.[27] At the workshops held during the Institutes, sample cases are given to the participating judges. Since each judge is given an identical pre-sentence report, any difference in sentence can only be attributed to the variety of judicial conceptions about the weight to be given certain factors in sentencing. Disparity in sentence can only be attributed to the sentencing judge, rather than differences in the case.[28]

When this technique was used at a Third Circuit Institute, the sentences for auto theft ranged from 79 days in jail to five years in prison. In a mail fraud case the sentences for the same offender ranged from eighteen months to fifteen years. In an income tax case the offender received from a $5,000 fine to five years in jail and a $10,000 fine. An embezzler drew recommendations from one year's probation to five years in prison.[29]

These examples illustrate widespread inequality in sentences, a disparity that can only be attributed to the abuse of judicial discretion. Proper individualization of punishment can only take place through the use of judicial discretion, but judicial sentencing power must be given proper goals and boundaries within which to operate. Both the legislatures and the courts have failed to accomplish this.

[26] E. GREEN, JUDICIAL ATTITUDES IN SENTENCING (1961).

[27] 28 U.S.C. § 334 (1964).

[28] The absolute validity of these statistics is doubtful since the atmosphere, tension, and responsibility of the courtroom could not be measured. Yet, since each case had the same facts, the statistical problems with actual courtroom sentencing were avoided.

[29] Celler, *Legislative Views on the Importance of the Sentencing Institute*, 30 F.R.D. 471, 472 (1962). While these figures represent the extremes, an analysis of the practice cases used in the Seventh Circuit shows that the disparity was widespread as well as extreme. No more than fifty percent of the judges gave the same sentence. *Seminar and Institute on Disparity of Sentences*, 30 F.R.D. 500–505 (1962). *See also* Appendix A, *infra*.

THE CAUSES OF DISPARITY

The precipitant of disparity has been the trend toward individualization of sentences. While present statutes give the trial judge widespread discretion in the type and length of sentence to impose, neither the legislature through rational penal codes, nor the appellate courts by judicial review of sentences, provide any guidelines for the exercise of judicial discretion. Improper or inconsistent exercise of that discretion has thus been the principal cause of disparity.

In attempting to provide sentencing alternatives that fit the offender, the legislatures have given little direction for the proper use of indeterminate, split, or definite sentences or probation.[30] The legislatures, in authorizing long sentences for most offenses, have increased the judge's discretionary power without indicating for whom the long sentence is intended. Additionally, the courts have failed to control their use of discretion by providing for appellate review of sentences.

Innumerable types of state statutes allocate authority over sentence length and release time to the legislatures, the courts, and the parole boards in different proportions. These divisions of authority can be grouped into four basic classifications:[31] 1) the maximum sentence length and the minimum term are fixed by the courts;[32] 2) the maximum is fixed by statute, the minimum by the court;[33] 3) the maximum is fixed by the court,

[30] An indeterminate sentence is the use of a minimum and maximum term, the former set by the judge. Parole eligibility comes upon completion of the minimum. A definite sentence involves a minimum which bears a statutorily fixed relation to the maximum. A split sentence combines a short term of incarceration with a longer period of probation. These definitions tend to vary from state to state. The above apply on the federal level. *See* notes 36–39, *infra*.

[31] *See* Note, *Statutory Structure for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960) for a detailed analysis of sentencing statutes.

[32] ARIZ. REV. STAT. ANN. § 13–1643 (1956); *Ill. Rev. Stat.* ch. 38, § 1–7(e) (1964); N.J. STAT. ANN. § 2A: 164–17 (Supp. 1967). In some states the minimum may be fixed by the court but only up to a term which is a certain percentage of the maximum. PA. STAT. ANN. tit. 19, § 1057 (1964). Other states give the judge total discretion to fix the minimum, with the result that a minimum may be within one year of the maximum, *e.g.*, 9–10 years. ILL. REV. STAT. ch. 38, § 1–7(e) (1961).

[33] HAWAII REV. LAWS § 258–52 (1965); MICH. STAT. ANN. § 28.1080 (1954).

the minimum by statute;[34] 4) the statutory maximum and minimum are applied by the court.[35]

On the federal level, statutory dispositions which are available for each offender include: 1) a definite sentence fixed by the court with parole eligibility at ⅓ of the sentence;[36] 2) a split sentence, up to six months in jail, and up to the maximum for the offense on probation;[37] 3) an indeterminate sentence where the minimum parole date, which cannot be more than ⅓ of the maximum term, is set by the court,[38] or, where no minimum is set, and the release time is left up to the parole board;[39] 4) a sentence for the maximum term, with a three month commitment for observation followed by resentencing based on the observer's report.[40]

By a manipulation of the maximum and minimum terms of the indeterminate sentence,[41] a judge can individualize the sentence, differentiating between offenders on the basis of his subjective perceptions of what factors are relevant to the sentence. The judge, to the extent that he is able to control the minimum term, deprives the parole board of its function of determining the release date of the prisoner.

Not only is there misuse of the indeterminate sentence, but there is an unfortunate amount of confusion about the use of different types of sentences. This is particularly clear in the federal courts where the judge has many sentencing alternatives. The Sentencing Institute cases show a general lack of consensus among the judges, not only about the length but also the type of sentence.[42]

Penal codes generally have failed to make meaningful classifications of crimes according to their severity. There are far too many differences in statutory sentence lengths based upon distinctions which have no bearing on the relative harmfulness of the conduct, the need for protecting society from such harm, or the probable dangerousness of the offender.[43]

Unjustified sentence disparity has led commentators to suggest three major remedies which would provide standards for the exercise of judicial discretion: 1) uniform revision of penal codes to reclassify crimes according to severity and to provide for shortened sentences for the ordinary offender and extended terms for the special offender within each class,[44] 2) control of the use of minimum and maximum terms of the indeterminate sentence,[45] and 3) the use of appellate review of sentences.[46]

Remedies for Disparity

The necessary threshold reform of penal codes is a reduction in the number and variety of distinctions among crimes and sentences. The possibilities for a rational legislative delineation of crimes and penalties are exhausted by a few categories of relative seriousness.[47] The American

[34] Tex. Code Crim. Proc. art. 42.09 (1966); Wisc. Stat. Ann. § 959.05 (Supp. 1968).

[35] Cal. Pen. Code § 3023 (1956); Ohio Rev. Code § 5145.01 (1964).

[36] 18 U.S.C. § 4202 (1964).

[37] 18 U.S.C. § 3651 (1964).

[38] 18 U.S.C. § 4208(a)(1) (1964).

[39] 18 U.S.C. § 4208(a)(2) (1964).

[40] 18 U.S.C. § 4208(b) (1964).

[41] The use of an indeterminate sentence can lead to a variety of sentences within a single jurisdiction. Out of 194 successive admissions to a Massachusetts prison in one year, 53 different types of sentences were involved. Glueck, *Predictive Devices and the Individualization of Justice*, 23 Law & Contemp. Prob. 461, 464 (1958).

[42] *Seminar and Institute on Disparity of Sentences*, 30 F.R.D. 458–59 (1962). *See also* Appendix A.

[43] Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. Pa. L. Rev. 465, 473 (1961); *accord*, Beckett, *Criminal Penalties in Oregon*, 40 Ore. L. Rev. 1, 8 (1960). Judge Beckett found that the 1,413 penal statutes of the Oregon Revised Statutes contained 466 penalty types—a penalty that is distinct from all other penalties and may be prescribed for one or more crimes.

[44] American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures (Tent. Draft, Dec. 1967) (hereinafter A.B.A. Standards: Sentencing); A.L.I. Model Penal Code (1962) (hereinafter M.P.C.); Advisory Council of Judges of the National Council on Crime and Delinquency, Model Sentencing Act (1963) (hereinafter M.S.A.); Flood, *The Model Sentencing Act*, 9 Crime and Delinquency 370 (1963); Murrah & Rubin, *Penal Reform and the Model Sentencing Act*, 39 N.Y.U. L. Rev. 251 (1964); Ohlin & Remington, *Sentencing Structure: Its Effect upon Systems for the Administration of Criminal Justice*, 23 Law and Contemp. Prob. 495 (1958); Rubin, *Allocation of Authority in the Sentencing-Correction Decision*, 45 Texas L. Rev. 455 (1967); Tappan, *Sentencing under the Model Penal Code*, 23 Law and Contemp. Prob. 528 (1958); *Wechsler, Sentencing, Correction, and the Model Penal Code*, 109 U. Pa. L. Rev. 465 (1961).

[45] *Id.*

[46] American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences (Tent. Draft April 1967) (hereinafter A.B.A. Standards: Appellate Review); *Hearings on S. 2722 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th* Cong., 2nd Sess. (1966); Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 Vand. L. Rev. 671 (1962).

[47] M.P.C. § 6.01, Comment p. 10 (Tent. Draft #2, 1954); A.B.A. Standards: Sentencing § 2.1 (a); M.S.A. §§ 7–9.

Law Institute's Model Penal Code, recognizing that the length and nature of the sentence must rest in part upon the seriousness of the crime, has established three categories of felonies with appropriately graduated penalties. The Model Sentencing Act gives minimal attention to the nature of the crime, but rather focuses on the personality of the offender. Both proposals provide for an extended sentence based on the character of the offender.[48]

The Model Penal Code, The Model Sentencing Act, and The American Bar Association Standards agree that there is no rationality to a system that authorizes long sentences based solely on the type of crime committed. The presence of high maximum terms, originally intended to arm the courts against the particularly dangerous offender, has led to the imposition of these inordinately long sentences on offenders who neither need nor deserve them. This drives sentence lengths beyond the term needed for the average offender and offers an opportunity for the exercise of unchecked judicial discretion likely to produce disparity.[49] The model proposals attempt to isolate the characteristics of the dangerous offender and provide extended terms for him while protecting the ordinary offender from an excessive sentence.[50]

[48] Table showing minimum and maximum for extended and ordinary terms under THE MODEL PENAL CODE AND THE MODEL SENTENCING ACT:

	Ordinary		Extended	
	Minimum (yrs.)	Maximum (yrs.)	Minimum (yrs.)	Maximum (yrs.)
Model Penal Code				
1st degree.....	1–10	life	5–10	life
2nd degree.....	1–3	10	1–5	10–20
3rd degree.....	1–2	5	1–3	5–10
Model Sentencing Act				
1st degree.....	none	life	none	life
Atrocious crimes*...	none	0–10	none	0–30
Ordinary felony....	none	0–5	none	0–30

* Optional Section.
Sources: M.P.C. §§ 6.06–6.09; M.S.A. §§ 5, 7, 9.

