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CIVIL LIBERTIES AND CRIMINAL CODE REFORM*

JOHN H.F. SHATTUCK** AND DAVID E. LANDAU***

INTRODUCTION

Enactment of criminal laws which are fair, clear, and co-extensive with society's interests in criminal justice is an important legislative goal. Only the Constitution itself is comparable to the criminal laws as a bulwark against invasion of civil liberties. Criminal statutes define crimes and set procedures for establishing guilt or innocence. Less visible, but no less important, are other major elements of the criminal justice system covered by these statutes such as terms for obtaining bail,¹ sentencing,² jurisdictional boundaries,³ grand jury proceedings,⁴ and rules governing probation and imprisonment.⁵

Because criminal statutes set out the limits of freedom, a comprehensive revision of the criminal laws is perhaps the most fundamental legislation possible and involves both risks and potential benefits to civil liberties. Passage of a new criminal code would, for example, sweep away much of the judicial interpretation of current criminal statutes which can serve as a check on their misapplication.⁶ Moreover, overbreadth often results from the type of drafting required to generalize and consolidate existing criminal statutes into a comprehensive new

* This article is a substantially revised version of a report of the same title published by the American Civil Liberties Union in April, 1980. The report was submitted to members of Congress by Norman Dorsen, President; Ira Glasser, Executive Director; and John Shattuck, Washington Office Director of the ACLU, to assist them in evaluating the various criminal code proposals then pending in Congress. The report was prepared with the assistance of Martin Michaelson, Esq., of Washington, D.C.

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¹ 18 U.S.C. §§ 3141, *et seq.* (1976).

² *Id.* §§ 3562, *et seq.*

³ *Id.* §§ 3231, *et seq.*

⁴ *Id.* §§ 3331, *et seq.*

⁵ *Id.* §§ 3651, *et seq.*

⁶ See S. REP. NO. 96-553, 96th Cong., 2d Sess. 381 (1980) [hereinafter cited as SENATE REPORT].

code. Another risk to civil liberties is that those current criminal statutes which endanger civil liberties may be reinforced or expanded in a code bill, and thus become more difficult to repeal or challenge in court. Finally, a comprehensive criminal code revision necessarily requires substantial legislative compromises, and experience has demonstrated that some of these compromises can endanger civil liberties.⁷

Against these risks must be weighed the considerable benefits a criminal code could confer. Clarity and greater certainty are examples. Comprehensive criminal law revision would also give Congress the opportunity to undo (or at least not repeat) past mistakes in the criminal law field, a surprisingly large number of which were made in omnibus crime laws enacted or proposed during the last fifteen years.⁸

There is little doubt that existing federal criminal law contains defects. Some of these defects are profound, such as a sentencing system which tends to discriminate on the basis of race and socioeconomic status.⁹ Other defects are relatively unimportant, such as the perpetuation of obsolete, unenforced statutes.¹⁰ In the voluminous legislative record developed during a decade of efforts to reform the federal criminal law, little concrete evidence exists that certain defects—such as the excessive number of culpable states of mind—have in fact prejudiced defendants or substantially frustrated courts or prosecutors. Other significant defects of existing law—such as abuses of plea bargaining—have been addressed obliquely, if at all, in most of the proposed codification bills.¹¹

Thus, the effort to comprehensively revise federal criminal law can be worthwhile, but only if it results in a coherent approach to crime and punishment while rigorously enforcing the limits of government power mandated by the Bill of Rights and our strong civil liberties traditions. Responsible committees of Congress, notably the House Criminal Justice Subcommittee and House Judiciary Committee in the Ninety-Fifth and the Ninety-Sixth Congress, have disagreed among themselves as to whether these objectives can be achieved in the context of a single bill.¹²

⁷ See, e.g., S. 1722, 96th Cong., 1st Sess. § 1302 (1978) (obstructing a government function by physical interference) [hereinafter cited as S. 1722].

⁸ See, e.g., Organized Crime Control Act of 1970, Pub. L. No. 91-452 (1970); Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3701 *et seq.* (1976).

⁹ See S. 1437, 95th Cong., 2d Sess. §§ 991(c)-(d) (1978) [hereinafter cited as S. 1437].

¹⁰ See, e.g., 18 U.S.C. § 45 (1976) (capturing or killing carrier pigeons); *id.* § 953 (private correspondence with foreign governments); *id.* § 2198 (seducing a female steamship passenger).

¹¹ See Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978).

¹² Compare STAFF OF SUBCOMM. ON CRIMINAL JUSTICE, HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., REPORT ON RECODIFICATION OF FEDERAL CRIMINAL LAW, (Comm. Print No. 29, 1979) [hereinafter cited as HOUSE RECODIFICATION REPORT] with

This article will examine the bills that have been proposed by Congress and comment on their compatibility with these goals.

I. THE TROUBLED HISTORY OF S. 1 AND ITS PROGENY

The congressional criminal code effort got off to a bad start in 1973 with a bill, S. 1,¹³ that rejected many reasonable recommendations of the National Commission on the Reform of Federal Criminal Laws (the Brown Commission),¹⁴ and would have expanded the criminal law in ways that cut deeply into constitutional rights. S. 1 did, however, have some attractive features. It simplified many definitions, eliminated inconsistencies, and reorganized offenses. It reduced seventy-nine undefined states of culpability¹⁵ to four defined terms of general application—intentional, knowing, reckless, and negligent¹⁶—and it repealed a variety of obsolete or never used crimes on the books, such as interfering with a government carrier pigeon,¹⁷ seducing a female passenger on a steamship,¹⁸ and writing a check for less than one dollar.¹⁹

In most respects, however, S. 1 was a disaster for civil liberties. It would have vastly expanded the criminal law as an instrument of government secrecy,²⁰ criminalized many forms of political dissent,²¹ restricted freedom of the press,²² and unnecessarily broadened the powers of federal prosecutors and investigative agencies.²³

Fortunately, S. 1 was not enacted. It created such a storm that it died in committee. Following the demise of S. 1, a new bill was drafted in 1976 by the Senate Judiciary Committee leadership, including Senators Edward Kennedy (D-Mass.) and John McClellan (D-Ark.), with the help of the Carter Administration's Department of Justice. This bill, S. 1437,²⁴ was passed by the Senate in early 1978.²⁵ Those who

HOUSE COMM. ON THE JUDICIARY, CRIMINAL CODE REVISION ACT OF 1980, H.R. 6915, 96th Cong., 2d Sess. (1980) [hereinafter cited as H.R. 6915].

¹³ S. 1, 93rd Cong., 1st Sess. (1973), reintroduced as S. 1, 94th Cong., 1st Sess. (1975) [hereinafter cited as S. 1].

¹⁴ NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW, FINAL REPORT (1971) [hereinafter cited as FINAL REPORT].

¹⁵ The states of mind are dispersed throughout Title 18. See SENATE REPORT, *supra* note 6, at 59.

¹⁶ S. 1, *supra* note 13, § 301.

¹⁷ 18 U.S.C. § 45 (1976).

¹⁸ *Id.* § 2198.

¹⁹ *Id.* § 336.

²⁰ S. 1, *supra* note 13, §§ 1122, *et seq.*

²¹ *Id.* §§ 1301-02, 1831-33, 1861-62.

²² *Id.* §§ 1122, *et seq.*

²³ *Id.* §§ 1002-03.

²⁴ S. 1437, *supra* note 9.

²⁵ 95 CONG. REC. S750 (daily ed. Jan. 30, 1978).

supported S. 1437 pointed to its improvements over S. 1.²⁶ But while S. 1437 was an improvement over S. 1, it represented unacceptable risks for civil liberties.

S. 1437 deleted several dangerous features of S. 1, such as the sections which would have created an Official Secrets Act,²⁷ and a provision expressly allowing a government official charged with a federal crime to invoke the "Nuremberg defense" of following orders,²⁸ among others.²⁹ It also contained reforms of existing law, including repeal of the Smith Act,³⁰ expansion of certain civil rights laws to cover women and aliens,³¹ and a mechanism to reduce disparities among federal sentences, although at the risk of imposing longer sentences and increasing imprisonment.³²

On balance, however, the substantial defects of S. 1437, largely carried forward from S. 1, exceeded its limited benefits. The dangers to civil liberties were evident in the language of the bill and in the Judiciary Committee's voluminous report on it.³³ For example, the bill removed certain factual issues from consideration by the jury.³⁴ It greatly expanded federal law by including an attempt offense for every crime,³⁵ and by making a federal offense of "endeavors to persuade" someone to engage in illegal conduct.³⁶ This would have attached an inchoate crime involving speech but no conduct to all but a handful of offenses in the federal criminal code. The bill also expanded the federal law of conspiracy.³⁷

Many crimes in S. 1437, defined more broadly than in current law, impinged on first amendment freedoms³⁸ and expanded federal jurisdic-

²⁶ Kennedy, *Federal Criminal Code: An Overview*, 47 GEO. WASH. L. REV. 451 (1979).

²⁷ See note 20 *supra*.

²⁸ S. 1, *supra* note 13, § 541.

²⁹ See notes 21-23 *supra*.

³⁰ 18 U.S.C. § 2385 (1976). The Smith Act makes it "unlawful for any person to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence."

³¹ S. 1437, *supra* note 9, § 1504.

³² See text accompanying note 120 *infra*.

³³ S. REP. NO. 95-605, 95th Cong., 2d Sess. (1980).

³⁴ The grading of certain offenses involves determinations of factual issues. Since these facts are not part of the offense, they will be determined by the judge. See S. 1437, *supra* note 9, §§ 301(c), 1302.

³⁵ *Id.* § 1001 (attempt). See generally Note, *Criminal Attempt, Conspiracy' and Solicitation Under the Criminal Code Reform Bill of 1978*, 47 Geo. Wash. L. Rev. 550 (1979).

³⁶ S. 1437, *supra* note 9, § 1003 (solicitation).

³⁷ *Id.* § 1002 (conspiracy).

³⁸ *Id.* § 1301 (obstructing a government function by fraud); § 1302 (obstructing a government function by physical interference); § 1311 (hindering law enforcement); § 1334 (obstructing a proceeding by disorderly conduct); § 1343 (making a false statement); § 1525 (revealing private information submitted for a government purpose); § 1722 (extortion); §§ 1842, 3311 (disseminating obscene material); § 1861 (failing to obey a public safety order);

tion.³⁹ The bill also failed to accomplish many reforms recommended by the Brown Commission,⁴⁰ the American Law Institute,⁴¹ the American Bar Association,⁴² and other groups such as the American Civil Liberties Union.⁴³ Moreover, several reforms originally in the Senate bill were removed on the Senate floor, e.g., repeal of the Logan⁴⁴ and Comstock Acts,⁴⁵ and new dangers to civil liberties were added before the bill's final passage, e.g., preventive detention⁴⁶ and "contemporary community" standards for federal obscenity prosecutions.⁴⁷ Finally, the sentencing provisions in S. 1437 created a significant danger that the length of prison terms at the federal level would be substantially increased.⁴⁸

After the Senate passed S. 1437, the bill came under close scrutiny in the House. The House Subcommittee on Criminal Justice conducted extensive hearings and concluded in October, 1978, that S. 1437 was "seriously flawed."⁴⁹ One of the witnesses, Representative Robert F. Drinan (D-Mass.), who became the Subcommittee's Chairman in 1979, stated that "S. 1437 as passed by the Senate reflects confused policy choices, incoherent approaches to crime and an array of provisions which only can bring confusion and injustice into federal criminal law."⁵⁰ Some of the sharpest words in the House Subcommittee's report explaining its rejection of S. 1437 warned of the risks involved in changing and expanding so much criminal law at once, particularly when the rights of so many people were at stake.⁵¹ The report also stated:

It is virtually impossible to draft a bill that literally translates present Federal criminal statutes into a new format and style. The drafters of S. 1437, however, did not attempt a literal translation. They made several major

§ 401(a) (liability of an accomplice); § 1833 (engaging in a riot). This is not an exhaustive list.

³⁹ *Id.*

⁴⁰ FINAL REPORT, *supra* note 14, §§ 401, 1352, 3101.

⁴¹ See generally MODEL PENAL CODE (Official Draft 1962).

⁴² AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF JUSTICE: SENTENCING ALTERNATIVES AND PROCEDURES (1979). [hereinafter cited as AMERICAN BAR ASSOCIATION STANDARDS].

⁴³ See *Reform of the Federal Criminal Laws, Hearings on S. 1722 and S. 1723 before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 10151 (1979); *Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. 1186-1218 (1978) (Statement of John Shattuck and David Landau of the American Civil Liberties Union) [hereinafter cited as *House Hearings*].

⁴⁴ 18 U.S.C. § 953 (1976) (private correspondence with a foreign government).

⁴⁵ *Id.* § 1461 (mailing obscene or crime-inciting matter).

⁴⁶ S. 1437, *supra* note 9, § 3503. (release pending trial in a capital case).

⁴⁷ *Id.* § 1842 (disseminating obscene material).

⁴⁸ *Id.* §§ 2001, *et seq.*

⁴⁹ HOUSE RECODIFICATION REPORT, *supra* note 12, at 1.

⁵⁰ Address by the Honorable Robert Drinan at the Yale Law School (1977) (on file at the ACLU, Washington Office).

