

1970

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John L. McClellan

G. Robert Blakey
Notre Dame Law School

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Recommended Citation

John L. McClellan & G. R. Blakey, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties*, 46 Notre Dame L. 55 (1970-1971).

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THE ORGANIZED CRIME ACT (S. 30) OR ITS CRITICS: WHICH THREATENS CIVIL LIBERTIES?

*Senator John L. McClellan**

A. Introduction

On January 23, 1970, the Senate passed by the overwhelming vote of 73 to 1, S. 30, the Organized Crime Control Act of 1969.¹ During the debate in the Senate, S. 30 was subjected to indiscriminate charges that it would, in the words of the American Civil Liberties Union, "make drastic incursions on civil liberties" and that it ran "counter to the letter and spirit of the Constitution."²

Certain newspaper commentators and a prominent mayor have echoed those charges,³ and recently a report critical of several key titles of S. 30 was published by the Committee on Federal Legislation of the Association of the Bar of the City of New York.⁴ The committee, like the Civil Liberties Union, based its criticism of S. 30 largely on supposed principles of civil liberties.⁵

The purpose of this article is to set the record straight concerning the implications of S. 30, as it passed the Senate, for fundamental civil liberties and our treasured Bill of Rights.

EDITOR'S NOTE: On September 23rd, the House Judiciary Committee reported an amended version of S. 30 to the House. As reported, S. 30 retained the major shape in which it passed the Senate, discussed here by Senator McClellan, although a number of limiting amendments were made to the bill. Favorable action is expected on the bill and it should become law largely in the form discussed by Senator McClellan before Congress adjourns for the election day recess. The *Notre Dame Lawyer* hopes to be able to publish a discussion of the House bill by Congressman Poff of Virginia, the leading advocate of S. 30 in the House, in a forthcoming issue.

* United States Senator from Arkansas. The assistance of G. Robert Blakey and Russell M. Coombs of the Staff of the Subcommittee on Criminal Laws and Procedures in the collection of these materials, drawn in part from an address on the Senate floor, is hereby acknowledged. See 116 CONG. REC. S8642 (daily ed. June 9, 1970).

1 116 CONG. REC. S481 (daily ed. Jan. 23, 1970). The act now is pending in Subcommittee No. 5 of the House Judiciary Committee, which has held hearings on the measure. See, e.g., 116 CONG. REC. H5071 (daily ed. June 3, 1970) (remarks of Congressman Fascell inserting House testimony by the author).

2 Letter from the American Civil Liberties Union to each member of the Senate, January 20, 1970, page 1 [hereinafter cited as ACLU January 1970 letter]. The letter is reprinted at 116 CONG. REC. S422-26 (daily ed. Jan. 22, 1970).

3 See, e.g., Washington Post, Feb. 22, 1970, § D, at 4, col. 1 (excerpts from speech by New York City mayor); New York Times, Feb. 1, 1970, § E, at 12, col. 3 (column by Tom Wicker); Washington Post, Jan. 30, 1970, § A, at 18, col. 1 (editorial); New York Times, Feb. 3, 1970, at 42, col. 1-2 (editorial); 116 CONG. REC. S1631 (daily ed. Feb. 10, 1970) (republishing and discussing news article by C. Fritchey); *id.* at H6179 (daily ed. June 29, 1970), E6393 (daily ed. July 8, 1970), and H7015 (daily ed. July 21, 1970) (remarks of Congressman Steiger on coverage of S. 30 by Congressional Quarterly); *id.* at E7037 (daily ed. July 27, 1970) (remarks of Congressman Celler inserting TIME magazine article). There also have been some news articles and columns favorable to S. 30. See, e.g., 116 CONG. REC. S1649 (daily ed. Feb. 16, 1970) (republishing E. Methvin article on the fifth amendment and witness immunity).

4 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE PROPOSED ORGANIZED CRIME CONTROL ACT OF 1969 (S. 30) (1970) [hereinafter cited as ABCNY].

5 Examination of S. 30's implications for civil liberties has by no means led uniformly to its disapproval. See e.g., *Hearings on S. 30 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., 249 (1969) [hereinafter cited as *Hearings*] (testimony of Milton G. Rector, Director of the National Council on Crime and Delinquency). The A.B.A., for example, thoroughly examined S. 30 and relevant

Over 2,500 years ago the Greek slave Aesop embodied the folk wisdom of his people in a series of stories that remain relevant even today. In one of those stories, he told of the shepherd boy who repeatedly cried, "Wolf." Villagers came to his aid until they grew weary of finding that he had each time sounded a false alarm. When at last the wolf appeared, no one responded to his call for help, and the wolf took his toll of the flock unmolested and unimpeded.