[49] *Supra* note 44; A.B.A. STANDARDS: SENTENCING § 2.5, Comment p. 84.

[50] M.S.A. § 5. The court may sentence a defendant convicted of a felony to a term of 30 years if it finds that one or more of the following exist: a) The defendant is being sentenced for a felony in which he inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. b) The defendant is being sentenced for a crime which seriously endangered the life or safety of another, he has previously been convicted for one or more felonies not related to the instant crime as part of a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. c) The defendant is being sentenced for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony committed as a part of a continuing criminal activity in concert with one or more persons.

Although use of extended terms raises difficult and largely unresolved questions of procedure[51] and classification,[52] it seems wiser to run the risk of possible misapplication of this device to a few offenders rather than to continue to expose all offenders to excessive sentences.[53]

The primary effect of classifying offenses and distinguishing between the ordinary and extended term is a proper focus on factors relevant to the protection of society and the rehabilitation of the criminal. Such a reform would introduce rationality into the sentencing process because the use of an ordinary and extended term gives the sentence an objectivity relating to the aims of correction, thus ensuring proper individualization. A limitation on sentence length would narrow the scope of judicial discretion, but only reduce the possibilities for disparity. Within each class of felony disparity would still be possible unless the use of the indeterminate sentence is controlled.[54]

[51] In revising its penal code, New York has refused to adopt the MODEL PENAL CODE distinctions between the ordinary and extended terms on the grounds that the imposition of an extended term demanded certain procedural safeguards which the legislature felt would interfere with the sentencing process. Although THE MODEL PENAL CODE § 7.07(6) and THE MODEL SENTENCING ACT § 4 attempt to solve these problems by controlling disclosure of the pre-sentence report and granting a right to cross-examination at a hearing on the sentence, the New York commission refused to propose a system in which an extended term was based on a formal finding as to character. *Proposed N.Y. Penal Law Study Bill*, Senate Int. 3918, Assembly Int. 5376, pp.274–77 (1964), quoted in A.B.A. STANDARDS: SENTENCING § 2.5, Comment p. 89.

[52] For a critique of M.S.A. § 5 definition of a professional criminal, *see* A.B.A. STANDARDS: SENTENCING § 2.5, Comment p. 96. They suggest six criteria which more clearly delineate the class: 1) He should be a part of a continuing conspiracy. 2) The object of the conspiracy should be a continuing illegal business. 3) The defendant should have derived a major portion of his income over a time from such an enterprise. 4) He should have occupied a supervisory or other management position in the operation. 5) He should be over 21. 6) The public needs the protection of a substantial prison term.

[53] A.B.A. STANDARDS: SENTENCING § 2.5, Comment p. 93.

[54] The Illinois Criminal Code, revised in 1961, attempted to make broad gradations in sentence

The model proposals differ over the value of the judge's power to impose a term less than the statutory maximum. It is argued by proponents of the judicially fixed maximum that judges will be sufficiently competent to individualize the sentence on the basis of the crime and the offender's personality.[55] Moreover, they think that the use of judicial discretion will decrease plea bargaining and thus prevent the ultimate decision over release time from shifting from the parole board to the prosecutor.[56] Finally, they argue that parole authorities are not yet sufficiently sophisticated to be given total discretion to determine release time. Judicial determination of the maximum sentence gives visibility to the deterrent and retributive functions of punishment.

On the other hand there are several arguments in favor of a legislatively fixed maximum.[57] First, if such a maximum is used, any difference in sentence will be based on release time determinations by the parole board rather than on subjective judicial delineations of the severity of the crime. Secondly, a study undertaken for the drafters of the Model Penal Code showed no substantial increase in plea bargaining in states with legislatively fixed maximums.[58] To control undesirable plea bargaining and to provide for the presence of mitigating circumstances, the Code gives the judge power to reduce the degree of the felony charged.[59] The final argument is that parole boards are the best qualified to make a decision about the progress of the inmate toward rehabilitation. There is no need to limit that decision by a variation of the maximum term. The necessary retributive and deterrent functions of punishment can be fulfilled by a discretionary use of a limited minimum term without alteration of the maximum term.

To the extent that parole boards are influenced by variation in the maximum term, statutory maximums would more effectively reduce the chances of objectionable disparity while amply fulfilling the aims of correction. If, however, plea bargaining actually increases and judges fail to reduce charges when justice demands, the use of a judicially fixed maximum would be superior. Whichever alternative is adopted, judicial abuse of the maximum term is only a secondary cause of disparity when compared with the uncontrolled application of the minimum term.

Since the focus of the Model Sentencing Act is on rehabilitation and the parole board is in the best position to determine the inmate's response to rehabilitative efforts, the Act does not permit the use of minimum terms.[60] Release is totally in the hands of the parole board. The Model Penal Code, taking into account the deterrent and retributive goals of punishment, provides for an automatic minimum proportional to the gravity of the felony.[61] But recognizing the possibility that correction will not be needed in specific cases, the Code authorizes the institution to petition for a resentence.[62]

The A.B.A. Standards take the most realistic approach to the use of a minimum term. Since it is unnecessary to imprison all offenders in order to reassure the public, and since the legislature cannot precisely identify those offenders who require even a minimum term, the proposal gives a court authority to impose a short minimum term after a finding that such a minimum is necessary to protect the public from further criminal conduct.[63] Since the minimum term

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severity. ILL. REV. STAT. ch. 38 (1961). But since the judge still has the authority to set both the minimum and the maximum within the statute, ch. 38, § 1–7(e), actual disparity will not be reduced. For example, the statutory maximum for voluntary manslaughter is twenty years. Through an indiscriminate use of the indeterminate sentence, the judge has 95 possible sentences from which he can choose to carry out his perception of the factors relevant to the sentence. (Number of possibilities = $[n\text{-}1(n)]/2$ with n equal to the range between the minimum and maximum terms under the statute.) Failure to control the use of the indeterminate sentence is more of a cause of disparity than the presence of excessive statutory terms.

[55] A.B.A. STANDARDS: SENTENCING § 3.1; M.S.A. § 9.

[56] Ohlin and Remington, *Sentencing Structure: Its Effects upon Systems for the Administration of Criminal Justice*, 23 LAW AND CONTEMP. PROB. 495, 500(1958). If the judge must apply the statutory maximum term, the defendant may bargain with the prosecutor for a reduction of the charge in return for a guilty plea. Or the defendant may refuse to plead guilty knowing that the judge cannot take a guilty plea or mitigating circumstances into account when fixing sentence. Thus the accused has nothing to lose by standing trial. If, however, the judge has discretion in setting the maximum, the defendant may plead guilty on the theory that the judge will take this and other facts into account when setting the maximum.

[57] M.P.C. § 6.06.

[58] Wechsler, *supra* note 44, at 479.

[59] M.P.C. § 6.12. However, Prof. Wechsler admits that courts may be more reluctant to reduce the degree of crime than the sentence. Wechsler, *supra* note 44, at 478.

[60] Flood, *supra* note 44, at 372–73.

[61] M.P.C. § 6.06. *See* note 48, *supra*.

[62] M.P.C. § 7.08 (3).

[63] A.B.A. STANDARDS: SENTENCING § 3.2 (c)(vi). This way a prison can keep an inmate for a year if necessary, yet release him if it finds that incarceration was unnecessary or more harmful than probation. The docket-crowding procedure of M. P. C. § 7.08 (3) is avoided.

does serve several legitimate purposes,[64] the best proposal is to make its use discretionary rather than obligatory. By controlling the length of the minimum term and by making its use dependent on a finding by the judge that public safety requires a minimum confinement, the aims of punishment can be met while disparity attributable to abuse of judicial discretion is reduced.

The most acute instance of disparity is imprisonment rather than fine, probation, or any other alternative not involving confinement. The role of the legislature in providing boundaries for the exercise of judicial discretion is limited to broad declarations of preferences for sentences not involving confinement[65] and to verbalizations of standards for imprisonment based on the need of the public for protection or the need of the offender for institutional care. Sentencing councils and institutes provide the major hope for a rational exercise of judicial discretion in this area[66] by producing a meaningful articulation of sentencing goals.

The third major proposal for eliminating sentence disparity is appellate review of sentences. This would affect disparity in both sentence length and the use of probation. The United States is one of the few countries where the total decision over a sentence rests with one man;[67] only thirteen jurisdictions have statutes that specifically provide for a review of sentence.[68]

Prior to 1891 the old circuit courts had express power to reduce legal but excessive sentences.[69] Presently, the circuit courts have power to reverse, modify, or affirm judgments on appeal under a statute[70] similar to some state statutes in which the courts have found authority to review sentences.[71] But Judge Frank in *U.S. v. Rosenberg*[72] held that, although the question of statutory construction had never been decided precisely, sixty years of authority established that a federal appellate court had no control over a sentence within the statutory limit.[73] More appellate courts, however, will most likely begin to exert a limited but effective role in the review of judicial sentencing discretion and the elimination of disparity in light of the recommendations of the American Bar Association Project on Minimum Standards for Criminal Justice[74] and the recently enacted law providing for appellate review of sentences in the federal courts.[75]

The presence of appellate review will have a notable effect on both the trial judge and the prisoner.[76] The dialogue between the appellate

[64] A minimum term 1) serves as a community reassurance, 2) shares the responsibility over release between the judiciary and the parole board, 3) is an institutional necessity for any valid correctional program to operate, 4) serves the purpose of general and special deterrence. A.B.A. STANDARDS: SENTENCING § 3.2, Comment p. 146–47.

[65] The model proposals suggest that probation be available for every offender except perhaps the most serious. A.B.A. STANDARDS: SENTENCING §§ 2.2, 2.3; M.P.C. § 7.01; M.S.A. §§ 1, 7–9; *accord*, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: CORRECTIONS, Appendix A, p. 206 (1967); N.Y. PEN. LAW § 65.00 (1967).

[66] The Sentencing Council, used in the federal district courts for the Northern District of Illinois, the Eastern District of Michigan, and the Eastern District of New York, has proved an effective, though limited means of reducing disparity in sentences and increasing the use of probation. Each judge in a panel of three is supplied with a pre-sentence report for each offender who is to be considered by the panel. Each judge then summarizes the relevant factors on a sentencing sheet and states his proposed disposition of the offender. The panel than meets to discuss each case and the proposed punishments. The ultimate sentence is the responsibility of the judge who heard the case, but in approximately one out of three cases, the final sentence is different from the original proposal. The Sentencing Council has produced a set of workable standards within the district court. Levin, *Toward More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499 (1966); Smith, *The Sentencing Council and the Problem of Disproportionate Sentences*, 11 PRAC. LAW. 12 (1965).