⁵¹ HOUSE RECODIFICATION REPORT, *supra* note 12, at 4.

changes in important areas such as determining sentence length, jurisdiction, and *mens rea*. They also made countless subtle changes in the meaning of current statutes by changing statutory language to conform to the bill's rigid format and style.⁵²

Like its predecessor, S. 1, S. 1437 was not enacted. To the extent that S. 1437 was built on S. 1, it rested on a poor foundation. S. 1437 contained too many risks to civil liberties and the Senate was not able to amend it sufficiently to remove enough of those risks. Although its proponents in the Senate strongly urged passage, S. 1437 was rejected in the Ninety-Fifth Congress.

The criminal code revision effort intensified in the Ninety-Sixth Congress. From a civil liberties perspective the question of whether acceptable legislation could be developed turned on three factors: (1) Would the House Judiciary Committee build on its experience and draft a new bill which would reform the criminal law without endangering civil liberties? (2) Would the Senate avoid the mistakes of S. 1 and S. 1437 and either accept a House-drafted bill or substantially change its own approach to criminal code revision? (3) Would the Carter Administration restrain its Department of Justice from pressing for the kind of prosecutorial legislation that the Department helped draft and pass in the Senate in 1978? Underlying each of these questions was the issue of whether a comprehensive criminal code bill, acceptably drafted from a civil liberties point of view could pass through the legislative process without unacceptable amendments.

Civil liberties groups recognized early in the Ninety-Sixth Congress that the key to a successful codification effort would be a new bill. In their view, building a criminal code upon the foundation of S. 1 and S. 1437 would not work.⁵³ Accordingly, these groups, as well as the American Bar Association and various criminal justice agencies, worked closely with the House Subcommittee on Criminal Justice to draft a new bill. A large number of civil liberties recommendations were adopted by the House Subcommittee in its August 1979 draft of a bill. The American Civil Liberties Union endorsed that draft, with several reservations, in its testimony before the Subcommittee in September, 1979.⁵⁴

While maintaining the comprehensive format of S. 1437, the House bill rejected most of its worst features. The bill, H.R. 6915,⁵⁵ was reported by the House Judiciary Committee in June, 1980. For the most part H.R. 6915 retained the substance of current law and made a few reforms which enhanced civil liberties. The bill also contained several

⁵² *Id.* at 35.

⁵³ *House Hearings, supra* note 43, at 1186.

⁵⁴ *Id.*

⁵⁵ H.R. 6915, *supra* note 12.

provisions adverse to civil liberties, such as, reactivating the Logan Act,⁵⁶ raising the penalties for possession of marijuana,⁵⁷ and providing mandatory prison terms for Class A felons.⁵⁸ Most of the controversial provisions of the proposed code however, were omitted from the House bill, which represented the most valuable and balanced effort to date to reform the federal criminal laws.

During the Ninety-Sixth Congress the Senate proceeded on a course entirely separate from that of the House and processed S. 1722, which was a revised version of S. 1437. S. 1722 was introduced in September, 1979, and was marked up by the Senate Judiciary Committee in December of that year.

Like S. 1437, S. 1722 would have made innumerable changes in federal criminal law. While some of these changes would have improved the criminal laws and others would have protected civil liberties, many would have expanded the powers of government investigators and prosecutors at the expense of civil liberties. On the positive side, S. 1722 would have eliminated or mitigated several objectionable features of S. 1437, such as a comprehensive solicitation provision, a proposed new crime of failing to obey a public safety order, and a substantially expanded crime of extortion. In some sections it would have codified judicial decisions favorable to civil liberties. The bill would have also incorporated several civil liberties improvements including: protecting civil rights, adding sex as an express category of unlawful discrimination, and broadening the classes of protected persons to include aliens;⁵⁹ adopting a new defense to a charge of contempt of court where the underlying judicial order that was violated was issued in violation of the first amendment;⁶⁰ repealing the Smith and Logan Acts;⁶¹ and narrowing some aspects of the federal riot offense.⁶²

On the negative side, S. 1722 contained several unacceptable provisions. It would have carried forward a variety of the provisions in S. 1437 which expanded current law at the expense of civil liberties; it added several new sections broadening current law which did not appear in S. 1437;⁶³ it lowered the mental state requirements for some of the

⁵⁶ *Id.* at 145. See also note 44 *supra*.

⁵⁷ H.R. 6915, *supra* note 12, § 2713.

⁵⁸ *Id.* § 3321(1).

⁵⁹ S. 1722, *supra* note 7, § 1504.

⁶⁰ *Id.* § 1311(b)(2).

⁶¹ The bill does not re-enact these statutes, thereby repealing them. See notes 30, 44 *supra*.

⁶² S. 1722, *supra* note 6, §§ 1831-33.

⁶³ *Id.* § 3502 (release pending trial in a non-capital case); § 1701(c)(10), 1702(c) and 1712(c) (jurisdiction over arson and other property destruction offenses, including property such as public utilities); § 401(b) (facilitation).

offenses in existing law;⁶⁴ it overruled or disapproved some of the case law narrowing the interpretation of several broad statutes in the current criminal code;⁶⁵ and it codified some court decisions giving an expansive interpretation of current criminal law at the expense of civil liberties.⁶⁶ Among the particularly objectionable features of S. 1722 most of which, it is important to note, were not contained in H.R. 6915, were the following: a new governmental right to appeal sentences;⁶⁷ a substantial risk of longer prison sentences;⁶⁸ a new authority for judges to impose severe restrictions on the freedom of persons awaiting trial and presumed to be innocent, including preventive detention and psychiatric institutionalization;⁶⁹ broad offenses of obstructing government functions;⁷⁰ unsworn, oral statements being covered in the crime of making a false statement;⁷¹ a new federal jurisdiction over certain offenses committed on any nuclear or other "energy facility", including conspiracy, solicitation, or attempt to commit such offenses;⁷² a new crime of obstructing an official proceeding by disorderly conduct;⁷³ an obscenity statute based on varying and unpredictable "contemporary community standards" of what is obscene;⁷⁴ and a new generic crime of hindering law enforcement.⁷⁵

In evaluating the Senate bill, we weighed its improvements over current law against the setbacks for civil liberties. The reforms and setbacks are not necessarily of equal weight, since each provision must be judged by the magnitude of its impact. For example, the Logan Act, an anachronistic statute adopted in 1792 which prohibits private citizens from meeting with foreign officials to discuss foreign policy, has never resulted in a federal prosecution. Similarly, the Supreme Court has sharply narrowed the Smith Act. On the other hand, provisions creat-

⁶⁴ S. 1722 recodifies state of mind as to circumstances and result, where not stated (all sections—see *id.* § 303(b)), *id.* § 1311 (hindering law enforcement); § 1358 (retaliating against a public servant).

⁶⁵ *Id.* § 1343 (making a false statement); § 1345 (perjury); § 1311 (hindering law enforcement); § 3725(b) (government appeal of sentences).

⁶⁶ *Id.* § 401(b)(3) (co-conspirator liability—codifying "Pinkerton" doctrine making co-conspirator liable for all offenses growing out of conspiracy if they were "reasonably foreseeable," even those offenses which he did not participate in or know about); see *id.* § 1842 (obscenity); § 1301 (obstructing a government function by fraud); § 1343 (making a false statement).

⁶⁷ *Id.* § 3725(b).

⁶⁸ *Id.* §§ 2001, *et seq.*

⁶⁹ *Id.* § 3502.

⁷⁰ *Id.* §§ 1301-02.

⁷¹ *Id.* § 1343.

⁷² *Id.* §§ 1701(c)(10), 1701(c)(1), 1001-03.

⁷³ *Id.* § 1334.

⁷⁴ *Id.* § 1842.

⁷⁵ *Id.* § 1311.

ing a governmental right to appeal sentences and allowing judicial discretion to jail or otherwise sharply curtail the freedom of persons awaiting trial on the ground that they are dangerous to the community are likely to have a broad impact on routine operations of the criminal justice system. Balancing the civil liberties setbacks in S. 1722 against the civil liberties improvements, the authors concluded that the bill should not be enacted, unless it were substantially amended to conform to H.R. 6915.⁷⁶

⁷⁶ The civil liberties setbacks in S. 1722 were compounded by the fact that the bill was reported by the Senate Judiciary Committee at the price of simultaneous approval of a broad related bill, S. 114, to reinstitute the federal death penalty. As the price for their support of the Code, the sponsors of the death penalty bill, Senators Strom Thurmond, and Dennis DeConcini, asked the Committee to report S. 114 without any hearings or legislative record, threatening to attach it as an amendment to S. 1722 if it were not reported. S. 114 would have enacted the death penalty for murder, kidnapping, rape, bank robbery, airplane hijacking, and explosives offenses where death results. Moreover, the bill authorized the death penalty for espionage and treason in peacetime, even when they do not involve the death of a victim. The bill was objectionable because of the fundamental question of whether *any* death penalty is constitutional or desirable—a question which the Supreme Court, however, has answered in the affirmative. See *Proffitt v. Florida*, 428 U.S. 242 (1976) (declaring that the imposition of the death penalty under Florida statutes did not violate the prohibition against infliction of cruel and unusual punishment under the eighth and fourteenth amendments); *Gregg v. Georgia*, 428 U.S. 153 (1976) (declaring that the imposition of the death penalty for the crimes of murder under the Georgia statutes did not violate the prohibition against infliction of cruel and unusual punishment under the eighth and fourteenth amendments). The authors strongly disagree with these decisions and believe the death penalty to be unconstitutional under all circumstances. See *Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan, Marshall, Douglas, J.J., concurring), *Gregg v. Georgia*, 428 U.S. 153 (Brennan & Marshall, J.J., dissenting). The applicability and procedures of S. 114 fail to meet the clear constitutional requirements for death penalty statutes.

First, S. 114 § 2(h) authorizes the death penalty for nonhomicidal crimes, in contravention of the Supreme Court decision in *Coker v. Georgia*, 433 U.S. 584 (1977), *Coker* held that the death penalty was a constitutionally impermissible sentence for a nonhomicidal rape. The basis of the Court's opinion in *Coker* was that the death penalty is an excessive and, therefore, cruel and unusual punishment, unless the defendant causes the death of another human being. Since S. 114 authorizes the imposition of the death penalty for the crimes of peacetime treason and espionage regardless of whether death occurs, *Coker* raises grave doubts about the constitutionality of this statute.

Second, S. 114 § 2(d) permits federal juries to find statutory aggravating circumstances by a mere majority vote, thus creating the possibility of constitutionally impermissible, nonunanimous jury verdicts in capital cases. See *Johnson v. Louisiana*, 406 U.S. 356 (1972) (declaring constitutional a Louisiana statute permitting nonunanimous jury verdicts in non-capital cases); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (declaring constitutional an Oregon statute permitting nonunanimous jury verdict in criminal cases); *Andres v. United States*, 333 U.S. 740 (1948) (declaring that the sixth amendment requirement of unanimity applies to all issues left to the jury). Third, S. 114 § 2(f) severely impinges on the eighth amendment because it appears to preclude the sentencing jury from considering certain relevant mitigating factors in deciding whether to impose a death sentence. *Lockett v. Ohio*, 438 U.S. 586 (1978) (striking down an Ohio statute which limited mitigating circumstances considered by a jury).

Fourth, S. 114 § 2(i) burdens the defendant with the risk of non-persuasion concerning all mitigating factors, in apparent contravention of the teachings of *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Finally, the recent Supreme Court decision in *Godfrey v. Georgia*, 446 U.S.

II. MAJOR CIVIL LIBERTIES ISSUES

A variety of issues emerge as the major civil liberties problems in S. 1722. In some of these areas—government appeal of sentences, pretrial release, sentencing, jurisdiction over crimes on energy facilities, and obstructing a government function by physical interference—the bill contains fundamental civil liberties flaws. While in other sensitive areas, such as conspiracy, attempt, false oral statements, obstructing proceedings by disorderly conduct, hindering law enforcement, riot and obscenity, the flaws in the bill are damaging to civil liberties, some of them individually are of less significance, or are partially offset by improvements, or could be remedied by technical drafting changes. The remainder of this article will discuss these issues in detail.

A. GOVERNMENT RIGHT TO APPEAL SENTENCES

Under current law the government has no right to appeal a trial court's decision to impose a sentence which the government considers too lenient. The one limited exception to this long-standing rule of Anglo-American jurisprudence is Title X of the Organized Crime Control Act of 1970,⁷⁷ involving special dangerous repeat offenders. This statute was recently held constitutional by the Supreme Court.⁷⁸ S. 1722 would give the government a right to appeal all sentences below the sentencing guidelines in felony and class A misdemeanor cases. Defendants would have a right to appeal sentences above the guidelines.

A government right to appeal sentences would conflict with the purpose of the double jeopardy clause, which is to prevent the government from overreaching by limiting the prosecutor to one opportunity for conviction and sentencing.⁷⁹ While the Supreme Court took a different view of this issue, as noted above, it did so in the unique circumstances of special dangerous offenders and should not be considered to have pronounced the final word on government appeal of sentences as a rule. As a general matter, if the government fails to make its case, it cannot repeatedly threaten the accused. To protect the accused and ensure finality of decision, the Constitution "limit[s] the Government to a single criminal proceeding to vindicate its very vital interest in enforce-

420 (1980) (striking down Georgia statutes; aggravating circumstances for imposition of death sentence), casts serious doubt on the validity of the bill's catchall aggravating circumstance of "especially heinous cruel or depraved manner." The overbroad and vague language at issue in *Godfrey* was actually narrower than S. 114 § 2(h)(5).