There are among us today self-appointed shepherds of civil liberties who decry every attempt to strengthen the processes of law enforcement in our society. Like the shepherd boy who so long ago endangered his flock by sounding false alarms, these modern-day shepherds run the risk, too, of endangering the civil liberties of us all. No civilized society can long permit within its domain an ever-rising tide of lawlessness. Such a tide is now lashing out against our society, and there are few who do not agree that it must be stopped and turned back. Nevertheless, I am concerned that there is a danger that if this difficult task cannot be accomplished now with the enactment of prudent reforms in the administration of our system of criminal justice, other less prudent steps will be taken at a later time — to the detriment of us all. Edmund Burke aptly remarked to the House of Commons in 1780 on the question of electoral reform:

Consider the wisdom of a timely reform. Early reformations are amicable arrangements with a friend in power; late reformations are terms imposed upon a conquered enemy; early reformations are made in cool blood; late reformations are made under a state of inflammation. In that state of things the people behold in government nothing that is respectable. They see the abuse, and they will see nothing else. They fall into the temper of a furious populace provoked at the disorder of a house of ill fame; they never attempt to correct or regulate; they go to work by the shortest way; they abate the nuisance, they pull down the house.⁶

I deeply believe that the framework of civil liberty embodied in our Bill of Rights need not be condemned or demolished to achieve needed reforms in the operation of our system of criminal justice. I am concerned, however, lest our people come to believe that effective crime control requires us to set aside the Bill of Rights.⁷ I am troubled by the thought of what might occur if, panicked by an understandable fear of crime, they acted on that belief. It could mean the end of the kind of society that we know today.

I know, too, that specious claims of "repression," "police state tactics," or "civil liberties violations," indiscriminately made and constantly repeated in reference to any and all attempts to strengthen law enforcement, can soon lead to the creation of the belief that only abrogation of the Bill of Rights will

constitutional and civil liberties authorities, and concluded by approving the bill and urging its swift enactment, although it also recommended seven amendments. A.B.A. Board of Governors Resolution, July 15, 1970; see *A.B.A. Testimony at Hearings on S. 30 Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (July 23, 1970) (the testimony at the hearings is not officially bound as this article goes to press) [hereinafter cited as *ABA Testimony*]; 116 CONG. REC. S8968 (daily ed. June 12, 1970) (correction of misinformation on views of A.B.A. section council); *id.* at S11834 (daily ed. July 21, 1970) (remarks of author inserting A.B.A. resolution and Senate staff memorandum on title I).

⁶ P. STANLIS, EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 287 (1963).

⁷ See generally 116 CONG. REC. S6261 (daily ed. Apr. 27, 1970) (remarks of Senator Goldwater, with republication of CBS News Poll on citizens' attitudes on Bill of Rights).

protect us from criminals. It will then be only a matter of time until that belief forms the basis for action. It is thus important that those in positions of responsibility carefully identify the specious character of such claims, lest they contribute to that false and dangerous belief. It is therefore, because I love liberty more, not less, that I have advocated the enactment of S. 30 and defended it from such unjustified and specious claims.

The passage of S. 30 by the Senate on January 23⁸ was the culmination of a year of detailed study, hearings, and consultations,⁹ and a result of one of the most thoroughly gratifying bipartisan efforts in which I have participated since coming to the Senate. The process had its start on January 15, 1969, when, along with Senators Hruska, Ervin and Allen, I introduced S. 30, the "Organized Crime Control Act."¹⁰ It continued through the introduction of seven other bills designed to deal with organized crime, which now appear with revisions in the ten substantive titles of S. 30.¹¹ Senators Eastland,¹² Mundt,¹³ Ervin,¹⁴ Hruska¹⁵ and Tydings¹⁶ and the late Senator Dirksen¹⁷ joined me in introducing some of these measures or introduced other bills that are now reflected in S. 30.

Extensive hearings were begun in March and continued in June of 1969, and gradually the various bills were worked into S. 30 to form an integrated, comprehensive organized crime control measure.¹⁸ The subcommittee solicited the views of experts and interested organizations and worked closely with the Department of Justice. Indeed, the Department was most helpful and made a number of valuable suggestions that were incorporated in the bill.