[67] George, *supra* note 5. Practically all European countries provide some sort of appellate review of sentences. *See Hearing on S. 2722 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2nd Sess. at 86–100 (1966) (hereinafter *Hearings on S. 2722*).

[68] ARIZ. REV. STAT. ANN. § 13–1717 (1956); CONN. GEN. STAT. ANN. § 51–194 (Supp. 1965); FLA. STAT. § 932.52 (Supp. 1966); HAWAII REV. LAWS § 212–14 (Supp. 1965); ILL. REV. STAT. ch. 110 A, § 615 (Supp. 1967); IOWA CODE ANN. § 793.18 (1950); ME. REV. STAT. ANN. tit. 15, §§ 2141–44 (Supp. 1966); MD. ANN. CODE art. 26, §§ 132–38 (1966); MASS. GEN. LAWS ch. 278, §§ 28A–28D (1959); NEB. REV. STAT. § 29-2308 (1964); N.Y. CODE CRIM. PROC. §§ 543,764 (1958); ORE. REV. STAT. § 138.050 (1963); TENN. CODE ANN. § 40–2711 (1955). *See* Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, *15* VAND. L. REV. 671, at 689–97 (1962) for a list of cases which interpret general statutes regarding appellate jurisdiction as giving a court power to modify legal but excessive sentences. Comm. v. Williams, 402 Pa. 48, 166 A.2d 44(1960); State v. Johnson, 67 N.J. Super. 414, 170 A.2d 830 (App. Div. 1961).

[69] Act of March 3, 1879, ch. 176, 20 Stat. 354.

[70] 28 U.S.C. § 2106 (1964).

[71] Mueller, *supra* note 68 for citations.

[72] 195 F.2d 583 (2nd Cir. 1952).

[73] *Accord*, Blockburger v. United States, 284 U.S. 299, 305 (1932); United States v. Martell, 335 F.2d 764, 767 (4th Cir. 1964).

[74] A.B.A. STANDARDS: APPELLATE REVIEW.

[75] *S. 1540*, 90th Cong., 1st Sess., 113 CONG. REC. 9,132 (daily ed. June 29, 1967).

[76] Address of Lord Ch. Just. of England, Rt. Hon. Baron Hewart of Bury to the Twelfth Annual Meeting

and trial courts can lead to the development of sentencing criteria regarding the use of the cumulative sentence for conduct arising from a single occasion,[77] the use of probation, and the use of the indeterminate sentence.[78] The appellate courts can avoid stretching the law to reverse a case where the real objection is the excessiveness of the sentence.[79] The presence of appellate review will force the trial judge to attempt to articulate reasons for his sentence decision. Disparity will occur less frequently if judges are required to justify apparent inequality.

Review, by providing opportunities for the airing of grievances, may also reduce the hostility of prisoners to a judicial system which gives one man so much control over their sentence.[80] Appellate review will provide a forum to remedy unjustified sentence disparity and to establish standards for sentencing.[81]

It is essential, however, that the appellate court must itself have adequate standards and a record upon which to base its decision. Unfortunately, the lack of precision in correctional goals and the inadequacy of means to accomplish these goals necessarily inhibit creation of such standards. The more uncertain the appellate court is about the objectives of punishment and their application to a particular offender, the greater the likelihood that the court will feel obliged to defer to the trial judge's discretion. Accordingly, a system of standards for the penocorrectional process must be articulated either by the legislature[82] or by the courts in the dialogue of the common law process.[83]

To ensure effective review, the record on appeal must contain a statement by the trial judge explaining the sentence, in addition to pertinent information from the trial, the pre-sentence report, and the transcript from the sentencing hearing.[84] Not only will this statement be essential for the reviewing court, but it will also aid the correctional authorities in dealing with the offender, and may be of therapeutic value to the defendant.[85]

The major objections to appellate review of sentences are that the court's docket will be overburdened with frivolous appeals and that review of sentence is beyond the traditional powers of the court. The problem of an increase in appeals is a serious one to which several solutions have been proposed. Adoption of the English system in which the defendant seeks leave to appeal against sentence has been suggested.[86] Although this procedure does give each sentence a minimal review, an appeal conditioned on leave of court substantially reduces the necessity for

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of the Canadian Bar Assoc., 5 CAN. B. REV. 564, 572 (1927) quoted in Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L. J. 1453, 1460 (1960).

[77] Cumulative sentences are separate sentences, one beginning at the expiration of the other.

[78] *Appellate Review of Sentences*, 32 F.R.D. 249, 293 (1962) (remarks of Prof. Wechsler); 113 CONG. REC. 9,132 (daily ed. June 29, 1967).

[79] *Appellate Review of Sentences*, 32 F.R.D. at 271 (1962) (remarks of Chief Judge Sobeloff). This seems to be the effect of a practice in Oklahoma where appellate courts reduce sentences for errors that do not rise to the level of reversible error, *e.g.*, Hudson v. State, 399 P.2d 296 (Okla. Crim. App. 1965); Henderson v. State 385 P.2d 930 (Okla. Crim. App. 1963).

[80] A.B.A. STANDARDS: APPELLATE REVIEW § 1.2, Comment p. 25–26. However an article, Note, *supra* note 76 at 1465, suggests that alleviation of unrest may not be a realistic goal of review since prisoners operate on a straight uniformity theory of sentencing based only on the type of crime and prior criminal record. The presence of review may increase prisoner frustration when false hopes are destroyed.

[81] Hall, *Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 521, 762–63 (1937).

[82] M.P.C. § 1.02; *See Hearings on S. 2722, supra* note 67, at 96 for examples from European codes.

[83] The English system of review operates free of legislative standards, but it nonetheless has produced practical principles which exert some influence on the trial court. The court does not pretend to substitute its own notion of the appropriate sentence. "It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive . . . to such an extent as to satisfy this Court that there was a failure to apply the right principles, then this Court will intervene." R. v. Ball, 35 Crim. App. 164 (1951). Excessiveness seems to be a ground for modifying a sentence when it surpasses an unexpressed norm established by the court for a particular offense and circumstances. If the sentence is within the proper range, the court will not alter it, but if it goes beyond the range, it will be reduced. Meador, *Review of Sentences in England*, in A.B.A. STANDARDS: APPELLATE REVIEW 126,129. *See* Thomas, *Theories of Punishment in the Court of Criminal Appeal*, 27 MOD. L. REV. 546 (1964).

[84] A.B.A. STANDARDS: APPELLATE REVIEW § 2.3 (c); M.S.A. § 10; *S. 1540*, 113 CONG. REC. 9,132 (daily ed. June 29, 1967).

[85] A.B.A. STANDARDS: APPELLATE REVIEW § 2.3, Comment p. 45–46; Note, *supra* note 17, at 1165. Both Pennsylvania and New Jersey require the trial judge to state briefly the reasons for the sentence imposed. SUPREME COURT OF PENNSYLVANIA RULES OF COURT, RULE 43; SUPREME COURT OF NEW JERSEY RULES OF COURT, RULES 3:7–10(b). There is not much evidence that this practice has contributed toward greater rationality in sentencing. RUBIN, THE LAW OF CRIMINAL CORRECTION 122 (1963).

[86] Approximately 8% of those eligible seek leave to appeal, 9.5% of these motions are granted, and 6.5% of those who perfect an appeal have their sentences quashed or changed. Meador, *supra* note 83, at 122.

full dress review and thus lightens the workload of the court.[87]

Another proposed solution to the problem of frivolous appeals has been a legislative grant to the court of authority to increase the sentence.[88] An increase was permitted until recently in England,[89] but the stigma of unfairness was found to outweigh the benefits from the very few cases in which a too lenient sentence was increased.[90] The original Senate bill[91] allowing an increase was amended to forbid it, in part because frivolous appeals could be more effectively prevented by the use of appeal by leave of court. Also, it was feared that a statute authorizing increase raised possible constitutional objections.[92]

The objection that appellate courts are ill-adapted to the review of sentences[93] is largely belied by the experience of the English system and the few American jurisdictions where an appeal of sentence is allowed. In the past years when the judge had little discretion in the setting of sentence, appellate review would have served no purpose. But today when statutes give the judiciary great sentencing discretion, the appellate courts have a very real function in ensuring proper exercise of that discretion. Admittedly, appellate review is no panacea, nor is it yet perfectly developed. Failures at rationalization of sentences by the trial judge,[94] lack of communication between appellate and trial courts,[95] and the general hesitancy of appellate courts to exert their influence on the sentencing process[96] tend to minimize the effectiveness of appellate review of sentences, but do not diminish its possibilities.

Constitutional Objections to Disparity in Sentences

The Constitution of the United States[97] and most state constitutions[98] have clauses prohibiting cruel and unusual punishment.[99] Whether it is a tribute to our enlightened form of government[100] or a commentary on the standards of violence tolerated in American society, there can be little doubt that this particular constitutional prohibition has had slight impact on the administration of criminal law.

In the early twentieth century, the Supreme Court put to rest the stagnant reading of the Eighth Amendment. The Court ruled that the clause was to be interpreted progressively, not only prohibiting the obsolete cruelties of the Stuarts, but also acquiring new meaning as public opinion became enlightened by humane justice.[101] The Court gave added content to the Amendment when it ruled, in *Weems v. United States*,[102] that excessive punishments came within the prohibition of the clause. The sentence for the minor offense was held to be "cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishment comes under the condemnation of the bill of rights, both on account of their degree and kind".[103] The Court used a comparative

[87] Meador, *supra* note 83, at 121. S. 1540 is based on the premise that appeal by leave of court will substantially prevent frivolous appeals and regulate the court's docket. 113 Cong. Rec. 9,132 (daily ed. June 29, 1967).

[88] A. B. A. Standards: Appellate Review § 3.3 (Tent. Draft, Dec. 1967). *Contra*, A.B.A. Standards: Appellate Review § 3.4 (Tent. Draft, April 1967). The Special Committee for the December Draft felt that it was proper for the court to correct an excessively low sentence. They argued that double jeopardy was avoided if an increase was allowed only on the defendant's appeal and that the threat of an increase would be sufficient deterrent for frivolous appeals. Comment p. 3–4 (Tent. Draft Dec. 1967).

[89] Criminal Appeal Act of 1907, 7 Edw. 7, c. 23, § 4(3).