⁷⁷ 18 U.S.C. § 3576 (1976).

⁷⁸ *United States v. DiFrancesco*, 101 S. Ct. 426 (1980).

⁷⁹ See Brief of American Civil Liberties Union, Amicus Curiae at 7, *United States v. DiFrancesco*, 101 S. Ct. 426 (1980).

ment of criminal laws."⁸⁰

Government appeal of sentences offers the government a second criminal proceeding. Apart from placing defendants in double jeopardy, the government's ability to appeal a sentence would inevitably weaken a defendant's right to appeal a conviction. For example, suppose a defendant is unjustly convicted, based on illegally seized evidence or a coerced confession, and is sentenced to probation. He wishes to appeal the conviction, but if he does, the prosecutor is likely to seek to appeal the sentence. There is a substantial risk that the defendant's sentence will be increased, and might include prison, if he loses the appeal. Thus, he decides to waive his appeal in light of the burden it carries with it.

The government's ability to appeal sentences would also inevitably be a factor in plea bargaining. Take, for example, the case of a defendant indicted for a felony, who claims he is innocent and wants to proceed quickly to trial. The defendant believes that, even if he is found guilty, the circumstances of the case are such that he would likely receive a sentence below the guidelines. As a result, he declines the prosecutor's offer of a plea bargain. The prosecutor then reminds him that the government can appeal a low sentence. This increases the risk to the defendant, and influences him to change his mind and accept the plea bargain. Under section 3725 of S. 1722 the defendant cannot appeal a plea-bargained sentence. Therefore, insofar as it increases a defendant's incentive to accept a plea bargain, the right of the government to appeal sentences fails, contrary to claims of its proponents, to contribute to the goal of "reducing unwarranted sentence disparity."⁸¹ It also coerces a defendant to waive his right to a trial.

Advocates of government appeal of sentences argue that giving the prosecutor this new power is desirable to "assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines."⁸² However, guidelines can be promulgated to reduce sentencing disparity without allowing prosecutorial appeals. The statutory requirement that trial judges must state reasons for departing from the guidelines will facilitate ample discussion of appropriate sentencing considerations. In any event, there is no reason to adopt the extreme approach of a government sentencing appeal without any experience in the use of sentencing guidelines to correct disparities.

Finally, the civil liberties considerations disfavoring government

⁸⁰ *United States v. Jorn*, 400 U.S. 470, 479 (1971). See also *Green v. United States*, 355 U.S. 184, 187-88 (1957).

⁸¹ SENATE REPORT, *supra* note 6, at 1137.

⁸² *Id.* at 1136.

appeal of sentences should not be swept aside to give the government an opportunity to argue that certain defendants were treated too leniently. Proponents have argued that such government power would be exercised only for "good" purposes, *i.e.*, to plug loopholes that allow white-collar criminals to avoid imprisonment, or to assure adequate punishment of law enforcement officials convicted of civil rights violations.⁸³ But the expansion of government power proposed in S. 1722 would be far more broadly available. In evaluating this expansion of prosecutorial power, we must also envision its use by, for example, a Justice Department hostile to anti-war demonstrators or other political "enemies." History is filled with examples of the abuse of expanded prosecutorial power.⁸⁴ Whatever evidence there may be to support the broad assertion that "in recent years defendants convicted of white collar crime or government corruption are simply not being sentenced to terms of imprisonment,"⁸⁵ the danger to civil liberties of granting the government a general right to appeal sentences is too great to disregard.⁸⁶

B. PRETRIAL RELEASE AND PREVENTIVE DETENTION

Under the Bail Reform Act of 1966,⁸⁷ as the Senate Report on S. 1722 notes, "in non-capital cases a person is to be ordered released pre-trial under those minimal conditions reasonably required to assure his presence at trial. Danger to the community and the protection of society are not to be considered as release factors under the current law."⁸⁸ As a matter of established constitutional principle, the accused is presumed innocent until proven guilty at trial, and freedom may not be lawfully restricted except by the minimum condition necessary to assure appearance at trial, and for no other purpose.⁸⁹ S. 1722 and earlier Sen-

⁸³ *Id.*

⁸⁴ See text accompanying notes 81-82 *supra*.

⁸⁵ Memorandum of Senate Judiciary Committee Staff in response to ACLU criticism of S. 1722 at 6 (1980) (on file at the ACLU, Washington Office).

⁸⁶ The only example of abuse that has been cited, *United States v. Denson*, 588 F.2d 1112 (5th Cir. 1979), was not a white-collar crime case. In *Denson*, a nonprison sentence of a policeman was held to be illegal and beyond the trial court's authority. Moreover, the Court of Appeals in that case correctly pointed out that "[i]t is well settled that the Government may properly seek a writ of *mandamus* to correct an illegal sentence imposed by a District Court." *Id.* at 1127. The appellate court's refusal in *Denson* to issue the writ of *mandamus* should be criticized. But that misses the point: it is inaccurate to imply that the government cannot, under current law, seek appellate review of an *illegal* sentence. The enactment of such statutory authority could be codified, and its exercise made mandatory rather than discretionary, to avoid the result in *Denson*. That would be a far cry from giving the government broad power to appeal *any lawful sentence* below the guidelines.

⁸⁷ 18 U.S.C. §§ 3141-56 (1976).

⁸⁸ SENATE REPORT, *supra* note 6, at 1072. See 18 U.S.C. § 3146 (1976).

⁸⁹ See *Jackson v. Indiana*, 406 U.S. 715 (1972); *Stack v. Boyle*, 342 U.S. 1 (1951).

ate bills proposed substantial modifications of the conditions of pretrial release. By contrast, the Brown Commission, the Model Penal Code, and the various House bills would have retained current law in this area. Under the Senate proposal, judges would be permitted to utilize a broad new range of nonmonetary release conditions in order not only to assure the appearance of the accused,⁹⁰ but also purportedly to protect the community.⁹¹ These new conditions include requirements that the accused "report on a regular basis to a designated law enforcement agency";⁹² "refrain from excessive use of alcohol . . . or controlled substances";⁹³ "avoid all contact with potential witnesses who may testify concerning the offense";⁹⁴ undergo . . . psychiatric treatment, . . . and remain in a specified institution if required for that purpose⁹⁵ and "satisfy any other condition . . . requiring that the person return to official detention after specified hours or during specified periods, and *abide by such other severe restrictions on the person's freedom, associations, or activities that the court deems appropriate.*"⁹⁶ Judges would be empowered to issue warrants for the immediate arrest of accused persons who violate any of these new release conditions, and those arrested would be subject to summary contempt penalties, including imprisonment.⁹⁷

These fundamental changes in the law of pretrial detention threaten civil liberties because (1) they radically broaden the discretion of judges to determine whether to release persons accused of crime; (2) they permit the use of a vague new criterion of "community safety" in a judge's pretrial release decision; and (3) they expand the types and severity of restrictions that judges may impose.

Senate approval of pretrial detention raises the question of the extent to which a defendant's freedom should be limited before he is convicted of a crime. Of course, the presumption of innocence does not prohibit all restrictions on an accused person. The bail system, release on personal recognizance and, indeed, the requirement that a defendant appear for trial are proper and necessary restrictions on a defendant's pretrial freedom. But there is a sharp constitutional distinction between restrictions necessitated by the criminal justice process itself and restrictions to protect the community.

Thus, if it is necessary to prevent the defendant from fleeing, since his guilt or innocence can only be determined if he appears at trial,

⁹⁰ Proposed 18 U.S.C. § 3502(a).

⁹¹ *Id.* § 3502(b).

⁹² *Id.* § 3502(d)(4).

⁹³ *Id.* § 3502(d)(5).

⁹⁴ *Id.* § 3502(d)(6).

⁹⁵ *Id.* § 3502(d)(8).

⁹⁶ *Id.* § 3502(d)(11) (emphasis added).

⁹⁷ *Id.* § 3502(f).

detention resulting from failure to satisfy high money bail may be justified.⁹⁸ But detention for any other purpose is unacceptable because it erodes the presumption of innocence. Predictions of dangerousness are demonstrably unreliable when made by psychiatrists, much less judges or prosecutors.⁹⁹ Such predictions will result in a form of sentence before trial, based on verdicts of "tentatively guilty." Since guilt cannot be assumed without trial, pretrial conditions to protect the community violate the presumption of innocence and cannot be characterized as anything but a form of "preventive detention."

It is hardly sufficient that the release factors identified in S. 1722 are to be "taken into account . . . not in the initial decision as to whether or not a suspect should be bailed, but in the subsequent decision concerning what conditions should be placed on the suspect's freedom once released."¹⁰⁰ From the suspect's point of view, it is no consolation to be freed on bail and then immediately ordered by the same judge who granted bail to "undergo psychiatric treatment . . . in a specified institution," or to "return to official detention during specified periods," or to "abide by such other severe restrictions . . . that the court deems appropriate."¹⁰¹ The restrictions that can be imposed under S. 1722 on accused persons who are found to be a risk to community safety, severely erode their rights under the Eighth Amendment and the Bail Reform Act to have bail limited to amounts or conditions reasonably required to assure their appearance at trial.¹⁰² The sweep of judicial discretion created by this section is breathtaking. In fact, some of the conditions proposed in S. 1722 might be unacceptable and unconstitutional even *after conviction* if used as conditions for probation or parole.¹⁰³ Even the controversial preventive detention provision in S. 1437 and the District of Columbia preventive detention statute were limited to particular crimes or types of offenders. S. 1722, by contrast, covers every person accused of *any* crime.¹⁰⁴ Addressing this point, the Senate

⁹⁸ See note 89 *supra*.

⁹⁹ See generally Duke, *Bail Reform for the Eighties: A Reply to Senator Kennedy*, 49 FORDHAM L. REV. 40 (1980).

¹⁰⁰ SENATE REPORT, *supra* note 6, at 10.

¹⁰¹ Proposed 18 U.S.C. § 3502(b), (d)(8), (d)(11).

¹⁰² Proposed 18 U.S.C. § 3146(a).

¹⁰³ See *Sobell v. Reed*, 327 F. Supp. 1294 (S.D.N.Y. 1971) (a parolee, or other person released for good time and deemed as on parole, possesses federal constitutional rights including rights guaranteed by the first amendment, and such rights may be limited only on a showing of a compelling state interest).

¹⁰⁴ S. 1722 §§ 1001, *et seq.* Moreover, unlike the District of Columbia preventive detention scheme, there are no procedural safeguards in § 3502. Although it is dangerously broad, the D.C. scheme, unlike § 3502, requires a hearing at which the prosecution must demonstrate that there is a substantial probability of the defendant's guilt, and that there is clear and convincing evidence that he falls within one of the detention categories, D.C. Code § 23-1322(b)(1), (2)(A) (1977). Furthermore, the D.C. Code limits the time period for which a

Committee Report asserts that "under our existing knowledge it is virtually impossible to single out in statutory form the kinds of defendants, the kinds of offenses, and the kinds of factors that will make for a reasonable total assessment of the likelihood of . . . dangerousness."¹⁰⁵ Remarkably, the Report then asserts that the catchall provision permitting a judge to restrict an accused person in any "appropriate" way¹⁰⁶ "will permit the judge to restrict release while avoiding the controversies and practical arguments surrounding preventive detention."¹⁰⁷

Severe restrictions on the freedom of persons accused of crime cannot be insulated from constitutional challenge merely by changing a label. Preventive detention is the only appropriate label for what is proposed by S. 1722 since the bill authorizes judges to protect the community by imposing such "severe restrictions on the person's freedom, associations, or activities that the court deems appropriate."¹⁰⁸

C. SENTENCING¹⁰⁹

Under current law, a judge may impose a sentence upon a convicted defendant based on either the statute defining the offense or one of several special sentencing provisions concerning "youth"¹¹⁰ and "young adult" offenders,¹¹¹ "dangerous special offenders,"¹¹² and "dangerous special drug offenders."¹¹³ Each offense in Title 18 authorizes a

defendant can be detained, *Id.* § 23-1322(d)(2)(A), and provides criteria for detention, *Id.* § 23-1433(a). By contrast, § 3502(d)(11) would apparently authorize the detention of a "dangerous" misdemeanor even if the period of detention before trial exceeded the maximum punishment for which the defendant would be eligible upon conviction. Similarly, a judge could apparently order detention under D.C. Code § 23-3502(d)(11) even in the face of convincing evidence that the defendant was innocent of the underlying offense.

¹⁰⁵ SENATE REPORT, *supra* note 6, at 1077-78.

¹⁰⁶ Proposed 18 U.S.C. § 3502(d)(11).

¹⁰⁷ SENATE REPORT, *supra* note 6, at 1078.

¹⁰⁸ Proposed 18 U.S.C. § 3502(d)(11). *See generally*, Duke, *supra* note 99.

¹⁰⁹ S. 1722, *supra* note 7, §§ 2001-2306, 991-97. *See* M. FRANKEL, CRIMINAL SENTENCES—LAW WITHOUT ORDER (1973); KENNEDY, *Toward a New System of Criminal Sentencing: Law With Order*, 16 AM. CRIM. L. REV. 353 (1979). *See generally* Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (Part III) (1978); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); TWENTIETH CENTURY TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); Alschuler, *supra* note 11; Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980).