[90] Meador, *supra* note 83, at 141–42 quoting from Report Of The Interdepartmental Committee on the Court of Criminal Appeal (1965). As a result of this Report, the Criminal Appeal Act of 1966 § 4 (2) was passed forbidding an increase of sentence on appeal.

[91] *Hearings on S. 2722*, at 2.

[92] 113 Cong. Rec. 9,132 (daily ed. June 29, 1967). For constitutional objections regarding double jeopardy, *see* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L.J. 606 (1965).

[93] Hart, *The Aims of the Criminal Law*, 23 Law And Contemp. Prob. 401, 440 (1958).

[94] Note, *supra* note 76, at 1466.

[95] Meador, *supra* note 83, at 127.

[96] Halperin, *Appellate Review of Sentences in Illinois—Reality or Illusion*, 55 Ill. B.J. 300 (1966).

[97] U.S. Const. Amend. VIII.

[98] Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. Rev. 847 & n.7 (1961).

[99] These prohibitions stem from the English Declaration of Rights, 1 W. & M. 2d Sess., s.2 (1688).

[100] 2 Story, Constitution § 1903.

[101] Weems v. United States, 217 U.S. 349, 378 (1910).

[102] Weems, a minor official in the United States Government of the Philippine Islands was convicted of defrauding the government of 416 pesos. For this offense he was sentenced to 15 years *cadens temporal*, which included imprisonment at hard labor with a chain from wrist to ankle at all times, denial of all assistance from outside the prison, denial of all civil rights during the term, and surveillance for life after release. 217 U.S. at 364.

[103] *Id.*, at 374. The Court cited with approval the dissenting opinion of Mr. Justice Field who in O'Neil v. Vermont, 144 U.S. 323, 339–40 (1891), said that the Eighth Amendment is directed not only against medieval tortures, but against all punishments which

standard to determine the excessiveness of the sentence. Compared to the punishments imposed for more severe federal and Philippine crimes, the sentence to Weems was cruel and unusual.[104]

Several years later the approach of *Weems* was implicitly rejected by the Court in *Badders v. U.S.*[105] In the absence of a more precise test for establishing excessiveness, *Weems* continues to be cited for the general proposition that a sentence so manifestly disproportionate to the seriousness of the offense or of such a nature that it shocks the conscience violates the Eighth Amendment.[106] But few cases have actually so held.[107]

Today the *Weems* approach seems to have little vitality.[108] Individualized sentencing is more concerned that the punishment fit the criminal rather than the crime. A comparative approach to excessiveness is valueless since prison sentences in the United States are uniformly lengthy. As a check on excessive sentences the *Weems* principle is dormant, but the Eighth Amendment is not yet dead. In 1963, dissenting to a denial of *certiorari*, three members of the Supreme Court indicated their willingness to apply constitutional principles to the criminal sentence.[109]

In *Rudolph v. State*, a young Negro was convicted of raping a white woman and was sentenced to death.[110] He appealed on the ground that the Eighth and Fourteenth Amendments forbade the imposition of the death penalty on a convicted rapist who had neither taken nor endangered human life. Justice Goldberg stated that the following questions seemed relevant and worthy of argument:[111]

> 1) In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate "evolving standards of decency that mark the progress of our maturing society," or "standards of decency more or less universally accepted"?
>
> 2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against "punishments which by their excessive . . . severity are greatly disproportioned to the offense charged"?
>
> 3) Can the permissible aims of punishment (*e.g.*, deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (*e.g.*, by life imprisonment); if so, does the imposition of the death penalty for rape constitute "unnecessary cruelty"?

The first and second questions resurrect the *Weems* approach, comparing the sentence imposed with sentences in other jurisdictions and examining the punishment in light of the offense. Although this line of inquiry may have relevance

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by their excessive length or severity are greatly disproportioned to the offense charged. The whole prohibition of the Amendment is against that which is excessive. 217 U.S. at 371.

[104] Weems v. United States, 217 U.S. at 380–81 (1910).

[105] 240 U.S. 391 (1916). In Badders the petitioner convicted of seven counts of mail fraud, sentenced to seven five year concurrent terms, and fined $1,000 on each count appealed on the grounds that the sentence violated the Eighth Amendment. J. Holmes, a dissenter in Weems, in writing for the Court summarily dismissed the claim by citing a pre-Weems decision, Howard v. Fleming, 191 U.S. 126 (1903). In that case the Court had said that the fact that lesser punishments had been inflicted for an offense of a more grievous nature did not make the petitioner's sentence cruel. Undue leniency in one case did not transform reasonable punishment in another case into a cruel one. 191 U.S. at 135–36. Thus Badders implicitly rejected the Weems comparative approach.

[106] Rogers v. United States, 304 F.2d. 520 (5th Cir. 1962); Black v. United States, 269 F.2d 38 (9th Cir. 1959); Mickle v. Henricks, 262 F. 687 (D.C. Nev. 1918).

[107] In State v. Evans, 73 Idaho 50, 245 P.2d 788 (1952), the defendant was charged with committing lewd and lascivious acts on a minor. Under the Idaho sentencing procedure, the trial judge was to set the maximum authorized by the legislature for each offense or a life sentence in the instant case. The court held that since a mandatory maximum term of life for a class of felony that could include such minor offenses as "necking" with a fifteen year old would be grossly disproportionate to the offense and violate the constitution, it would construe the statute as authorizing the judge to fix a sentence less than life. In State v. Kimbrough, 212 S.C. 348, 46 S.E. 2d 273 (1948), the court held that a sentence of thirty years at hard labor for a burglar was cruel and unusual punishment where the jury had recommended mercy and the defendant had no past record.

[108] Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145 (1967). Most judges find little that shocks the conscience of the community. Hendrick v. United States, 357 F.2d 121 (10th Cir. 1966); Rogers v. United States, 304 F.2d 520 (5th Cir. 1962); Halprin v. United States, 295 F.2d 458 (9th Cir. 1961); Gallego v. United States, 276 F.2d 914 (9th Cir. 1960); United States v. Rosenberg, 195 F.2d 583 (2nd Cir. 1952).

[109] Rudolph v. Alabama, *cert. denied*, 375 U.S. 889 (1963) (Goldberg, J., with Brennan and Douglas, J. J., dissenting).

[110] Rudolph v. State, 275 Ala. 115, 152 So. 2d 662 (1963).

[111] Rudolph v. Alabama, *cert. denied*, 375 U.S. at 889–91 (footnotes omitted).

for the death penalty, it would seem to have only limited value when applied to prison sentences.

It is the third question that has relevance to the problem of excessive sentences. The inquiry must be whether the permissible aims of punishment can be fulfilled as effectively by punishing the offense less severely, and if so, whether the imposition of the particular sentence constitutes unnecessary cruelty. Although Justice Goldberg was concerned with the imposition of the death penalty, this type of analysis—which gives due process content to the Eighth Amendment—applies as well to an excessive term of imprisonment. Giving due weight to the exercise of judicial discretion, it must be determined whether or not the punishment assessed is reasonably necessary to obtain the legitimate ends sought to be achieved by the law of corrections.[112] If the state interest is clearly insufficient to justify the punishment imposed, the sentence is cruelly excessive.[113]

Clearly, few statutes could be attacked on these grounds as unconstitutional, since it is difficult to argue that the mere statutory authorization of a long prison term violates the Constitution. Only when a sentence has been imposed on a particular offender is the analysis operative. Yet the majority of cases have held that prohibitions such as the Eighth Amendment are directed to the legislatures.[114] If a statute does not violate the Constitution, then any punishment set in conformity with it cannot be adjudged excessive; it is the power of the legislature, not the judiciary, to assess punishment.[115]

This approach has been qualified. A substantial minority of cases have established in *dicta* that a sentence within a valid statute will not *ordinarily* be held cruel and unusual.[116] By implication then, the Eighth Amendment does control the exercise of judicial discretion in some instances.

Several cases on the state level have held that the constitutional prohibition against excessive punishments applies to judicial as well as legislative action.[117] In *Barber v. Gladden*[118] the court said that the fact that a sentence was within the statute did not prevent it from violating the constitution,[119] although it held that a 25 year sentence for burglary with explosives did not violate the prohibition. *Singletary v. Wilson*[120] held that when the legislature had not fixed any maximum penalty for the crime of forgery, the fine imposed by the trial judge was subject to the constitutional prohibition against cruel and unusual punishments and excessive fines.[121] The court reasoned that when the legislature had delegated unlimited power to the courts to fix the sentence, the exercise of judicial power would be governed by the cruel and unusual punishment clause.

Since legislatures have given the courts widespread discretion to individualize the punishment, this exercise of judicial power should be governed by constitutional principles. When statutes permit the imposition of long sentences, manipulation of maximum and minimum terms, and discretionary use of probation without the benefit of legislative guidelines, the Eighth Amendment should be interpreted to require that the sentence imposed be reasonably necessary to achieve the ends of punishment.

A similar constitutional argument may be made when a defendant is given a sentence which differs from the sentence received by his co-defendant. Generally this approach has been rejected by the courts.[122] A recent case, however, held that in certain circumstances a different sentence for co-defendants was impermissible.[123] The court said

[112] Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1074 (1964); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 641 (1966).

[113] Comment, *Revival of the Eighth Amendment: Development of Cruel Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 1011 (1964).

[114] Note, *supra* note 98, at 852.

[115] Chavigny v. State, 112 So. 2d 910, 915 (Fla. D.C. App. 1959), *cert. denied*, 114 So. 2d 6 (Fla. 1959), *cert. denied*, 362 U.S. 922 (1960); State v. McNally, 152 Conn. 598, 211 A.2d 162 (1965). In United States v. Rosenberg, 195 F.2d 583 at 607 (2nd Cir. 1952), J. Frank said that no federal court had explicitly held that a sentence within a constitutional statute was cruel and unusual punishment; *accord*, Pependrea v. United States, 275 F.2d 325 (9th Cir. 1960).

[116] Black v. United States 269 F.2d 38 (9th Cir. 1959), *cert. denied*, 361 U.S. 938 (1960); United States v. Sorcey, 151 F.2d 899 (7th Cir. 1945), *cert. denied*, 327 U.S. 794 (1946); Schultz v. Zerbst 73 F.2d 668 (10th Cir. 1934).

[117] Several state constitutions expressly apply the prohibition to judicial exercise of power. MD. DECL. RIGHTS art. 25; MASS. DECL. RIGHTS art. 26; N.H. CONST. art. I, § 33.

[118] 210 Ore. 46, 309 P.2d 192 (1957); *see also* State v. Ross, 55 Ore. 450, 104 P. 596 (1909), *Modified on rehearing*, 55 Ore. 474, 106 P. 1022 (1910), *appeal dismissed*, 227 U.S. 150 (1913).

[119] ORE. CONST. art. I. § 16.

[120] 191 S.C. 153, 3 S.E.2d 802 (1939).

[121] S.C. CONST. art. I, § 19.

[122] Badders v. United States, 240 U.S. 391 (1916); Hedrick v. United States, 357 F.2d 121 (10th Cir. 1966); United States v. Sorcey 151 F.2d 899 (7th Cir. 1945), *cert. denied*, 327 U.S. 794 (1946); Beckett v. United States, 84 F.2d 731 (6th Cir. 1936); People v. Pulaski, 15 Ill. 2d 291, 155 N.E. 2d 29 (1959).

[123] United States v. Wiley, 278 F.2d 500 (7th Cir. 1960). The probation application of the defendant, a minor accessory without a criminal record, was not

that while it would not have granted probation to the defendant in the circumstances, it could not say that the trial judge's refusal to grant probation was an abuse of discretion, but the court added that to single out arbitrarily a minor defendant for the imposition of a more severe sentence than was received by co-defendants was an error which the court would correct by exercising its supervisory power in aid of its appellate jurisdiction.[124] Although it seems rash to say that the court was arguing on an equal protection basis,[125] this sort of analysis would have been an appropriate ground for decision. There was no apparent rational basis for differentiation between the co-defendants. Since the defendant was a minor offender without a criminal record, it is arguable that a sentence more severe than those of his co-defendants violated his constitutional right to equal treatment under the law.

Since proper individualization of punishment requires a consideration by the trial judge of all the facets of the crime and criminal, there will be numerous bases for rationalizing differences in sentences. For this reason the burden of proving irrational differentiation will be great, and the equal protection clause may be of limited effectiveness. But such an analysis is available to strike down a clearly arbitrary basis for differentiating between offenders, as when a minor accomplice without a prior record is given a more severe sentence than the principal offender.

Conclusion

The trend toward individualized disposition has produced widespread differences in sentences imposed upon offenders convicted of the same crime. Some of these differences are attributable to valid objective factors. But in other cases the disparity can only be attributed to the identity of the trial judge and cannot be rationally justified. Subjective and ambiguous perception of the relevant factors in sentencing by the trial bench has produced unjustified disparity in sentences.

Until sentencing factors become more capable of objective determination, the legal system should provide boundaries for the exercise of judicial discretion. The sentencing function should be left to the unchecked discretion of the trial judge only when the exercise of that discretion becomes totally just and scientific. Pending a more adequate formulation of sentencing objectives and factors, the sentencing process should be reformed by revision of penal codes to control the use of the indeterminate sentence and to distinguish between the ordinary and extended sentence, and by appellate review of sentences.

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considered by the judge because the defendant had pled not guilty and stood trial. After conviction, the trial judge imposed a three year prison sentence. Co-defendants who were principals in the crime and had criminal records received one and two year sentences. The appellate court held that the refusal of the trial judge to consider an application for probation because the defendant had stood trial was erroneous and remanded the case for consideration of the defendant's application. United States v. Wiley, 267 F.2d 455 (7th Cir. 1960). The trial court then denied the application and reimposed the three year sentence.

[124] United States v. Wiley, 278 F.2d 500, 502–03 (1960).

[125] Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 63–64 (1966). Mr. Rubin claims that the court's statement that the trial judge did not abuse his discretion in denying probation indicates that it is implicitly basing its decision on a constitutional theory of equal protection. The court, however, claimed that although the trial judge did not abuse his discretion in denying probation, he did abuse it when he set a three year sentence.

APPENDIX A

SAMPLE FROM A SENTENCING INSTITUTE

Synopsis of a pre-sentence report given to each judge.

The defendant is a thirty-six year old white male who pleaded guilty to robbing a Savings and Loan of $1,863 with a toy gun. He had a minor criminal record, had been previously committed for insanity and was technically in the custody of the hospital when he was arrested. Psychiatric testimony at the hearing resulted in a diagnosis of sociopathic personality and anti-social reaction.

The case was presented to the participating judges before and after the Institute. The following are the sentence results:

Sentence	Before		After	
	Number	%	Number	%
1. Civil commitment	1	1.8	—	—
2. Commitment under § 4244 to determine capacity	1	1.8	10	21.3
3. Probation with psychiatric care	3	5.6	1	2.1
4. Commitment under § 4208 (b)	28	51.9	15	31.9
5. Straight sentence				
0–4 years	2	3.7	2	4.2
5–9 years	6	11.1	3	6.4
10–14 years	4	7.4	4	8.5
15–20 years	2	3.7	1	2.1
6. Indeterminate sentence under § 4208 (a)(2)				
0–4 years	—	—	1	2.1
5–9 years	1	1.8	4	8.5
10–14 years	2	3.7	2	4.2
15–20 years	3	5.6	3	6.4
7. Sentence under § 4208 (a) (1) 1 year min.–10 year max.	1	1.8	1	2.1

Source: Seminar and Institute on Disparity of Sentences, 30 F.R.D. 401, at 501 (1962).

ADMISSIBILITY OF CONFESSION OF CODEFENDANT

LEONARD SINGER

In *Bruton v. United States*,[1] two men were prosecuted for the armed robbery of thirty dollars from a branch United States Post Office.[2] Bruton's codefendant, Evans, confessed his participation in the crime to both state and federal officials;[3] his statement, introduced into evidence at their joint trial through testimony of a federal investigator, directly implicated Bruton. Neither defendant testified, and both appealed their convictions.[4] Evans' conviction was reversed because his confession was held inadmissible.[5] Bruton's conviction was upheld by the Court of Appeals of the Eighth Circuit.[6] The Supreme Court of the United States granted certiorari.[7]

The basic postulate analyzed in this case concerned the jury's ability to follow limiting instructions with regard to a confession of one defendant which implicated the other.[8] The

[1] 391 U.S. 123 (1968). Noted, 82 HARV. L. REV. 231 (1968).

[2] 18 U.S.C. § 2114.

[3] He first confessed to a local detective who notified the Postal Inspector. State charges against him on other alleged crimes were dropped after Evans admitted his participation in the postal robbery. Evans v. United States, 375 F.2d 355, 358–9 (8th Cir. 1967).

[4] Bruton v. United States, 391 U.S. 123, 124 (1968).

[5] Evans v. United States, 375 F.2d 355, 361 (8th Cir. 1967). The confession was inadmissible on the basis of Miranda v. Arizona, 384 U.S. 436 (1966). On retrial Evans was acquitted. Bruton v. United States, 391 U.S. 123, 124 n. 1 (1968).

[6] Evans v. United States, 375 F.2d 355 (8th Cir. 1967). The court relied on Delli Paoli v. United States, 352 U.S. 232 (1957), *see* p. 197 of text and note 26 *infra*.

[7] 389 U.S. 818 (1967).

[8] Three articles in this general area are 3 COL. J. LAW & SOC. PROB. 80 (1967); 51 MINN. L. REV. 264 (1966); 36 U. CIN. L. REV. 306 (1967).

confession, although relevant as to Evans, was inadmissible hearsay as to Bruton; Bruton was unable to cross-examine its content.[9] The trial judge had instructed the jury to disregard the confession of Evans insofar as it implicated Bruton when it determined the latter's guilt or innocence.[10]

The Supreme Court decided that: "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment".[11] This conclusion was based upon the rationale and spirit of two recent decisions, *Pointer v. Texas*[12] and *Jackson v. Denno*,[13] which dealt with substantially different problems.

Pointer held that within the guaranty of the Sixth Amendment Confrontation Clause is the defendant's right to cross-examine witnesses against him.[14] The Court in *Bruton* reasoned that the jury could not follow the limiting instructions of the judge and, contrary to those admonitions, applied the full force of the confessor's implicating statements against Bruton in its consideration of his guilt.[15] If the jury considered the confession in relation to Bruton he was effectively denied his right to cross-examine this adverse witness.

It was *Jackson* which cast doubt on the jury's ability to follow limiting instructions. *Jackson* held unconstitutional a New York procedure by which the jury first determined the voluntariness of the alleged confession and then the guilt of the confessor.[16] By this procedure, "the fact of a defendant's confession is solidly implanted in the jury's mind",[17] and it would be "difficult, if not impossible," to show that a confession, found to be involuntary, did nevertheless influence the jury's deliberations as to the guilt of the defendant.[18] Once significantly prejudicial or unreliable evidence is exposed to the jury, its full impact cannot be lessened by a charge to the jury on its proper or limited use. *Bruton* reasons that such evidence, in fact, is not disregarded by the jury and that the defendant must be able to cross-examine its source. If he does not have that chance he is denied the Confrontation Clause guaranties as articulated in *Pointer*.[19]

Mr. Justice White, who along with Mr. Justice Harlan dissented in *Bruton*, had "no doubt that serious minded and responsible men are able to shut their minds to unreliable information when exercising their judgement"; he thus rejected "the assumption of the majority that giving instructions to a jury to disregard a codefendant's confession is an empty gesture".[20] He never reached the Confrontation Clause issue because he did not believe *Jackson* was applicable to the problem of a codefendant's confession. *Jackson* was distinguished on two grounds: First, while a defendant's own admission is the most damaging

[9] The Sixth Amendment of the United States Constitution dictates that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." The hearsay rule is a product of the same problem that may have made the Founding Fathers press for such an amendment. Both the Sixth Amendment and the hearsay rule demand that unreliable and untrustworthy evidence be kept out of the consideration by the jury of the defendant's guilt.

[10] Bruton v. United States, 391 U.S. 123, 125 n.2 (1968).

[11] *Id.* at 126. Roberts v. Russell, 392 U.S. 293 (1968), holds that *Bruton* is to be applied retroactively and under Pointer v. Texas, 380 U.S. 400 (1965), is applicable to the states through the Fourteenth Amendment. The Sixth Amendment, note 9 *supra*, also may be relevant to attitudes toward jury competency. If evidence not subject to the hearsay rule may be introduced against the defendant then the problem becomes a method of helping the jury decide what weight to give to each witnesses' testimony. If it sees the witness and views his reactions and demeanor, the jury will be able to determine the correct weight to give his damaging testimony. But the Constitution recognizes the dangers of allowing the jury to review evidence without any information as to the nature of the source.

[12] 380 U.S. 400 (1965).

[13] 378 U.S. 368 (1964).