¹¹⁰ 18 U.S.C. §§ 5005-26 (1976) (mandatory variable sentencing of offenders under twenty-two years of age at time of conviction).

¹¹¹ 18 U.S.C. § 4216 (1976) (mandatory variable sentencing of offenders between ages of twenty-two and twenty-six).

¹¹² 18 U.S.C. § 3575 (1976) (increasing penalties for recent multiple offenses, conspiracies, and offenses involving special expertise).

¹¹³ 21 U.S.C. § 849 (1970) (increasing penalties for multiple drug offenses).

sanction, usually a maximum term of imprisonment and a maximum fine.

Unless the offense is punishable by death or life imprisonment, the judge may suspend the sentence and place a defendant on probation when satisfied that the ends of justice and the best interests of the public and the defendant will be served thereby.¹¹⁴ The judge may impose "such terms and conditions as the court deems" would best serve the public and the defendant, including a split sentence of up to six months imprisonment followed by probation.¹¹⁵ In deciding what sentence to impose or whether to suspend sentence, the judge is free to consider any relevant information.¹¹⁶

If a sentence of imprisonment in excess of one year is imposed, the defendant will be eligible for parole release after serving one-third of the term of imprisonment, unless the judge specifies an earlier date.¹¹⁷ If parole is not granted,¹¹⁸ the defendant will be released at the expiration of the sentence minus any "good-time" credited.¹¹⁹

S. 1722 would completely replace the current sentencing system. The bill establishes a United States Sentencing Commission to develop a system of guidelines and policy statements, with the goal of reducing sentencing disparity and providing more rational and determinate sentencing practices.¹²⁰ Judges are directed to impose the applicable guideline for the type of offense and type of offender in a particular case, but are permitted to sentence outside the guidelines.¹²¹ Judges must specify the reasons for the sentence on the record.¹²² Sentences outside the guidelines are subject to appellate review by both the defendant and the government.¹²³ S. 1722 provides for six sanctions: probation, fine, imprisonment, restitution, notice to victims, and criminal forfeiture.¹²⁴ The latter three sanctions can be imposed only in addition to other sanc-

¹¹⁴ 18 U.S.C. § 3651 (1976 & Supp. II 1978) (suspension of sentence and probation).

¹¹⁵ *Id.* Besides the split sentence alternative, the judge may impose conditions of probation including fines, restitution, support or participation in rehabilitation programs.

¹¹⁶ 18 U.S.C. § 3577 (1976). This section affirmatively establishes that any information concerning the background, character, and conduct of the convicted offenders may be received and considered for the purpose of imposing an appropriate sentence.

¹¹⁷ *Id.* § 4205.

¹¹⁸ *Id.* § 4206. The guidelines call for consideration of the severity of the offenses and the possibility of jeopardy to the public welfare.

¹¹⁹ *Id.* §§ 4161-66. Good-time is deducted if the prisoner has "faithfully observed all the rules and has not been subjected to punishment." *Id.* § 4161. Good-time may be forfeited for violation of rules. *Id.* § 4165. The Attorney General may later restore any forfeited good-time upon recommendation of the Director of the Bureau of Prisons. *Id.* § 4166.

¹²⁰ Proposed 28 U.S.C. §§ 994-95.

¹²¹ Proposed 18 U.S.C. § 2003(b).

¹²² *Id.* § 2003(c).

¹²³ *Id.* § 3725.

¹²⁴ *Id.* § 2001(b).

tions.¹²⁵ If a sentence of imprisonment is imposed, it will be determinate.¹²⁶ Parole release is abolished.¹²⁷ The sentence imposed will equal time served less good-time credited; good-time itself is substantially cut back.¹²⁸

This new system of sentencing fails to address several important and well-established civil liberties concerns about the current sentencing system, and makes a number of changes which are likely to have an adverse impact on civil liberties.

(1) *Use of Imprisonment*

Despite the considerable body of evidence on the destructive and debilitating effects of prison on most persons,¹²⁹ S. 1722 does not generally restrict the use of imprisonment as a sanction.¹³⁰ Incarceration should be the penalty of last resort, to be imposed only when no less restrictive alternative is appropriate.¹³¹ While the bill sets out a number of factors to be considered in imposing sentence, including consideration of the kinds of sentences available,¹³² there are no statutory provisions that require the least restrictive sentence, or state that probation is a preferred sentence. The Senate Report states “[I]n the abstract, the fac-

¹²⁵ *Id.*

¹²⁶ *Id.* §§ 2302-03.

¹²⁷ *Id.*

¹²⁸ *Id.* § 3824(b).

¹²⁹ As Charles Silberman has written, “the ball and chain and rock pile are gone, along with enforced silence, lock-step marching and other harsh disciplinary methods designed to keep prisoners docile and compliant. Yet prisons . . . remain brutal and brutalizing places.” C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 372 (1978). In recent years, federal courts have declared the prison systems in Arkansas, Alabama, Oklahoma, Rhode Island, New Hampshire and Mississippi to be in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. *Hutto v. Finney*, 437 U.S. 678 (1978) (holding Arkansas’ prisons, including its primitive isolation cells, constituted cruel and unusual punishment where duration and conditions of confinement remain uncured); *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977) (declaring the Alabama state prison system unconstitutional); *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1977) (declaring the Oklahoma prison system unconstitutional); *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977) (declaring the Rhode Island state prison system unconstitutional); *Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977) (declaring the New Hampshire state prison system unconstitutional); *Roberts v. Williams*, 302 F. Supp. 972 (N.D. Miss. 1969) (holding various practices of the Mississippi state prison unconstitutional).

The number of defendants sentenced to prison was eighty percent higher in 1975 than in 1968. C. SILBERMAN, *supra*, at 374. The United States now imprisons a much higher percentage of its citizens than any Western European nation. *Legislation to Revise and Recodify Federal Criminal Law: Hearings of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d sess. 1900 (II) (1978) (statement of Alvin Bronstein). Studies have found that incarceration does not change the rate of recidivism, and therefore many prisoners could be released into the community without endangering the public. C. SILBERMAN, *supra*, at 373.

¹³⁰ *Id.* § 2003.

¹³¹ American Civil Liberties Union, *Policy Guide: 1977 Supp.* at 76.

¹³² Proposed 18 U.S.C. § 2003(a).

tors required to be considered create no presumption either for or against probation."¹³³ This fails to implement recommendations of the Brown Commission, the American Bar Association and many sentencing experts that Congress should guide the courts toward greater use of probation.¹³⁴

Similarly, the Sentencing Commission is given insufficient guidance on the use of imprisonment. The sentencing guidelines are required to reflect the general appropriateness of imposing a sentence other than imprisonment for a first time offender not convicted of a crime of violence or other serious offense.¹³⁵ The Commission is also to impose substantial terms of imprisonment on repeat offenders.¹³⁶ Nowhere is the Commission instructed to use the least restrictive sanction or to emphasize probation, as widely recommended by sentencing experts.

The failure to include a presumption against confinement is particularly troublesome in the context of determinate sentencing. Fixed sentences, without parole, may well lead to disproportionate and unjustly harsh punishment, unless the system includes a tilt against confinement.

(2) *Sentence Lengths*

In addition to exacerbating the current over-emphasis on incarceration, S. 1722 would make several changes in current law which could produce longer terms of imprisonment. First, the bill contains no effective "safety net" mechanism for trimming disproportionately long prison sentences. It substantially cuts back good-time credits¹³⁷ and abolishes all forms of parole release—even release for the limited purposes of adjusting disparities or mitigating excessively long terms.¹³⁸ At the same time, the bill does not shorten statutory maximum sentence lengths.¹³⁹ Judges now routinely sentence defendants to long prison terms, with parole eligibility occurring after one-third of the sentence has been served.¹⁴⁰ Although the Sentencing Commission is required to consider the average sentences imposed and the length of the term of

¹³³ SENATE REPORT, *supra* note 6, at 959-60.

¹³⁴ FINAL REPORT, *supra* note 14, § 1301(2); AMERICAN BAR ASSOCIATION STANDARDS, *supra* note 42; A. HIRSCH, *DOING JUSTICE*, chs. 5, 13, 14 (1976); P. O'DONNELL, M. CHURGIN & D. CURTIS, *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM* (1977); National Council on Crime and Delinquency, *Policy Statement: The Non-Dangerous Offender Should Not Be Imprisoned*, 19 *CRIME & DELINQUENCY* 449 (1973).

¹³⁵ Proposed 28 U.S.C. § 994(i).

¹³⁶ *Id.* § 994(h).

¹³⁷ Proposed 18 U.S.C. § 3824(b).

¹³⁸ There are no provisions for early release in the bill, therefore, parole is abolished.

¹³⁹ *Id.* § 2301(b).

¹⁴⁰ 18 U.S.C. § 4203.

imprisonment actually served when promulgating guidelines,¹⁴¹ the bill permits particular guidelines to be as long as the statutory maximum if that is the judgment of the Commission. Under S. 1722, actual time served under the guidelines could be two-thirds longer than sentences under current law. If parole release is abolished, therefore, statutory maximums should be reduced by two-thirds in most cases. S. 1722, unlike H.R. 6915, does not significantly reduce net statutory maximum sentences.¹⁴²

Proponents of S. 1722 have acknowledged the risk of longer terms of imprisonment under the bill, but they claim it contains two adequate safety valves. First, there would be a delay between the promulgation of the guidelines and the implementation of the system so that the predicted impact of the guidelines could be analyzed.¹⁴³ Second, a prisoner could petition the court for a reduction of sentence if the prisoner has been sentenced to more than five years,¹⁴⁴ or the sentence could be reduced if the court finds extraordinary and compelling reasons to do so.¹⁴⁵

Neither of these mechanisms is a sufficient general safety valve. If the guidelines are too long or prove unworkable there will be nothing to prevent an across-the-board increase in sentence lengths. Similarly, the right to petition a court for reduction of sentence is so restrictive that it would have very limited impact. The right to petition is only available twice—once after five years, and once after the minimum guideline range has expired, if it is longer than eight years.¹⁴⁶ Even at these two points, the sentence may be reduced only in “extraordinary and compelling circumstances” or if the goal of eliminating unwarranted sentencing disparity necessarily requires the reduction.¹⁴⁷ This mechanism would only be available in rare cases, and assumes that a judge who sentences within the guidelines would consider ignoring those same guidelines five years later. Moreover, it assumes that no sentence under five years requires a safety net. In short, these two “safety valve” provisions will have little impact on the majority of offenders.

An administrative release mechanism which can address disproportionate or disparate sentences should be retained at least for a transitional period after the enactment of the new sentencing system. Unlike traditional parole, this release mechanism should not permit considera-

¹⁴¹ Proposed 28 U.S.C. § 994(1). Cf. H.R. 6915, *supra* note 12 (establishing reduced maximum prison sentences).

¹⁴² Proposed 18 U.S.C. § 2301.

¹⁴³ S. 1722, *supra* note 7, § 134(1)(c).

¹⁴⁴ Proposed 18 U.S.C. § 2302(c)(2).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

tion of such factors as rehabilitation or dangerousness, but should be limited to consideration of proportionality and disparity.

(3) *Sentencing Disparity*

Another major problem area in S. 1722's sentencing provisions is that they may not ultimately serve to reduce unwarranted disparity in sentencing. This is because the bill authorizes the use of several different rationales—one of the major causes of current sentencing disparity.¹⁴⁸

S. 1722 retains "rehabilitation and corrections as a purpose of a sentence, while recognizing . . . that 'imprisonment is not an appropriate means of promoting correction and rehabilitation.'"¹⁴⁹ It also permits other conflicting rationales, such as deterrence, retribution, and incapacitation, to be employed.¹⁵⁰ As the Committee Report states, "In setting out four purposes of sentencing, the Committee has deliberately not shown a general preference for one purpose of sentencing over another, in the belief that different purposes may play greater or lesser roles in sentencing for different types of offenses committed by different types of defendants."¹⁵¹ Moreover, both the Commission and the sentencing judge can choose among competing sentencing rationales in punishing particular offenses.¹⁵² This makes equal treatment for similar offenses unlikely.

Thus, when the Sentencing Commission promulgates its guidelines and policy statements, it will be permitted to choose without limitation among various and inconsistent objectives and theories of corrections. The Commission may design one set of guidelines for robbery to deter other similar offenses, another set of guidelines for rape to incapacitate the offender, and still another for white-collar crime to punish the offender.¹⁵³ These various guidelines would be based on conflicting sentencing philosophies, making it impossible to integrate the system. Some factors—such as age, education, vocational skills, drug dependence, previous employment record, family ties, community ties, criminal history, and degree of dependence upon criminal activity for a livelihood—go to the status and not the conduct of the offender.¹⁵⁴ Other factors may relate to aggravating or mitigating circumstances in

¹⁴⁸ *Id.* §§ 2003(a)(2), 101(b).

¹⁴⁹ SENATE REPORT, *supra* note 6, at 942 (quoting Proposed 18 U.S.C. § 2302(a)). *See* Proposed 18 U.S.C. §§ 101(b)(4), 2003(a)(2)(D).

¹⁵⁰ Proposed 18 U.S.C. §§ 2003(a)(2), 101(b).

¹⁵¹ SENATE REPORT, *supra* note 6, at 942.