[14] Pointer v. Texas, 380 U.S. 400, 406–7 (1965). *Bruton* analyzes Douglas v. Alabama, 380 U.S. 415 (1965) as an application of *Pointer*. There the confessor, already convicted, refused to answer questions relating to a statement he made which had implicated the defendant. The Court said this was a denial of effective confrontation as the jury may have inferred that the statement was made and that it was true. The opinion emphasized that effective confrontation would have been possible only if the confessor had affirmed the statement as his own.

[15] Bruton v. United States, 391 U.S. 123, 137 (1968).

[16] Jackson v. Denno, 378 U.S. 368, 377 (1964).

[17] *Id.* at 388.

[18] *Id.* at 389. Justice Harlan wrote a strong dissenting opinion which notes first, that the Court had never before mistrusted the jury and, second, that the problem of a jury's ability to follow instructions is present in all situations. *Id.* at 430. For a suggestion that the majority's rationale ought to extend to search and seizure cases, *see* 4 HOUS. L. REV. 139 (1966).

[19] Mr. Justice Stewart, concurring, said that the Sixth Amendment Confrontation Clause itself precludes reliance on limiting instructions. Certain evidence is so prejudicial that a jury cannot be trusted to apply the instruction correctly even though the trial judge instructed it on that point. Bruton v. United States, 391 U.S. 123, 137–8 (1968).

[20] *Id.* at 143.

evidence against him, the admissions of a codefendant are viewed with special suspicion.[21] Through the judge's instructions the jury (who may well perceive this problem through its own analysis) realizes that a codefendant's confession has little evidentiary value against the defendant. Second, while a coerced confession is not necessarily unreliable as to truth, the basis for prohibiting a codefendant's statement from applying to another defendant is its essential unreliability and untrustworthiness.[22] Again, "this the jury can be told and can understand".[23] The dissent also noted that the inevitable result of the majority's holding is separate trials for potential codefendants, which would be administratively burdensome and provide for "varying consequences for legally indistinguishable defendants".[24] Unfortunately, Justice White does not expand on this latter risk, which, however, would not be great in the *Bruton* context because there the defendants are distinguishable; one had confessed and the other had not. The difference in a court's treatment of the two would be the result of evidentiary factors and not simply the result of separate trials.

Justice White was in accord with *Delli Paoli v. United States*[25] which the majority overruled. *Delli Paoli* held that a codefendant's statement was admissible at a joint trial solely against the declarant, and that the jury was capable of following the judge's admonitions to use that evidence only in that limited capacity. The Court had listed five separate indicia relevant to determining whether or not the jury had followed the instructions: 1) that the case involved an easily understood conspiracy; 2) that the separate interests of each defendant were repeatedly emphasized throughout the trial; 3) that the confession was not admitted until the rest of the government's case was presented, which facilitated separate consideration of it; 4) that the confession was merely corroborative and cumulative of other evidence already presented against the non-confessing defendant; and 5) that nothing appeared on the record to indicate confusion on the part of the jury.[26]

After setting out these factors, the *Delli Paoli* Court observed that the jury system would make "little sense" unless the Court presumed that the jury would follow clear instructions in circumstances such as indicated by the listed five factors.[27] The opinion acknowledged the existence of "practical limitations" to the presumption of the jury's competence, but rejected the claim that those limits were reached on the facts before the Court.[28] While not articulated in the opinion, these limitations are probably those which aroused the *Bruton* Court just eleven years later: evidence admitted in a manner which would lead to serious misconceptions by a jury who could not disregard it. The majority emphasized the necessity to determine the extent of reliance on the jury's competence on a case by case basis and believed that the trial judge was best suited to handle these problems.

The Court in *Bruton* referred to a number of cases both before and after *Delli Paoli* which rejected the general outlook portrayed in that case.[29] *People v. Aranda*,[30] a Supreme Court of California decision after *Delli Paoli*, held that after the prosecutor had related the defendants in his summation it would be "highly unlikely" that the jury could have disregarded the confession of one defendant when considering the codefendant's guilt.[31] However, the opinion carefully notes that the admission of the confession would not always be prejudicial.[32] Three possible alternatives were discussed:

1. A joint trial would be allowed if all references

[21] *Id.* at 141.
[22] *Id.* at 142.
[23] *Id.*
[24] *Id.* at 143. It is interesting that while Mr. Justice White rises to defend jury capability against the majority's attacks he admits that at trials of legally indistinguishable defendants there may be two different results. Certainly one factor he must look to in order to account for this consequence is the nature of the jury and its possible propensity to be influenced by feelings or facts other than those which are considered legally significant and relevant.
[25] 352 U.S. 232 (1957). The case involved the prosecution of five codefendants on a federal charge of conspiring to deal unlawfully in alcohol.
[26] *Id.* at 241–2.
[27] *Id.* at 242. *See also* Opper v. United States, 348 U.S. 84, 95 (1954) (rejected "unfounded speculation" that jurors disregarded clear instructions which theory if followed would upset the judicial system's reliance "upon the ability of a jury to follow instructions."); Barnes v. United States, 374 F.2d 126, 128 (5th Cir. 1967); Golliher v. United States, 362 F.2d 594, 603 (8th Cir. 1966); Monts v. State, 214 Tenn. 171, 190, 379 S.W.2d 34, 42 (1964).
[28] Delli Paoli v. United States, 352 U.S. 232, 242 (1957).
[29] Bruton v. United States, 391 U.S. 123, 129–30, n.4 (1968). *See* People v. Vitagliano, 15 N.Y.2d 360, 206 N.E.2d 864, 258 N.Y.S.2d 839 (1965).
[30] 407 P.2d 265, 63 Cal.2d 518 (1965).
[31] *Id.* at 270 n.5, 63 Cal.2d at 527 n.5.
[32] *Id.*

were deleted effectively without prejudice to either the declarant or the codefendant.

2. Severance would be granted if the prosecution insisted on using the confession and no effective deletion was possible.

3. The confession would be totally excluded if there was no effective means of deletion and neither the prosecutor nor the defendant wanted severance.[33]

When evidence of prior crimes has been admitted for the jury's consideration only as to sentencing, a court has rejected the notion that instructions could erase that evidence from the minds of the jury in their determination of the defendant's guilt.[34] In a subsequent case the Supreme Court rejected this holding, but it is interesting to note that the rationale of two prior cases sounded much like that of the *Bruton* Court.[35] *United States v. Banmiller* believed that to expect the jury to so compartmentalize the evidence before it would require "psychological wizardry" on its part.[36] The danger is removed only by admitting such evidence after the determination of guilt. In this way the threat of the misuse of such evidence is completely erased. This solution is similar to one factor that the *Delli Paoli* Court found important—the timing of the admission of the confession.[37] Both courts indicated that separating the evidence for the jury as best as possible would be of significant aid to it in its decision-making process and would significantly remove the threat of prejudicial error.

Bruton does not explain what procedures are adequate to protect a defendant from the incriminating confession of a codefendant; it only rules that limiting instructions are inadequate.[38] In a footnote, the Court doubts the effectiveness of redaction—the elimination of the defendant's name from the codefendant's confession—as an alternative although the practice is widespread.[39] This could follow logically from the spirit of *Bruton*. The Court's premise is that the jury is unable (unwilling?) to limit evidence relevant and admissible to one defendant to that defendant alone. While the Court does not explain whether or not this is a conscious act, it claims that the jury actually uses the evidence in its consideration of another defendant against whom the evidence is relevant but inadmissible. Even though the codefendant's name has been deleted

[33] *Id.* at 272–3, 63 Cal.2d at 530–31. As can be seen from these alternatives, the California court also is willing to place great reliance on the discretion of the trial judge. *See generally* Kotteakos v. United States, 328 U.S. 750 (1946); Shepard v. United States, 290 U.S. 96 (1933); Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955); Hale v. United States, 25 F.2d 430 (8th Cir. 1928).

[34] United States v. Banmiller, 310 F.2d 720 (3rd Cir. 1962).

[35] Spencer v. Texas, 385 U.S. 554 (1967). *Spencer* also suggested that where the "conceded possibility of prejudice is believed to be outwieghed by the validity of the State's purpose in permitting introduction of the evidence," the defendant could be adequately protected by limiting instructions. *Id.* at 561. This case involved the admission of other crimes evidence under a recidivist statute. The Court said that this evidence is usually documentary and not inflammatory. It cited *Delli Paoli* for the observation that "the jury is expected to follow instructions in limiting this evidence to its proper function, and . . . [that] . . . the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest." *Id.* at 562. The Court further lectures, at 565, that:

> It would be extravagent in the extreme to take *Jackson* as evincing a general distrust on the part of this Court of the ability of juries to approach their task responsibly and to sort out discreet issues given to them under proper instructions by the judge in a criminal case, or as standing for the proposition that limiting instructions can never purge the erroneous introduction of evidence or limit evidence to its rightful purpose.

See Michelson v. United States, 335 U.S. 469 (1948). However, admission of a prior conviction which is constitutionally infirm is inherently prejudicial. Burgett v. Texas, 389 U.S. 109 (1967). *See also* Lane v. Warden, 320 F.2d. 179 (4th Cir. 1963); United States v. Jacangelo, 281 F.2d 574 (3rd Cir. 1960). *See generally* 78 HARV. L. REV. 426 (1964); 70 YALE L. J. 763 (1961).

[36] United States v. Banmiller, 310 F.2d 720, 725 (3rd Cir. 1962).

[37] *See* p. 4 *supra*.

[38] Bruton v. United States, 391 U.S. 123, 137 (1968). On the efficacy of limiting instructions, *see generally* Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959); 49 MINN. L. REV. 360 (1964); 74 YALE L. J. 553 (1965); 131 A.L.R. 908 (1941).

[39] Bruton v. United States, 391 U.S. 123, 134 n.10 (1968). For other looks at redaction, *see also* Kramer v. United States, 317 F.2d 114 (D.C. Cir. 1963); United States v. Jacangelo, 281 F.2d 574 (3rd Cir. 1960); People v. Clark, 17 Ill.2d 486, 162 N.E.2d 413 (1959) People v. Barbaro, 395 Ill. 264, 69 N. E2d 692 (1946); State v. Young, 46 N.J. 152, 215 A.2d 352 (1965); State v. Rosen 151 Ohio St. 339, 86 N.E.2d 24 (1949). THE ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Joinder and Severance § 2.3, 3 Crim. L. Rep. 2404, requires that:

> . . . when a defendant moves for severance because an out of court statement of a codefendant makes reference to him but is not admissible against him, the court determines whether the prosecution intends to offer the statement in evidence at the trial. If so the court should require the prosecuting attorney to elect one of the following courses: . . . a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that as deleted, the confession will not prejudice the moving defendant; . . . .

the jury can insert the codefendant's name in the appropriate space. Since the defendants are tried together this substitution process would be natural and possibly even encouraged, depending on the other evidence in the case. If all indirect and direct references to the codefendants are deleted, the prejudice may run the other way and harm the declarant's case by presenting a distorted picture of the scope of the confession. Oral testimony adds another dimension to the problem of controlling the jury's consideration of certain evidence. Oral misstatements or accidents are likely to occur, and no effective redaction may be practically achievable. On the basis of these considerations the Court will probably not accept redaction as substitute for the right to cross-examine.

A second alternative is the total exclusion of the confession from the evidence. This approach would seem to be consistent on the broadest level with the Court's admonition in *Miranda v. Arizona* that the "need" for confessions is oftentimes exaggerated.[40] In that case the Court was reaffirming the Constitutional safeguards to be followed in obtaining confessions. In *Bruton* the Court is enforcing the limiting safeguards necessary for the use of that confession in evidence once it has been legally obtained. In either situation the Court contends that there will be "no marked detrimental effect on criminal law enforcement... as a result of these rules".[41] In neither area is the possible administrative or procedural burden so great—as it might be in separate trials—as to outweigh the necessity of protecting the defendant's rights to their fullest degree.[42] But if automatic exclusion or separate trials would be the only two alternatives, the number of trials would increase and burden the already overcrowded court system, inconvenience witnesses, and possibly require repetition of substantial amounts of evidence. This would be the dilemma that the courts would face if deletion or redaction is considered insufficient protection for the defendant, and the only alternatives are exclusion or severance. However, the Court's present philosophy will not allow the subordination of the individual's rights because of administrative cost alone.[43]

[40] 384 U.S. 436, 481 (1966).

[41] *Id.* at 489.

[42] *See* counter argument by Mr. Justice White in his dissent in Bruton v. United States, 391 U.S. 123, 143 (1968).

[43] *Id.* at 134–5. In 1967 DUKE L.J. 202, 204, the dilemma was posed as one between three factors: 1) the administrative convenience and judicial economy of joint trials; 2) the evidentiary value of confessions of less than all of the defendants; and 3) the preservation of the codefendant's right to a fair trial.

The opinion does not describe when the "substantial threat" to the defendant's right to confrontation crystallizes.[44] Certainly there are "many circumstances" where reliance on the juror's ability to be discriminating in his use of the evidence is justified.[45] In "such cases" limiting instructions are effective protection for the defendant's rights.[46] But "some contexts" (such as in *Bruton*) present risks when "the practical and human limitations of the jury system cannot be ignored".[47] The Court never becomes more specific in its description of when a mere threat to this right becomes substantial enough to cause the full force of the Constitutional shield to come into play. It is possible that it is depending *sub silento* on the doctrine of harmless error which recognizes that there are violations of Constitutional demands of such an insignificant nature that reversal due to them alone is not required.[48]

[44] Bruton v. United States, 391 U.S. 123, 137 (1968). Two courts have interpreted "substantial threat" to depend in part on whether or not the confession of the codefendants varied materially. In Johnson v. Yeager, 399 F.2d 508 (3d Cir. 1968) the confessions did vary and presented a "serious risk" that the determination of guilt was not reliable. But in People v. De Vine, 293 N.Y.S.2d 691 (Queens Cty. Sup. Ct., N.Y. 1968), the court felt that the "facts in this movant's case fall far short of compliance with the principles laid down in *Bruton*..." as each confession was "one and the same" with the other. On this point it distinguished Johnson v. Yeager, *supra*. The court also emphasized the careful and frequent limiting instructions by the trial judge. *See also* Catanzaro v. Mancusi, 404 F.2d 296 (2d Cir. 1968).

Bruton's confrontation rationale has also affected certain state hearsay concepts; *see* Schepps v. State, 432 S.W.2d 926 (Tex. Ct. Crim. App. 1968), which held that no longer could a principal's confession be admitted as proof of his guilt in the trial of an accomplice. In this case the alleged principal himself did not testify.

[45] Bruton v. United States, 391 U.S. 123, 135 (1968).

[46] *Id.*

[47] *Id.*

[48] *See* Chapman v. California, 386 U.S. 18, 23–4 (1967). If in terms of the Constitution there has been error, reversal is still not automatic unless the error affects the substantial rights of the parties. The beneficiary of the error is required to prove that it was harmless beyond a reasonable doubt. The Court was striving for a "more workable" standard. *Id.* at 24. *Contra*, Smithson v. State, 247 A.2d 542 (Md. Ct. Spec. App. 1968) (harmless error rule will not be applicable to *Bruton*). In United States v. Guajardo-Melendez, 401 F.2d 35 (7th Cir. 1968), in dictum the court said that since the defendant's counsel "had the opportunity to cross-examine [the confessing defendant] but he declined to do so, therefore ... the confrontation clause rationale of *Bruton*, although persua-

If the investigation is to be along these suggested lines the important determination is whether "there is a reasonable possibility that the evidence complained of might have contributed to the conviction".[49] Whether or not there is a "reasonable possibility" that the evidence will affect the outcome in the *Bruton* context depends largely on the capability and attitude of the fact finder. Justice Brennan admitted the "impossibility" of determining how the jury handled the confession in *Bruton*.[50] But he believed that since this gap in the Court's knowledge did not produce a different result in *Jackson*, it alone should not disturb the Court in following that rationale in *Bruton*.[51] Both cases are dependent in part on conclusions about jury behavior which may be widely assumed but are not empirically verifiable.

The very few attempts at studying the jury have produced findings that would support the majority's opinion.[52] But the reliability and comprehensiveness of these studies should be taken into account before citing them as authority upon which to build the law of the land. They have been few in number, and their samples are far from representative. Simulated juries may not provide an accurate reflection of the actual process because those involved are consciously aware of the laboratory conditions of the trial. Actual juries are difficult subjects for any trustworthy empirical study. It seems that consideration of irrelevant prejudicial evidence by the jury is either so obvious that it needs no proof or so impossible to prove that it must be and is accepted on faith based on inferences from experience. The majority reasons that if the judge could play his proper role and exclude all the prejudicial evidence the jury could function in its normal role; but the spirit of *Bruton* will damage the unwritten trust in the jury's ability when it is relied upon to do comparable or even more difficult tasks than it faced in *Bruton*.

Furthermore, it is conceptually plausible that the problems created by the human frailities displayed by the jury as exposed in this decision have played something other than a totally negative role in the system. If the jury is the conscience of the community, relying on its extra-legal experience, perceptions, and common sense, then, necessarily, it sometimes will act outside its narrow legal role but still within the bounds of justice. For example, it is usually assumed in a personal injury case involving an individual plaintiff against a large corporate railroad that the jury gives the benefit of the doubt to the individual in determining the close cases since the railroad could better bear the loss. Some would argue that this prejudice is constructive and reasonable even though the jury in such case is no longer the objective finder of fact. Of course, it is always subject to control by the appellate courts. It is this flexibility of the jury system that makes it attractive to some. Dean Wigmore wrote that the jury "supplies the flexibility of legal rules which is essential to justice and popular contentment".[53] Legal institutions deal with human beings in informal, unnatural roles. The law cannot expect the jury to divest itself completely of its human nature in order to render its verdict. The jury allows the law to be more responsive to actual attitudes in the society. In each particular case the jury can aid the adversary proceeding by evaluating each party's claim

sive, would not seem to be literally applicable." The court went on to frame its opinion more in accord with the *Delli Paoli* principles by observing that the confession added little to the case against the confessor but that the statement was "deadly poison" to the defendant. *See also* United States v. Levinson, 405 F.2d 971 (6th Cir. 1968); People v. Williams, 4 Crim. L. Rep. 2354 (Ill. Ct. App. 1969); Lipscomb v. Maryland, 248 A.2d 491 (Md. Ct. Spec. App. 1968). However, Santoro v. United States, 402 F.2d 920 (9th Cir. 1968) disagrees with the *Guarjardo* dictum in that it states that the mere opportunity to confront is not enough. The court felt compelled to distinguish *Guarjardo* on the fact that in the case before it the confession was highly significant evidence. It already appears that exactly what is a serious violation of *Bruton* is not clear.

[49] Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963).

[50] Bruton v. United States, 391 U.S. 123, 136 (1968).

[51] *Id.* at 136–7.

[52] *See* Hoffman & Brodley, *Jurors on Trial*, 17 Mo. L. Rev. 235 (1952); H. Kalven & H. Zeisel, The American Jury, 149–62, 521–23 (1966); Moffat, *As Jurors See a Law Suit*, 24 Ore. L. Rev. 199 (1945). *See generally* Broeder, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744 (1959). Many have suggested without empirical or other evidence that juries in various contexts are incapable of performing the task of limiting the applicability of evidence. *See generally*, Jennings, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. Pa. L. Rev. 741, 754 (1965); Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 Harv. L. Rev. 392, 393 (1927); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165, 168–9 (1929); 68 Colum. L. Rev. 774, 775 (1968); 4 Hous. L. Rev. 139, 142 (1966); 39 J. Crim. L.C. & P.S. 498, 501 (1948); 49 Minn. L. Rev. 360. 362 (1964); 74 Yale L.J. 553, 555 (1965).

[53] Wigmore, *A Program for the Trial of Jury Trial*, 12 J. Am. Jud. Soc'y 166, 170 (1929); *See generally* R. Moreland, Modern Criminal Procedure 233–36 (1959).

through society's eyes. The jury allows society's interests to have a weight near equal to that of the individual.

However, these subtle functions of the jury as well as its more objective duties are now threatened to be circumscribed. For example, in long, multi-defendant, multi-count prosecutions the jury cannot be expected to compartmentalize evidence as to each defendant and to each count. *Bruton*'s rationale could not permit a jury to hear the evidence in a trial with twelve defendants and eighty-four counts.[54] The jury could not be trusted to evaluate properly evidence of a limited nature and not consider it evidence against all of the defendants on some or all of the counts. The instructions may be even more ineffective in this context than in *Bruton*. The state is faced with the expense and inconvenience of severed trials for each defendant or trials of a size which the court believes can be handled competently by a jury. Costs to the defendant in terms of time and expense will rise. There will be a substantial risk that the jury will consider improper but relevant evidence in the joint trial, but if that risk is lessened only by separate trials then the defendant, the state, and the witnesses will suffer heavy additional expenses of time and money.