¹⁵² Proposed 18 U.S.C. § 2003; Proposed 28 U.S.C. § 994(a)(2).

¹⁵³ Proposed 28 U.S.C. § 994(e).

¹⁵⁴ *Id.* § 994(d). A constitutional question may be raised by these provisions. *See* Robinson v. California, 370 U.S. 660 (1962) (California statute making "status" of narcotic addiction a crime where the offender had neither used nor possessed narcotics within the state struck

an individual case.¹⁵⁵ The Commission must predict every conceivable combination of factors in its guidelines. If the eighteen factors listed in the bill¹⁵⁶ are fully employed, the Commission would have to produce an enormously complex and unworkable guideline system.

The Senate Judiciary Committee added provisions to S. 1722 requiring that the guidelines be neutral as to the race, sex, national origin, creed and socioeconomic status of offenders.¹⁵⁷ It also provided for limited consideration of the offenders' education and vocational skills.¹⁵⁸ These two improvements, however, do not solve the underlying problems described above. The Commission system should be redrafted to direct the Sentencing Commission to promulgate guidelines based only on the nature and circumstances of the offense, the defendant's role in it, and any aggravating or mitigating circumstances relevant to these two central factors. The Commission must be required to specify which factors it used in its policy statements, and judges must be required to follow the guidelines for the offense unless there are factors present not already considered by the Commission.¹⁵⁹

D. CRIMINAL ATTEMPT

There is no attempt statute of general applicability in current federal law. Instead, certain criminal statutes contain attempt language within the substantive offense;¹⁶⁰ others define as a separate crime conduct which is a substantial step toward the commission of a more serious offense.¹⁶¹ Under existing law many crimes have no attempt offense attached.¹⁶² S. 1722 and its Senate predecessors would have "provided, for the first time in the Federal criminal code, a general attempt provision."¹⁶³ This was the approach recommended by the Brown Commission.¹⁶⁴ The House bill, on the other hand, would have preserved the current law approach toward attempt by providing that "[w]herever in this title attempt is made an offense, a person is guilty of attempt if, with intent to commit a crime, such person intentionally engaged in conduct

down as cruel and unusual punishment and in violation of the eighth and fourteenth amendments).

¹⁵⁵ Proposed 28 U.S.C. §§ 994(c) and (d).

¹⁵⁶ *Id.*

¹⁵⁷ Proposed 28 U.S.C. § 994(d).

¹⁵⁸ *Id.* § 994(e).

¹⁵⁹ *See* S. 1973, 96th Cong., 1st Sess. (1979) (A bill to establish the federal sentencing system).

¹⁶⁰ *See, e.g.*, 18 U.S.C. §§ 794, 2197 (1976).

¹⁶¹ *See, e.g., id.* § 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises).

¹⁶² *See, e.g., id.* § 641 (theft of public money, property or records).

¹⁶³ SENATE REPORT, *supra* note 6, at 151.

¹⁶⁴ FINAL REPORT, *supra* note 14, § 1001.

that constitutes a substantial step toward the commission of that crime."¹⁶⁵

The Senate's proposed expansion of criminal law would permit prosecution for the attempt of all but a few substantive offenses. Admittedly, it is difficult to decide when criminal law should intervene to punish conduct that may lead to a criminal event. It is clear, however, that the inchoate offenses of attempt, conspiracy and solicitation offer substantial opportunities for law enforcement to invade constitutionally protected conduct. Such a result is not speculative. The combination of overbroad inchoate offenses with substantive crimes can lead to constitutionally deficient prosecutions that cut into protected speech and conduct.¹⁶⁶

An additional reason not to generalize the criminal attempt offense is that, like other inchoate offenses, it supplies the basis for broad authority to investigate otherwise lawful conduct which may appear preparatory to a crime. Since most preparatory conduct is lawful in itself, a general attempt statute is likely to result in investigative abuses.

Current law punishes only those attempts to commit substantive crimes which Congress has selected on a crime-by-crime basis. This is a rational approach which conserves scarce prosecutorial and judicial resources while protecting civil liberties. This is not to say that the current list of attempted crimes could not be expanded (or contracted), nor that a uniform statutory definition of attempt could not be enacted. But the generalizing approach taken in S. 1722 is unwarranted, particularly since it would expand prosecutorial power in ways likely to result in violations of constitutional rights.¹⁶⁷

E. CRIMINAL CONSPIRACY

Criminal conspiracy under current federal law requires an agreement between two or more persons to commit a crime against the United States.¹⁶⁸ The agreement must be manifested by an overt act "knowingly done in furtherance of some object or purpose of the con-

¹⁶⁵ H.R. 6915, *supra* note 12, § 1101(a) (emphasis added).

¹⁶⁶ *See, e.g.* United States v. Spock, 416 F.2d 165 (1st Cir. 1969) (conspiracy to interfere with operation of the draft).

¹⁶⁷ The Judiciary Committee's exemption in Proposed 18 U.S.C. § 1004(b)(2) of certain offenses touching on first amendment rights, underscores the importance of considering whether an attempt offense should be included for each particular crime in the code. Instead of authorizing a general attempt statute and then listing exceptions, the law should attach attempt as an offense only to specifically identified crimes. Because of the substantial risks to civil liberties in the enactment of new inchoate crimes, the burden of justifying an attempt offense of any substantive crime is heavy and has not been met by the Senate Committee bill.

¹⁶⁸ 18 U.S.C. § 371 (1976).

spiracy," and proven beyond a reasonable doubt.¹⁶⁹ An agreement exists only if two or more persons intend to create it,¹⁷⁰ and those who enter the agreement must at least have the mental state which would be required to convict each of them of that offense.¹⁷¹ For example, if the crime in question requires specific intent, so does a charge of conspiracy to commit that crime.¹⁷² Similarly, if the crime in question requires specific knowledge, that specific knowledge "must be established before a defendant can be found to be a member of a conspiracy to commit that offense."¹⁷³ Finally, the defendant cannot be convicted of conspiracy to commit a federal offense unless the agreement he entered, as he understood it, encompassed that particular offense.¹⁷⁴

The conspiracy section of S. 1722 provides that "[a] person is guilty of an offense if he agrees with one or more persons to engage in conduct, the performance of which would constitute a crime or crimes, and he, or one of such persons in fact, engages in any conduct with intent to effect any objective of the agreement."¹⁷⁵ Unlike the corresponding provision in the House bill,¹⁷⁶ this language does not explicitly preserve the mental state and bilateral agreement requirements of current conspiracy law.¹⁷⁷ Thus, the Senate language as drafted does not provide that *two* or more persons must *intend* to agree, that the persons in the agreement must intend to commit a crime as the object of the agreement, or that their mental state must be the same as that required to convict them of the object crime.¹⁷⁸

The intent and bilateral agreement requirements of existing con-

¹⁶⁹ *United States v. Falcone*, 311 U.S. 205, 211 (1940).

¹⁷⁰ *See, e.g., Sears v. United States*, 343 F.2d 139 (5th Cir. 1965). This "bilateral agreement" requirement means, for example, that a person cannot conspire with a police undercover agent who is acting as a decoy, and who secretly intends to frustrate the conspiracy.

¹⁷¹ *United States v. Feola*, 420 U.S. 671, 686 (1975).

¹⁷² *United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975).

¹⁷³ *United States v. Tavoularis*, 515 F.2d 1070, 1074 (2d Cir. 1975).

¹⁷⁴ *United States v. Gallishaw*, 428 F.2d 760 (2d Cir. 1970). *See generally* Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925 (1977).

¹⁷⁵ Proposed 18 U.S.C. § 1002(a).

¹⁷⁶ H.R. 6915, *supra* note 12, § 1102.

¹⁷⁷ Indeed, the commentaries to the Model Penal Code make it clear that the language used in § 1102 is intended to overrule the bilateral agreement requirement. *See* MODEL PENAL CODE § 5.03, Comment, at 104 (Tent. Draft No. 10, 1960). *See also* Note, *Criminal Attempt, Conspiracy, and Solicitation Under the Criminal Code Reform Bill of 1978*, 47 GEO. WASH. L. REV. 550, 566 (1979).

¹⁷⁸ By contrast, the House bill expressly preserves the bilateral agreement and mental state requirements by providing that a conspiracy is established only "if 2 or more persons, with intent that a crime . . . be committed, knowingly agree to engage in the conduct that is required for the crime so intended, and any one of those persons so agreeing intentionally engages in any conduct in furtherance of the intended crime, each such person commits an offense one class next below the most serious crime so intended." H.R. 6915, *supra* note 12, § 1102(a).

spiracy law are more than theoretical niceties; they are important civil liberties protections against overbroad investigation and prosecution under the conspiracy laws. For example, under existing Federal Bureau of Investigation standards, federal conspiracy law is a basis for investigating alleged group criminality.¹⁷⁹ In the past, the FBI has investigated lawful political activity premised on the violation of conspiracy statutes such as the Smith Act and the Voorhis Act,¹⁸⁰ which on their face punish lawful speech and advocacy.¹⁸¹ Fortunately, the Supreme Court has significantly narrowed these statutes¹⁸² and S. 1722 would repeal them. In explaining the reason for the repeal, however, the Senate Report makes it clear that the general conspiracy provision is intended to carry forward some of the investigative and prosecutorial authority of the repealed statutes, stating that “[t]he Code more appropriately leaves this area to the general conspiracy provision. . . .”¹⁸³

The principal problem in applying the general conspiracy statute in the first amendment area is that vigorous dissent by persons engaged in political association can involve the lawful advocacy of acts that would be illegal if committed. Overt acts which might suffice to prove conspiracy in a criminal case, such as attending meetings and raising funds, may be wholly protected by the first amendment.¹⁸⁴

That is why the mental state and bilateral agreement requirements of existing law are important as minimal safeguards against overbroad application of the conspiracy law. The danger of drafting the general conspiracy provision so that its language does not expressly carry forward existing requirements, is underscored by the fact that existing FBI investigative guidelines provide for the use of conspiracy as a basis for opening an investigation of a “criminal enterprise engaged in terrorist activity.”¹⁸⁵ If the conspiracy provision in S. 1722 broadens current law, repeal of the Smith Act would do little to protect controversial political activities from unwarranted investigation.

In response to criticism of section 1002, the Senate Report on S. 1722 appears to concede that the statutory language is at least ambiguous, and seeks to cure the problem by adding legislative history. The

¹⁷⁹ U.S. ATTORNEY GENERAL, GUIDELINES FOR DOMESTIC SECURITY INVESTIGATIONS (1976) (on file Just. Dep’t, Wash. D.C.).

¹⁸⁰ 18 U.S.C. §§ 2385-2586 (1976).

¹⁸¹ See S. REP. NO. 755, 94th Cong., 2d Sess. 19 (1976). (FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK II).

¹⁸² *Yates v. United States*, 354 U.S. 298, 324-25 (1957).

¹⁸³ SENATE REPORT, *supra* note 6, at 189.

¹⁸⁴ See *Shumberg v. Citizens for Better Environment* 444 U.S. 620 (1980); *NAACP v. ALABAMA*, 357 U.S. 449 (1958).

¹⁸⁵ See note 179 *supra*; S. 1612, 96th Cong., 1st Sess. § 533 (1978).

Senate Report thus states, "[t]he Committee wishes to emphasize that it intends by this formulation to perpetuate the scope of current conspiracy law"¹⁸⁶ This emphasis is confusing, since the plain language of the bill appears to be in conflict with the legislative history. Moreover, the Report is contradicted by commentaries to the Model Penal Code, which explicitly state that the language used in section 1002 is intended to change current law. This problem is cured by the conspiracy provision in H.R. 6915, which expressly carries forward the mental state and bilateral agreement requirements of current law.

F. OBSTRUCTING GOVERNMENT FUNCTIONS

Operations of the federal government are protected against intentional obstruction by existing criminal law in several ways. It is a crime to "conspire . . . to defraud the United States."¹⁸⁷ The use of force to obstruct federal offices or employees in the performance of their official duties is also prohibited.¹⁸⁸ These functions include, among others, the following: official actions of federal law enforcement agents, judges, employees of penal institutions and certain designated federal inspectors;¹⁸⁹ actions of United States officers executing court orders or carrying out authorized search warrants;¹⁹⁰ military recruitment and enlistment activities when the United States is at war;¹⁹¹ and processing of mail.¹⁹²

Sections 1301(a) and 1302(a) of the Senate bill provide criminal penalties for obstructing any government function by fraud, and for obstructing certain specified government functions by non-forcible physical interference. These provisions are built upon broad existing crimes, which they further expand by adding new language, deleting existing language, codifying the broadest judicial interpretations of the current statutes in this area, and overruling several narrowing constructions in case law. Since controversial political conduct otherwise protected by the first amendment can sometimes be viewed as obstructing government functions, any expansion—or codification of expansive interpretations—of existing law in this sensitive area should be avoided.

(1) *Obstructing a Government Function by Fraud*

Section 1301 of S. 1722 is based upon the notoriously broad and widely criticized crime of "conspiracy to defraud the United States,"

¹⁸⁶ SENATE REPORT, *supra* note 6, at 165.

¹⁸⁷ 18 U.S.C. § 371 (1976).

¹⁸⁸ 18 U.S.C. § 111 (1976).

¹⁸⁹ *See id.* § 1114.

¹⁹⁰ *Id.* § 2231.

¹⁹¹ *Id.* § 2388.

¹⁹² *Id.* § 1701.

which the House bill would codify verbatim.¹⁹³ As originally enacted in 1867, this crime was intended to cover fraudulent conduct aimed at obtaining property or money from the United States, chiefly by evading the payment of taxes.¹⁹⁴ Through a century of interpretation, however, the statute has grown far beyond its original purpose to a point today where many commentators, including the Brown Commission, have called upon Congress to repeal it or curtail its application.¹⁹⁵ The evolution of the statute, as applied by prosecutors and expanded by courts, is summarized as follows by a leading commentator:

Conspiracy to defraud the United States has evolved in several stages. First, it was a crime reaching only agreements to use falsehood to induce action by the Government which would cause it a loss of money or property. It expanded to include an agreed-upon-falsehood which might disadvantage the Government in any way whatever, and ultimately covered virtually any impairment of the Government's operating efficiency. The end to be gained having thus been obscured, it remained only for the means to be made equally shadowy. This was accomplished in the cases which viewed any dishonest act, including concealment, as the measure of an interference with the Government. Suspiciously unethical conduct, the failure to disclose even that which Congress has never required to be disclosed, became the raw material from which criminal liability was fashioned.¹⁹⁶

Instead of narrowing the case law interpretation of the conspiracy-to-defraud provision toward its original scope, S. 1722 codifies the broadest reading of "defrauding the United States," by making it a crime if a person "obstructs or impairs a government function by defrauding the government through misrepresentation, chicanery, trickery, deceit, craft, overreaching, or other dishonest means."¹⁹⁷ In fact, section 1301 reaches even further than the broad language of section 371 by criminalizing *individual* as well as conspiratorial conduct, thus freeing the government from the burden of having to prove the elements of conspiracy in order to obtain a conviction in this area. The effect of such codification and further extension of the outer reaches of the case law, is to eliminate any possibility that the courts or Congress can be persuaded to set limits on the application of the crime of obstructing a government function by fraud.¹⁹⁸

¹⁹³ H.R. 6915, *supra* note 12, § 1705.

¹⁹⁴ See 1 REPORT OF COMMITTEES, 39TH CONG. 2D SESS., H. REP. 15 (Feb. 11, 1867). See generally, Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959).

¹⁹⁵ FINAL REPORT, *supra* note 14, at 71.

¹⁹⁶ Goldstein, *supra* note 195, at 461-62.

¹⁹⁷ Proposed 18 U.S.C. § 1301(a).

¹⁹⁸ This is made clear by the Senate Report, which states that § 1301 "is designed to fill a gap in existing law by reaching *all* conduct by which a person intentionally obstructs or impairs a government function by fraudulent means." SENATE REPORT, *supra* note 6, at 271 (emphasis added).

Section 1301 contains a single, extremely narrow bar to prosecution—"that the offense was committed solely for the purpose of disseminating information to the public."¹⁹⁹ In light of the breadth of the statute, as it stands, this provision has negligible value. In an information-dissemination prosecution under section 1301, it would be extremely difficult for the defendant to establish that the conduct at issue was solely for the purpose of disseminating information to the public. Although the Senate Report states that the bar is intended to render section 1301 inapplicable to cases such as the Daniel Ellsberg-Pentagon Papers prosecution,²⁰⁰ the bar would apparently not cover such cases if the information was disseminated in part for profit, for political gain, to embarrass government officials or to alter government policy.²⁰¹ This is a major flaw, but it could be remedied so as not to affect first amendment rights by changing "solely" to "in whole or part."

(2) *Obstructing a Government Function by Physical Interference*

Section 1302 of S. 1722 makes it a crime to intentionally obstruct or impair "by means of physical interference or obstacle . . . a government function in fact involving" the performance of an official duty by certain government officials.²⁰² The proposed crime is broader than current law (which is generally carried forward in the House bill²⁰³) because (1) it covers conduct not involving the use of force—a key limiting term in the current obstruction statute,²⁰⁴ and (2) it contemplates a broad definition of interference and reaches conduct which does not involve any form of assault or other aggressive physical contact.²⁰⁵

The obstruction statute on which section 1302 is based provides that a person who "*forcibly* assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title [18 U.S.C. § 1114 (1976)] while engaged in or on account of the performance of his official duties" is guilty of a crime.²⁰⁶ The use of force is a critical element. Thus, the courts have construed the term "forcibly" to modify each of the verbs which succeed it. "[I]t would be absurd to limit the modifying effect of 'forcibly' to the word 'assaults',

¹⁹⁹ Proposed 18 U.S.C. § 1301(b).

²⁰⁰ SENATE REPORT, *supra* note 6, at 283.

²⁰¹ The Senate Report appears to recognize the negligible value of the bar, stating that "[i]n one sense this bar . . . is unnecessary since, if the *sole purpose* underlying the offense was dissemination of information to the public, the actor could not also have harbored an intent to obstruct or impair a government function." *Id.* at 276-77 (emphasis added).

²⁰² Proposed 18 U.S.C. § 1302(a).

²⁰³ H.R. 6915, *supra* note 12, § 1701.

²⁰⁴ 18 U.S.C. §§ 4001, 4353 (1976).

²⁰⁵ SENATE REPORT, *supra* note 6, at 280.

²⁰⁶ 18 U.S.C. § 111 (1976) (emphasis added).

since this is the only one of the succeeding verbs in which the use or threat of force is necessarily implied. . . ."²⁰⁷ Not only is force required under section 111, but what constitutes force has been strictly construed. One appellate court recently held that "[t]hreats of the future use of force are not enough, . . . nor is mere deception of a federal agent, . . . nor, presumably, would be the mere refusal to unlock a door through which federal agents sought entrance."²⁰⁸ In virtually all of the reported decisions construing the term "forcibly" under 18 U.S.C. section 111, the conduct at issue has involved an assault or other aggressive physical contact.²⁰⁹

Section 1302 broadens the existing crime of obstruction by eliminating "forcibly" from the language of the statute. Moreover, to make it abundantly clear that the new crime will reach conduct not prohibited by current law, the Senate Report states that "obstruction," "impairment" and "interference" are "intended to be given an expansive construction."²¹⁰ As an example of the kind of broad construction intended, the Report cites "the causing of persistent noise" as conduct amounting to "physical interference."²¹¹ While such interference must be intentional under section 1302, so to must the far narrower category of *forcible* interference under section 111.²¹²

Section 1302 contains two defenses, one of which is narrower than existing law and the other of which attempts to codify what is now required by the first amendment. The first defense provides that a person may escape conviction under section 1302 if he proves that the federal function which he obstructed was "unlawful" and was "conducted by a government servant who was not acting in good faith."²¹³ The Senate Report concedes that this formulation would narrow a common law defense, since the proposed statutory defense is "more circumscribed than that obtained under the federal cases dealing with the right to forcibly

²⁰⁷ Long v. United States, 199 F.2d 717, 719 (4th Cir. 1952).

²⁰⁸ United States v. Cunningham, 509 F.2d 961, 963 (D.C. Cir. 1975) (citations omitted).

²⁰⁹ See, e.g., Ladner v. United States, 358 U.S. 169 (1958) (on rehearing) (shotgun assault); United States v. Mathis, 579 F.2d 415 (7th Cir. 1978) (unarmed assault); United States v. Camp, 541 F.2d 737 (8th Cir. 1976) (armed interference); United States v. Frizzi, 491 F.2d 1231 (1st Cir. 1975) (spitting in the face of a mail carrier); United States v. Alsondo, 486 F.2d 1339 (1st Cir. 1973), *rev'd on other grounds*, 410 U.S. 67 (1975) (shoving); United States v. Marcello, 423 F.2d 993 (5th Cir. 1970) (attempting to punch officer); United States v. Simon, 409 F.2d 474 (7th Cir. 1969) (kicking and biting).

²¹⁰ SENATE REPORT, *supra* note 6, at 281-82.

²¹¹ *Id.*

²¹² See, e.g., United States v. Feola, 420 U.S. 671, 686 (1975); United States v. Bamberger, 452 F.2d 696, 698 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1970); Long v. United States, 199 F.2d 717, 719 (4th Cir. 1952).

²¹³ Proposed 18 U.S.C. § 1302(b)(1).

resist unlawful arrest or search.”²¹⁴ The common law defense of resisting an illegal act of a law enforcement or other federal official, turns on the reasonableness of the defendant’s conduct, not on the officer’s “bad faith.”²¹⁵ Thus, for example, “intervention by a third party to prevent grievous bodily harm to another from what reasonably appears to be an unprovoked assault may not subject the intervenor to liability for violation of Section 111.”²¹⁶

The combination of an obstruction crime which is broader than current law, and a defense of resisting illegal conduct by law enforcement officials which is narrower, would have a serious impact on the exercise of first amendment rights. Consider the case of an orderly, non-violent demonstration occurring in front of a federal agency building to protest an action of the agency. Suppose that a law enforcement officer orders demonstrators to disperse or be arrested, on the ground that they are obstructing access to the building. The arresting officer believes the order to be lawful under section 1302. Even though the demonstrators might not be convicted for obstructing the federal agency, under section 1302 they could be convicted for obstructing the law enforcement officer if they refused to obey his illegal order. While the demonstrators might ultimately avail themselves of a defense that they were entitled to disobey an unconstitutional order,²¹⁷ there is clearly great potential for abuse in the broad discretion that section 1302 delegates to law enforcement officials to determine what constitutes a non-forcible obstruction prohibited by the statute.

The second defense available under section 1302 provides that a person may not be convicted if he can prove that the interference was (1) created in the course of conduct protected by the first amendment, (2) involved no violence or only “incidental,” “spontaneous minor violence,” and (3) did not “significantly” obstruct or impair the government.²¹⁸ This defense is an abbreviated version of what the first

²¹⁴ SENATE REPORT, *supra* note 6, at 284.

²¹⁵ See generally Chevigny, *The Right to Resist an Unlawful Arrest*, 68 YALE L.J. 1128 (1969); Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626 (1970).

²¹⁶ *United States v. Grimes*, 413 F.2d 1376, 1379 (5th Cir. 1969); *United States v. Kartman*, 417 F.2d 893, 895 n.5 (9th Cir. 1969) (“[I]t is a defense . . . [in a prosecution for forcible assault under 18 U.S.C. § 111] that the defendant reasonably believed the facts to be other than they were if his act would have been innocent had the facts been as defendant reasonably believed this to be.”) See also *John Bad Elk v. United States*, 177 U.S. 529, 535 (1900) (“[T]he other party might resist the illegal attempt to arrest him using no more force than was absolutely necessary to repel . . . the attempt to arrest.”).

²¹⁷ *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1968) (person faced with a law subjecting the right of free expression to prior restraint of a license may ignore it and exercise his first amendment rights).

²¹⁸ Proposed 18 U.S.C. § 1302(d)(2).

amendment itself commands.²¹⁹ Because section 1302 is broader than current law and reaches non-forcible interference with government functions, its impact on the first amendment is substantial. Thus, the defense is an attempt to save the statute from constitutional attack.

The broad delegation of authority to law enforcement officials to make quick judgments about what constitutes an obstruction under section 1302 cannot be effectively narrowed by a purported first amendment defense of the type proposed. Such judgments are often difficult to make even when the conduct at issue involves physical force. The difficulty is compounded when law enforcement officials are invited to use their discretion to determine when speaking, picketing or demonstrating cross the line between constitutionally protected activity and broadly defined interference with a government function.²²⁰

G. FALSE STATEMENTS

Current law is unsettled as to when it is a crime to make a false oral statement to a government official. 18 U.S.C. § 1001 punishes anyone who "knowingly and willfully falsifies . . . a material fact, or makes any false, fictitious or fraudulent statements or representations" in a matter within the jurisdiction of any federal department or agency.²²¹ The statute does not expressly cover oral statements, and judicial authority is in conflict over whether, and to what extent, it can be so interpreted.²²² This ambiguity in the current law of false statements results from the fact that "some courts have tended to narrow their interpretations of

²¹⁹ U.S. CONST. amend. 1.

²²⁰ H.R. 6915 would enact a narrower offense than section 1302 of S. 1722 by making it a crime to intentionally obstruct "the execution by a law enforcement officer of an arrest, or the prevention by a law enforcement officer of the imminent occurrence of a felony . . ." H.R. 6915, *supra* note 12, § 1701(a)(5). In other sections, the House bill prohibits assaults against law enforcement officers and a range of public officials engaged in the performance of their duties. Section 1701 is designed to address only the use of forcible interference which does not amount to an assault. Since it is narrowly drawn, it is less threatening to first amendment conduct than section 1302 of S. 1722. However, the common law defense of resisting an unlawful arrest, whether or not the arresting officer was acting in bad faith, should be re-stated in full.

²²¹ 18 U.S.C. § 1001 (1976).

²²² Compare *United States v. Adler*, 380 F.2d 917 (2d Cir. 1967) (intentional false statement to FBI calculated to provoke an investigation is a crime) *with* *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967) (false oral statement to FBI not a crime because penalizing such a statement would discourage open communications between the public and law enforcement officials). Contrary to assertions in the Senate Judiciary Committee staff memorandum, at 11, (*see* SENATE REPORT, *supra* note 6, at 379), *Friedman* is not an "an anomalous ruling." Other decisions bar the application of section 1001 to various types of oral statements. *See, e.g.*, *United States v. Bedore*, 455 F.2d 1109, 1110 (9th Cir. 1972) (false name given to FBI agent); *United States v. Davey*, 155 F. Supp. 175 (S.D.N.Y. 1957) (false name used in registering for selective service); *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1953) (false statements made to FBI agents investigating theft of jewelry).