Bruton's spirit may also reach the unanswered question in *Griffin v. California:*[55] does the defendant have a right to a jury instruction commanding the jury to disregard his failure to testify? Some states prohibit the use of any such instruction.[56] Giving such an instruction may well "sensitize" [57] the jury to the fact that the defendant has not testified, and it may then draw prejudicial inferences. But the failure to instruct at all would allow the jury to reach prejudicial conclusions based on the fact that the defendant did not testify. It is then not safe to give the instruction to the jury; but without the instruction there is no way to give boundaries to the jury's considerations. Once *Bruton* questions the jury's ability to follow limiting instructions when evaluating relevant but somewhat applicable evidence, it may also apply if evidence is before the jury without any instruction. In the latter case there will not even be an attempt to limit the jury's application of the evidence and, if *Bruton* is correct as to how it may use such evidence even under instruction, then serious prejudices may result.

A problem may also arise when curative instructions are given after improper remarks are made by a prosecutor.[58] If the *Bruton* rationale is that the jury is unable to disregard certain evidence against one defendant, will it be able to rid itself of or limit the effect of any evidence which is before it at all? Even if a motion to strike from the record is granted and the jury is told to disregard, the assumption could be that it probably will not or cannot disregard if the matter is relevant even though improper. The prosecutor—the symbol of the state—can be as influential and damaging in his remarks to the citizen juror as other evidence he considers. The court can always label the prosecutor's remarks as prejudicial, but the problem is in trusting the jury to disregard solely because of that instruction.[59]

[54] United States v. Branker, 395 F.2d 881 (2d Cir. 1968) reflects this position on these facts. The court indicated that the difficulties for the jury increase proportionately to the increase in the number of counts. *See* Schaffer v. United States, 362 U.S. 511 (1960); Kotteakos v. United States, 328 U.S. 750 (1946).

[55] 380 U.S. 609, 615 n.6 (1965).

[56] *See* § 546.270, R. S. Mo. 1959, V.A.M.S.; State v. Dennison, 428 S.W.2d 573 (Mo. 1968) (applying that statute). Some courts allow such instructions: *see* State v. Osborne, 258 Ia. 390, 139 N.W.2d 177 (1965); State v. Smith, 242 A.2d 49 (N.J. Super. Ct. 1968); Commonwealth v. Thomas, 240 A.2d 354 (Pa. 1968). That such instructions are not required, *see* State v. Senzarino, 39 Ohio Op.2d 383, 224 N.E.2d 389 (1967).

[57] Broeder, *The University of Chicago Jury Project,* 38 NEB. L. REV. 744 (1959).

[58] For a rejection of the effectiveness of curative instructions, *see* United States v. Lyon, 397 F.2d 505 (7th Cir. 1968).

[59] Other problems in joint jury trials may arise. An interesting situation arose in Parman v. United States, 399 F.2d 559 (D.C. Cir. 1968) where the defendant argued that the intermingling of the defense on the merits and the defense of insanity worked to his prejudice. The court rejected this claim but recognized "the disadvantages of a trial without bifurcation might have been substantially diminished by a bifurcated trial before one jury." It obviously would reconsider if "serious and substantial" prejudice could be shown. The issue now arises, analogous to Jackson v. Denno, *supra,* whether the same jury can effectively and fairly consider the evidence of these two possibly conflicting defenses.

Another possible problem arose in Huntt v. Russell, 285 F.Supp. 765 (E.D. Pa. 1968) where the codefendant changed his plea to guilty before the jury. No instructions were requested or given to the jury on their duty to disregard this action as to the defendant. The court did not believe that this error was substantial enough to cause reversal. This result may need to be reconsidered under the *Bruton* rationale.

Complicated instructions in aiding and abetting cases may also be troublesome under a *Bruton* analysis; *see* 68 COLUM. L. REV. 744 (1968). For the weaknesses of the jury in following instructions in lesser included offenses cases, *see* 3 LAND & WATER L. REV. 587 (1968), which refers to the jury's inherent power to find the defendant not guilty regardless of the evidence.

Conclusion

The problems surveyed with regard to confessions and the jury's competency to handle them in accordance with instructions should have an answer. But in dealing with confessions a simple, mechanical rule is not effective. Possibly some arbitrary line could be drawn as to the number of defendants and issues before the jury at any one time. But the impact and relevance of a confession varies greatly, depending upon the particular circumstance in which it is found.[60] This requires that there be considerable discretion placed in the hands of the trial judge who will have the best knowledge of those factors that need to be controlled. Discretion at this level promotes an efficient and just system.

A realistic approach within the scope of *Bruton* would permit a trial judge to rule before trial on the necessity of a severance. Rule 14 of the Federal Rules of Criminal Procedure would be both applicable and useful here. It provides:

> If it appears that a defendant or the government is prejudiced by joinder of offenses or of defendants in an indictment or information or for such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.[61]

The defendant's pretrial motion for severance would require the state to produce at a hearing both the alleged confession and affadavits of the testimony to be proffered at the trial. Also, the prosecutor should be prepared to reveal when in the proceeding he intends to introduce the statement. The burden would be on the state to demonstrate that a joint trial would not prejudice the nondeclarant. The following factors would be of significance to the judge in deciding on the necessity for severance:

1. The size of the trial and the scope of the confession.

Since *Bruton* was based on uncomplicated facts, the relative complexity of the trial facts can no longer be an important factor; the state can no longer protest severance on the grounds that the case would be easily understood. If the trial is a large one, and the confessions vary in scope, the judge may want to review the nature of the confessions to see if the implications therein, if any, would prejudice other defendants. If the confession only covers some of the counts, a joint trial would require some difficult compartmentalizing of the evidence by the jury. If the confession encompasses all of the counts to the declarant only and other facts are favorable to the state, then possibly the confession can still be admitted in a joint trial.

2. Timing of the introduction of the confession.

The jury may be more discriminating in the use of a confession presented at the end of the trial than a confession offered earlier in the proceeding. Or, possibly, if all evidence as to one defendant can be presented apart from the evidence as to the rest, the jury would have less trouble in properly using the evidence. Again, the scope of the confession would be relevant as to whom it implicates and the nature of the implications.

3. The cumulative nature of the confession with respect to the other evidence.

If the judge views the state's affadavits in a light most favorable to the defendant and he concludes that the state may have a prima facie case without the confession, then instead of contending that the admission of the confession would not be error, it is best to exclude the confession and retain the joint trial. Rule 14 of the Federal Rules of Criminal Procedure allows the judge to grant "whatever relief justice requires". Therefore, he could deny the motion for severance but still require the exclusion of the confession. This would force the state to decide a) how critical the confession is to its case against the declarant, and b) if it wants to or needs to bear the cost of separate trials. If the state does not seem to present a prima facie case, then severance will depend on the strength of the other factors the judge considers.

[60] This attitude was reflected in both *Bruton* and *Delli Paoli*. In *Bruton* the Court recognized that sometimes limiting instructions could be effective. Bruton v. United States, 391 U.S. 123, 153 (1968). In *Delli Paoli* it was made clear that sometimes limiting instructions would be ineffective to protect a codefendant. Delli Paoli v. United States, 352 U.S. 232, 243 (1957).

[61] The Notes of the Advisory Committee on Rules following Rule 14 recognize the *Bruton* problem and state that the purpose of the section "is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance."

Confessions constitute a sensitive and hard problem for law enforcement agencies and for the courts. Without a confession in evidence juries will be forced to determine guilt on a factual reconstruction of the act and not on the basis of what an accused said. Confessions would still be useful in the process of gathering the basic fact foundation but would have less an impact on the trial. If the judge decides before trial to exclude the confession then the efficiencies of the joint trial can be retained. Another way to look at this factor would be to consider how seriously would it prejudice the prosecutor's case to exclude the confession from evidence. This would highlight the basic decision being made: balancing the interests of fairness for the codefendant against the state's interest in using a confession in a joint trial.

The three aforementioned factors which were relied upon in *Delli Paoli* are still relevant and effective indicia of possible prejudice to the codefendant if used the way here suggested. The two other *Delli Paoli* factors—that the separate interest of the defendant is repeatedly emphasized throughout trial, and that the record does not show confusion on the part of the jury—have little, if any, remaining weight. *Bruton* held that limiting instructions emphasizing the separate interests of the defendants are not enough to protect their rights. Indications of jury confusion no longer would be relevant in the suggested pretrial procedure. Even during the trial the confusion and the source of the confusion would be hard to determine and would not be a good basis upon which to measure the extent of fairness in a joint trial.

This pretrial procedure would not be an added burden on the court's time when weighed against the time that would otherwise be taken up in numerous retrials of misjoined cases. If the defendant never makes a motion to sever until the trial starts, the burden would rest on him to show that the trial judge clearly abused his discretion under a rule such as Federal Rule 14 permitting the joint trial.

It is hard to foresee whether this plan would be viable and useful in all situations, but an attempt should be made to preserve the advantages of the joint trial. Law enforcement agencies are going to be forced to depend less on confessions and it would be over-ambitious and wasteful for the prosecutor to demand the inclusion of an unnecessary confession at the cost of the benefits of the joint trial. *Bruton* reflects the Court's continuing sensitivity towards the problems involved in securing and using confessions but it also develops an approach which will reduce the opportunity for both the state and the defendant to benefit through the use of the joint trial.

FEDERAL PROCEDURE FOR COURT ORDERED ELECTRONIC SURVEILLANCE: DOES IT MEET THE STANDARDS OF *BERGER* AND *KATZ*?

STEPHEN LINZER

Recent criminal law decisions of the United States Supreme Court have displayed a growing concern for the individual in society and for his right to be free from governmental intrusions upon his privacy.[1] At the same time, there has been an awareness on the part of individual members of the Court that crime, specifically organized crime, is growing rapidly and can only be controlled and limited by effective law enforcement procedures.[2] These two considerations—the right to privacy and the need to stop the growth of crime—are at conflict in the current controversy over the use of electronic surveillance[3] to aid in the investigation of serious crime.

Because of the nature of their operations and the need for secrecy, criminal groups utilize a minimum of written communications. However, the diversity of their enterprises, the large number

[1] The legal concept of a right to privacy was discussed by Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890). *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

[2] *See, e.g.*, Berger v. New York, 388 U.S. 41, 113–14 (1967), White, J., dissenting.

[3] As used, electronic surveillance includes eavesdropping, wiretapping, and all techniques or devices by which a person is able to hear or record the communications of others. For a history of electronic surveillance *see* DASH, KNOWLTON, and SCHWARTZ, THE EAVESDROPPERS, 23–34 (1959).