[§ 1001] to exclude various types of conduct from its purview.”²²³ At the very least, it is clear that oral exculpatory denials cannot be prosecuted as false statements under existing law.²²⁴

S. 1722 “disapproves . . . most [of] these narrow [judicial] interpretations” of 18 U.S.C. § 1001, and creates a new offense of making a false oral statement to a law enforcement or other investigative officer.²²⁵ This approach is contrary to the House bill,²²⁶ as well as to the recommendations of the Model Penal Code and the Brown Commission that false oral statements to law enforcement agents should not be generally criminalized.²²⁷

Freedom of speech and due process of law militate against indiscriminately penalizing unsworn oral statements. Such statements are incapable of verification by written record, and prosecution is based on the memories of witnesses. Moreover, placing the risk of committing a crime on anyone who wishes to make an oral communication to a law enforcement official will tend to chill public communications with the government. In addition, this offense has a significant potential for investigatory abuse. Finally, criminalization of false oral statements is unnecessary because the government has other remedies available. For example, when recourse to a grand jury subpoena is not available, a prosecutor can prepare a written record of an individual’s statement and request that the individual sign it. Preparation of a written record benefits both the declarant and the prosecutor, and eliminates the evidentiary problems connected with prosecuting false oral statements. In addition, the request for a signature alerts the declarant to the need for truthfulness, and increases the likelihood that the written record is accurate.

Contrary to these considerations, S. 1722 would criminalize any false oral statement made to federal investigative officials that is “volunteered or is made after the person has been advised that making such a statement is an offense”²²⁸ As amended in committee, the Senate crime would require corroboration.²²⁹ Although this amendment is an improvement, it does not substantially curtail the scope of the offense, since corroboration by another investigative official would be sufficient to satisfy the requirement. Neither the Senate bill nor the Report defines what is meant by volunteered statements. Nor is the warning re-

²²³ SENATE REPORT, *supra* note 6, at 377.

²²⁴ *See* Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962).

²²⁵ SENATE REPORT, *supra* note 6, at 377.

²²⁶ H.R. 6915, *supra* note 12, § 1742.

²²⁷ MODEL PENAL CODE, § 241.3; FINAL REPORT, *supra* note 14, § 1352.

²²⁸ Proposed 18 U.S.C. § 1343(a)(1).

²²⁹ *Id.* § 1346(b)(4).

quirement particularly effective. A person questioned by an investigative official and subjected to criminal penalties for false statements should be warned not only that making a false statement is an offense, but also that he or she has the right to remain silent and a privilege against self-incrimination.²³⁰ Indeed, the warning required by section 1343 may create the contrary impression—that the person is required to provide answers. The person questioned should be advised, as part of any warning given, that he or she is under no obligation to speak to federal officials in the absence of lawful compulsory process.

The one area in which there is a need to criminalize false oral statements involves intentional false alarms which divert public safety agencies, such as an intentional false fire alarm within federal jurisdiction.²³¹ The harm involved here can be substantial: there can be both a significant waste of government resources and a clear and present danger to the public.²³² In this narrow but important area, a criminal prohibition against the making of false oral statements does not impinge on first amendment rights.

H. JURISDICTION OVER CERTAIN CRIMES COMMITTED ON ENERGY FACILITIES

Under current law, federal criminal jurisdiction does not extend to most state-owned or private commercial property. Under a federal system of government, these areas are the responsibility of state and local authorities.

Breaking with this principle, the Senate bill creates a new jurisdictional basis for certain crimes²³³ “committed on premises that are part of a facility that is involved in the production or distribution of electricity, fuel or other forms or sources of energy, or research, development, or demonstration facilities relating thereto, regardless of whether such facility is still under construction or otherwise not functioning.”²³⁴ There is no corresponding provision in the House bill.

In contrast to current federal law, which leaves property crimes committed outside of federal enclaves or premises to state or local jurisdiction, the new energy facility jurisdiction proposal in S. 1722 would substantially expand federal authority without any showing that such expansion is necessary or that state and local enforcement in this area is

²³⁰ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

²³¹ See H.R. 6915, *supra* note 12, § 1744.

²³² Cf. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (man shouting “fire” in a crowded theatre).

²³³ Proposed 18 U.S.C. §§ 1701 (Arson), 1702 (Aggravated property destruction), 1712 (Criminal Entry).

²³⁴ *Id.* § 1701(c)(10), 1702(c)(1), 1712(c)(7).

inadequate.²³⁵ This new jurisdictional base was added by a Judiciary Committee amendment that was adopted without hearings or substantial debate. The purpose of the amendment was made clear in remarks by its sponsor, Senator Alan Simpson (R-Wyo.), who asserted to the Judiciary Committee that Congress should anticipate criminal disruption of nuclear energy facilities, despite the lack of any evidence, as other Committee members pointed out, that such criminal activity has occurred or that state and local authorities are not equipped to investigate and prosecute those who engage in such activities.²³⁶

This jurisdictional provision is broad in scope and potentially dangerous in effect. When coupled with the general inchoate offenses of S. 1722, it could be interpreted to provide new authority for federal investigative agencies to conduct surveillance of demonstrations and other political activities in the vicinity of nuclear and other energy facilities.²³⁷ Because inchoate crimes of conspiracy, attempt and solicitation would apply under S. 1722 to any speech, plan or activity suspected of leading to arson, aggravated property destruction or criminal entry, the effect of the new jurisdictional provisions could be to focus federal investigative efforts on persons and groups who publicly oppose certain forms of energy production, particularly nuclear energy. The Committee Report does nothing to alleviate these concerns, but merely states, *inter alia*, that while current federal law "covers only minor trespasses on nuclear facilities, and reaches only . . . a small minority of the total nuclear facilities in the country . . . [under S. 1722] criminal entry offenses of the type described that occur on any energy facility . . . would be covered."²³⁸

I. OBSTRUCTING A PROCEEDING BY DISORDERLY CONDUCT

There is no current federal statute that generally prohibits noise or behavior which disrupts a federal proceeding. While the disruption of judicial proceedings is presently an offense,²³⁹ S. 1722 goes beyond existing law and proposes a general obstruction crime which "extends to the obstruction of all official proceedings, whether they be judicial, legislative, executive or administrative."²⁴⁰ This proposal unnecessarily expands federal law and would chill the exercise of first amendment rights. The section makes it a federal offense to obstruct or impede any official proceeding "by means of noise that is unreasonable, by means of violent

²³⁵ SENATE REPORT, *supra* note 6, at 627.

²³⁶ Transcript Senate Judiciary Committee Proceedings, Dec. 1, 1979 (on file Senate Judiciary Committee, Wash. D.C.).

²³⁷ Proposed 18 U.S.C. §§ 1001 (Attempt), 1002 (Conspiracy), 1003 (Solicitation).

²³⁸ SENATE REPORT, *supra* note 6, at 627-28.

²³⁹ 18 U.S.C. §§ 401, 1507.

²⁴⁰ Proposed 18 U.S.C. § 1334.

or tumultuous behavior of disturbance, or by similar means."²⁴¹ With respect to the requirements that the proceedings be official and that the noise or behavior be unreasonable, the applicable state of mind that must be proven is "reckless."²⁴² Thus, a person need not specifically intend to be disruptive but must merely act in reckless disregard that his or her behavior would be disruptive. Such sweeping criminal liability is both unnecessary and chilling, even in the context of judicial proceedings,²⁴³ to say nothing of legislative, executive and administrative proceedings.

J. OBSCENITY

There are five criminal statutes in current law relating to obscene matter: mailing obscene or crime-inciting matter,²⁴⁴ importation or transportation of obscene matter,²⁴⁵ mailing indecent matter on wrappers or envelopes,²⁴⁶ broadcasting obscene language²⁴⁷ and transportation of obscene matter for sale or distribution.²⁴⁸ These statutes do not define obscene matter in detail, but merely describe such materials as "lewd, lascivious, indecent, filthy, or vile."²⁴⁹

The Senate and House bills generally codify these statutes²⁵⁰ and add to them a new "contemporary community standards" test of what constitutes obscenity, as adopted by the Supreme Court in *Miller v. California*.²⁵¹ By doing so, the bills enhance the status of *Miller* and effectively foreclose any possibility that the Court or Congress will narrow its vague and dangerous formulation of obscenity standards. Moreover, going beyond *Miller*, the Senate bill defines community as "the state or local community in which the obscene material is disseminated."²⁵² A general crime of obscenity impinges directly on first amendment rights and creates an inappropriate federal law enforcement function.²⁵³ A definition of obscenity that would give fair warning of what is prohibited and would be limited to a narrow category of expression, has long

²⁴¹ *Id.* § 1334(a).

²⁴² *See* § 303(b)(3).

²⁴³ *See* N. DORSEN & L. FRIEDMAN, *DISORDER IN THE COURT* (1974).

²⁴⁴ 18 U.S.C. § 1461 (1976).

²⁴⁵ *Id.* § 1462.

²⁴⁶ *Id.* § 1463.

²⁴⁷ *Id.* § 1464.

²⁴⁸ *Id.* § 1465.

²⁴⁹ *Id.* § 1461.

²⁵⁰ Proposed 18 U.S.C. § 1842; H.R. 6915, *supra* note 12, § 2743.

²⁵¹ 413 U.S. 15 (1973).

²⁵² Proposed 18 U.S.C. § 1842(b)(2) (emphasis added).

²⁵³ *See* *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 84-85 (1973) (Brennan, J., dissenting).

eluded the Supreme Court.²⁵⁴ In *Miller*, a majority of the Court predicted that its community standards test would separate protected "commerce in ideas" from punishable "commercial exploitation of obscene materials."²⁵⁵ The Georgia Supreme Court responded two weeks later by holding that the widely acclaimed film, "Carnal Knowledge," was obscene.²⁵⁶ Although the decision was later reversed by the Supreme Court,²⁵⁷ it graphically illustrates the constitutional danger posed by the vague and shifting community standards test.

The criminal code bills would codify the approach taken in *Miller*, thus cementing the varying community standards test into federal criminal law, and exacerbating the constitutional difficulty in the standard by narrowing the definition of community to mean local community. A criminal standard which is not applied uniformly is particularly dangerous in a federal law that regulates expression. The first amendment is undermined if it is not accorded the same meaning throughout the country. A citizen's first amendment rights should be the same whether he or she is in Georgia or New York.

Coupling the local community standards approach with the venue provisions of the Senate bill makes the obscenity statute created by S. 1722 especially dangerous.²⁵⁸ Since the standards to be applied in an obscenity prosecution include those generally accepted in the judicial district "in which the offense was completed",²⁵⁹ a local jury in any district in which a film, book, or magazine is distributed could find an author or publisher guilty of obscenity on a local community standard applicable nowhere else in the nation.²⁶⁰ This would subject distributors of expressive materials to a risk of criminal liability which would vary from one district to the next, and thereby substantially inhibit the exercise of first amendment rights. Under these circumstances the worst fears of Justice Brennan, dissenting in a case applying the *Miller* standard in a federal prosecution, would be realized: "The guilt or inno-

²⁵⁴ See *Miller v. California*, 413 U.S. 15 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Roth v. United States*, 354 U.S. 476 (1957).

²⁵⁵ 413 U.S. at 25.

²⁵⁶ *Jenkins v. Georgia*, 230 Ga. 726, 199 S.E.2d 183 (1973).

²⁵⁷ *Jenkins v. Georgia*, 418 U.S. 153 (1974).

²⁵⁸ Proposed 18 U.S.C. § 3311.

²⁵⁹ *Id.*

²⁶⁰ The limitation of venue in § 3311 to a district from which the material was disseminated or in which the offense was completed, is an important improvement. However, this limitation does not compensate for the lack of notice of what is obscene in particular localities and the wide variations in local community standards which would face distributors of expressive material under § 1842. Similarly, the defense in § 1842(c) "that dissemination of the material was legal in the political subdivision of locality in which it was disseminated" does not address the problem of multiple liability based on varying and unpredictable local community standards.

cence of distributors of identical materials mailed from the same locale [would] . . . turn on the chancy . . . place of delivery of the materials."²⁶¹

K. HINDERING LAW ENFORCEMENT

Current federal law on misprision of a felony and accessory-after-the-fact punishes affirmative conduct intended to assist an offender by preventing his apprehension, trial or punishment,²⁶² as well as affirmative conduct intended to conceal the commission of a federal felony.²⁶³ Other provisions of current law prohibit the intentional harboring of a person for whom an arrest warrant is known to have been issued "so as to prevent his discovery or arrest;"²⁶⁴ the willful harboring of an escaped federal prisoner;²⁶⁵ the harboring of a person one knows or has reason to believe has committed or is about to commit espionage;²⁶⁶ and the concealment of a person one knows to have committed treason.²⁶⁷

S. 1722 consolidates and expands the existing misprision and accessory-after-the-fact statutes into a generic crime of "hindering law enforcement."²⁶⁸ This expansion of current law impinges on the freedom of association and other first amendment activities, such as the gathering of news.

There are at least three features of the proposed new crime of hindering law enforcement that go beyond current law by changing statutory language or overruling judicial interpretations. First, the new accessory-after-the-fact crime in S. 1722²⁶⁹ does not require proof of specific intent to hinder, delay, or prevent discovery of a fugitive. This change would create broader criminal liability than now exists under the crime of harboring a prisoner²⁷⁰ and would overrule case law holding that specific intent must be shown to obtain a conviction for either harboring or concealing an offender or for harboring or concealing a person for whom an arrest warrant is known to have been issued.²⁷¹

The second proposed expansion of current law is an elimination of

²⁶¹ *Hamling v. United States*, 418 U.S. 87, 144 (1979).

²⁶² 18 U.S.C. § 3 (1976).

²⁶³ *Id.* § 4.

²⁶⁴ *Id.* § 1071.

²⁶⁵ *Id.* § 1072.

²⁶⁶ *Id.* § 792.

²⁶⁷ *Id.* § 2382.

²⁶⁸ Proposed 18 U.S.C. § 1311.

²⁶⁹ *Id.* § 1311(a)(1).

²⁷⁰ 18 U.S.C. § 1072.

²⁷¹ *Id.* § 3. *See* *United States v. Bisionette*, 586 F.2d 73 (8th Cir. 1978); *United States v. Jensen*, 561 F.2d 1297 (8th Cir. 1977); *United States v. Hobson*, 519 F.2d 765 (9th Cir.), *cert. denied*, 423 U.S. 931 (1975); *United States v. Garner*, 344 F.2d 42 (4th Cir. 1965).

the present requirement that a crime must have been committed by the person harbored or concealed.²⁷² As the Senate Report notes, the bill "does not . . . make commission of a crime by another a matter of proof in the prosecution of an aider. Instead, the section refers to assisting 'another person, knowing that such person has committed a crime, *or is charged with or being sought for a crime*'."²⁷³ The third proposed expansion of current law in the Senate bill is closely related to the second: the definition of harboring is broadened so as to extend "beyond conduct of a clandestine or surreptitious nature to reach any act of providing shelter or refuge."²⁷⁴ This would overrule narrower judicial interpretation of "harbors" which requires, among other things, secreting a fugitive.²⁷⁵

L. RIOT

Since 1968, federal law has included several riot-related crimes.²⁷⁶ The statutes prohibit interstate travel with intent to incite or organize a riot, commit violence in furtherance of a riot, or aid any person in inciting or participating in a riot, as evidenced by an overt act for any of those purposes.²⁷⁷ Riot is defined as an act of violence by a person who is part of a group of three or more persons, if the act involves a clear and present danger of injury to person or property.²⁷⁸ A separate statute makes it a crime to engage in a riot in a federal prison.²⁷⁹

Civil liberties groups generally opposed the 1968 federal anti-riot statute as a vague and overbroad threat to first amendment rights. The riot provisions in the Senate bill expand the 1968 statute in several ways and narrow it in others. The proposed improvements over current anti-

²⁷² See *United States v. Neal*, 102 F.2d 643, 645-46 (8th Cir. 1939), *cert. denied*, 312 U.S. 697 (1941).

²⁷³ SENATE REPORT, *supra* note 6, at 295 (emphasis added).

²⁷⁴ *Id.* at 296.

²⁷⁵ *See, e.g.*, *United States v. Shapiro*, 113 F.2d 891 (2d Cir. 1940); *United States v. Biami*, 243 F. Supp. 917 (E.D. Wis. 1965).

Section 1311 also appears to expand current law by expressly precluding a defense to the crime of hindering law enforcement by intentionally destroying or concealing a record or other object by claiming that the record or object "would have been legally privileged or . . . inadmissible in evidence" [§ 1311(c)]. The Senate Report states that "[t]his provision is intended to overrule *Neal v. United States*, 102 F.2d 643 (8th Cir. 1939), *cert. denied*, 312 U.S. 679 (1941), which held that concealment of relevant items was not assisting another when their evidentiary nature was not established." SENATE REPORT, *supra* note 6, at 297 n.24. By overruling *Neal* and barring a defense of privilege to a charge of hindering law enforcement by destroying records, § 1311(c) may place journalists in the position of committing a felony if they take affirmative steps to protect a confidential news source who is a criminal suspect, even in the absence of a grand jury subpoena or other formal legal process. It is not clear, however, how broad the *Neal* defense would be under current law in these circumstances.

²⁷⁶ 18 U.S.C. §§ 2101, 2102 (1976).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ 18 U.S.C. § 1792 (1976).

riot law include narrowing the definition of riot;²⁸⁰ raising the culpability levels for both leading and engaging in a riot from “knowing” to “intentional”;²⁸¹ and narrowing the interstate commerce jurisdictional basis for leading a riot, requiring travel in executing the offense, not merely in planning it.²⁸²

The House bill goes even further and repeals the broad interstate commerce jurisdiction in the 1968 anti-riot statute.²⁸³ In light of the fact that there have been only two significant prosecutions under the “Rap Brown” provisions of the 1968 Act—the “Chicago Seven”²⁸⁴ and “Wounded Knee”²⁸⁵ cases—both of which have raised substantial constitutional questions, the House Judiciary Committee concluded that the state riot statutes and federal property destruction statutes provided adequate coverage.

M. CONTEMPT

The basic federal contempt-of-court statute presently empowers a court to punish the intentional (1) misbehavior of any person in or near the court’s presence which obstructs the administration of justice; (2) misbehavior of a court officer; and (3) disobedience of a court order.²⁸⁶ The court has authority to punish by fine or imprisonment “at its discretion.”²⁸⁷

In view of this sweeping authority, there is a substantial need to revise the contempt law so as to limit judicial discretion, reduce the penalty for general contempt, and create adequate defenses to contempt charges resulting from the breach of an unconstitutional court order. Civil liberties groups have endorsed the improvements over current law in the Senate bill,²⁸⁸ but favor the more extensive and significant reforms contained in the House bill.²⁸⁹

The most important change is the creation of an affirmative defense to a contempt prosecution that a disobeyed court order was (a) invalid on any ground and the defendant took reasonable steps to obtain judicial review, or (b) was invalid under the first amendment.²⁹⁰ The House

²⁸⁰ Proposed 18 U.S.C. § 1834.

²⁸¹ *Id.* §§ 1831, 1833.

²⁸² *Id.* § 1831(c)(3).

²⁸³ H.R. 6915, *supra* note 12, § 2731.

²⁸⁴ *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

²⁸⁵ *United States v. Barnes*, 383 F. Supp. 368 (D.S.D. 1979).

²⁸⁶ 18 U.S.C. § 401 (1976).

²⁸⁷ *Id.*

²⁸⁸ Testimony of the authors, SENATE HEARINGS, *supra* note 6, at 10163.

²⁸⁹ H.R. 6915, *supra* note 12, §§ 1731(b)(2), 1736.

²⁹⁰ Proposed 18 U.S.C. § 1331(b).

bill goes even further and extends the defense to any "constitutionally invalid" court order.²⁹¹

A second area in which the House bill is preferable to S. 1722 concerns the penalties authorized for violating the general contempt statute. The House bill, implementing the recommendation in the study draft of the Brown Commission,²⁹² limits the authorized punishment to a \$500 fine or not more than five days in prison.²⁹³ By contrast, the general contempt provision in the Senate bill carries a penalty of six months imprisonment and a \$25,000 fine.²⁹⁴ While it is true that current contempt law has no penalty ceiling, sentencing practice under current law does not commonly involve penalties as high as those in the Senate bill.²⁹⁵ Moreover, by authorizing substantial penalties for violation of the general contempt provision, the Senate bill encourages use of the general provision in lieu of the new narrower crimes of failing to appear as a witness,²⁹⁶ refusing to testify or produce information,²⁹⁷ and disobeying a judicial order,²⁹⁸ each of which should afford defendants protection against overbroad interpretations of general contempt.

Finally, the House bill, unlike its Senate counterpart, requires an elaborate judicial certification before offenses in the contempt subchapter can be prosecuted.²⁹⁹ This certification process is intended to prevent prosecutors from using the contempt provision to coerce uncooperative witnesses.³⁰⁰ It is unclear whether a similar procedure is contemplated by the Senate bill, although one provision requires a prosecutor to obtain "the concurrence of the court" (not further defined) before initiating a contempt prosecution.³⁰¹

N. EXTORTION

Current law on extortion prohibits the wrongful use of force, violence or threat to obtain property to which the actor has no legitimate claim.³⁰² As interpreted by the Supreme Court in *United States v. En-*

²⁹¹ H.R. 6915, *supra* note 12, § 1731(b)(2).

²⁹² NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, I WORKING PAPERS, 601-60, 616, 626 (1970).

²⁹³ H.R. 6915, *supra* note 12, § 1731(a).

²⁹⁴ Proposed 18 U.S.C. § 1331(e).

²⁹⁵ H.R. REP. NO. 96-1396, 96th Cong., 2d Sess. 160 (1980) [hereinafter cited as HOUSE REPORT].

²⁹⁶ Proposed 18 U.S.C. § 1332.

²⁹⁷ *Id.* § 1333.

²⁹⁸ *Id.* § 1335.

²⁹⁹ H.R. 6915, *supra* note 12, § 1736.

³⁰⁰ HOUSE REPORT, *supra* note 295, at 167.

³⁰¹ Proposed 18 U.S.C. § 1331(c).

³⁰² 18 U.S.C. § 1951.

mons,³⁰³ the federal statute does not permit prosecution of persons engaged in bona fide strikes and labor disputes, even when incidental force or violence occurs during a dispute. By using the term "wrongful" to modify "force, violence or fear," Congress intended to punish as a federal crime only "where the alleged extortionist has no claim to that property."³⁰⁴ In other instances of property damage occurring during the course of a labor dispute, criminal conduct is punishable under *state* law.

To avoid an expansion of federal law which would impinge on both bona fide labor activities protected by the first amendment and states' jurisdiction to enforce their own criminal laws, civil liberties groups have recommended that Congress preserve the *Enmons* decision and the current language of the extortion statute so that persons or organizations can be prosecuted for extortion only when they wrongfully obtain property by threatening to use force or violence.³⁰⁵

Property damage committed or threatened during a lawful strike intended to induce an employer's agreement to legitimate collective bargaining demands, should not be punishable under federal law as a labor union offense. A legislative overruling of *Enmons* would involve federal law enforcement officials in any labor dispute in which property damage occurred during picketing which was intended to induce an employer's agreement, if the employer was engaged in interstate commerce. As the Supreme Court noted, this "would make a major expansion of federal criminal jurisdiction."³⁰⁶

The extortion provision in S. 1722 was substantially improved by Committee amendment to preserve most aspects of the Supreme Court decision in *Enmons*.³⁰⁷ The House bill unlike its counterpart in S. 1722, limits the crime to circumstances where property is wrongfully obtained thereby preserving the *Enmons* decision.³⁰⁸

III. CONCLUSION

This article addresses some of the major civil liberties issues in the

³⁰³ 410 U.S. 396 (1973).

³⁰⁴ *Id.* at 400.

³⁰⁵ Testimony of the authors, SENATE HEARINGS, *supra* note 6, at 10183.

³⁰⁶ 410 U.S. at 410. The Court pointed out:

The Government's broad concept of extortion—the "wrongful" use of force to obtain even the legitimate union demands of higher wages—is not easily restricted. It would cover all overtly coercive conduct in the course of an economic strike, obstructing, delaying, or affecting commerce. The worker who threw a punch on a picket line, or the striker who deflated tires on his employer's truck would be subject to a Hobbs Act prosecution and the possibility of 20 years imprisonment and a \$10,000 fine. *Id.*

³⁰⁷ Proposed 18 U.S.C. § 1722(b).

³⁰⁸ H.R. 6915, *supra* note 12, § 2552.

most recent federal legislative proposals for criminal code reform. Weighing these issues, some civil liberties advocates conclude that despite the improvement of S. 1722 over earlier criminal code bills and the inclusion of sections that would benefit civil liberties, a variety of the Senate bill provisions threaten civil liberties, several severely so.

Expansion of current law is not the only standard by which the legislation should be judged. As set forth in the introduction to this article, the test is the overall impact of the legislation on civil liberties. Thus, an evaluation of the civil liberties reforms of current law is also important to an analysis of the bill. S. 1722 contains several civil liberties improvements, but it would also reenact many areas of current law which impinge on civil liberties, thereby erecting a practical barrier to further reform.³⁰⁹ When this consideration is coupled with the concern that many of the bill's revisions of current law would adversely affect civil liberties, the failure of the legislation to reach enactment should not be deplored, although its demise should not be an excuse to shelve the laudable and monumental effort to reform federal criminal law.

³⁰⁹ Among the areas not discussed or cited above is the notorious and widely criticized court-made rule that a co-conspirator is liable for any "reasonably foreseeable" crime committed by another member of the conspiracy, even if he had no knowledge of the crime; provisions of the current law of sabotage which make it a crime to engage in conduct undertaken in reckless disregard of its risk of harm to broadly defined national defense materials; provisions of current law sharply curtailing the protections of the Fifth Amendment privilege against self-incrimination, by authorizing prosecutors and judges to limit the immunity of persons; penalties for violation of the Selective Service laws; and the broad authority provided by current law to eavesdrop and conduct federal wiretaps.