The product of this process was a bill which was carefully drafted to cure a number of debilitating defects in the evidence-gathering process in organized crime investigations, to circumscribe defense abuse of pretrial proceedings, to broaden federal jurisdiction over syndicated gambling and related corruption where interstate commerce is affected, to attack and to mitigate the effects of racketeer infiltration of legitimate organizations affecting interstate commerce, and to make possible extended terms of incarceration for the dangerous offenders

8 The Senate floor debate and voting upon S. 30 appears at 116 CONG. REC. S312, S320-52 (daily ed. Jan. 21, 1970); *id.* at S389-426 (daily ed. Jan. 22, 1970); and *id.* at S462-82 (daily ed. Jan. 23, 1970). Shortly after voting on S. 30, the Senate debated issues relevant to S. 30 in the context of S. 3246, the Controlled Dangerous Substance Act, some of the provisions of which were modeled upon S. 30. *See e.g.*, 116 CONG. REC. S801 (daily ed. Jan. 28, 1970) (applicability of rules of evidence to sentencing proceedings).

9 Part of that process, with relevant dates, is summarized at 115 CONG. REC. S12401 (daily ed. Oct. 13, 1969) (remarks of author).

10 115 CONG. REC. S279 (daily ed. Jan. 15, 1969). *See also* 115 CONG. REC. S2631 (daily ed. Mar. 11, 1969) (explanation of S. 30 by sponsors).

11 *See, e.g.*, 115 CONG. REC. S3856 (daily ed. Apr. 18, 1969) (introduction and explanation of S. 1861, later made title IX of S. 30); *id.* at S4913 (daily ed. May 12, 1969) (introduction and discussion of S.2122, later made title II of S. 30, with communications from National Commission on Reform of Federal Criminal Laws); *id.* at S5810 (daily ed. May 29, 1969) (introduction and explanation of S.2292, later made title VII of S. 30, with Justice Department letters).

12 S. 2022, 91st Cong., 1st Sess. (1969).

13 S. 2022, 91st Cong., 1st Sess. (1969).

14 S. 30 and S. 2122, 91st Cong., 1st Sess. (1969).

15 S. 30, S. 1623, S. 1861, S. 2022, S. 2122 and S. 2292, 91st Cong., 1st Sess. (1969).

16 S. 975 and S. 976, 91st Cong., 1st Sess. (1969).

17 S. 2022, 91st Cong., 1st Sess. (1969).

18 *See* S. REP. NO. 91-617, 91st Cong., 1st Sess. (1969) [hereinafter cited as REPORT]; 115 CONG. REC. S17088 (daily ed. Dec. 18, 1969) (remarks of author on submission of Senate Report No. 91-617).

who prey on our society. In addition, the bill incorporated the best of the recommendations in the organized crime field of the President's Crime Commission, the National Commission on Reform of Federal Criminal Laws, the American Bar Association Project on Minimum Standards of Criminal Justice, the Model Penal Code, the Model Sentencing Act, and Senate subcommittee witnesses who represented the National Council on Crime and Delinquency, the Association of Federal Investigators, the New York County Lawyers Association, the American Civil Liberties Union, the New York State Commission of Investigations, the National Association of Counties and the New York State Bar Association. The bill as been endorsed in principle by such diverse groups as the National Chamber of Commerce,¹⁹ the National Association of Counties²⁰ and the International Association of Chiefs of Police.²¹ I am pleased to say, too, that the Department of Justice now supports, with two minor reservations not involving substantive civil liberties issues,²² S. 30 as it was reworked and amended in the subcommittee and the full committee and passed by the Senate. This bill embodies, in short, what I believe is the most appropriate response that Congress can make to the special challenge that organized crime poses to the well-being of our nation.

The Attorney General in his testimony on S. 30 before the Senate subcommittee aptly observed that "[t]oo few Americans appreciate the dimensions of the problem of organized crime; its impact on all America, and what must be done to reduce — and ultimately to eradicate — its sinister and erosive effects."²³

America has had to contend with some form of organized crime since the founding of our Republic. Nevertheless, it has only been in the last half-century that these criminal groupings have begun seriously to threaten the very integrity of our nation and the well-being of such large segments of our people.

"Organized crime groups," the President's Crime Commission observed in 1967, "are known to operate in all sections of the Nation."²⁴ The most influential of these groups, the twenty-six²⁵ families of La Cosa Nostra, estimated to have a total membership of some 3,000 to 5,000, operate, however, primarily

19 See 115 CONG. REC. S15231 (daily ed. Dec. 1, 1969) (republishing of National Chamber of Commerce resolution); 116 CONG. REC. H1637 (daily ed. Mar. 10, 1970) (republishing and discussion by Congressman Poff of National Chamber of Commerce report on S. 30, *HERE'S THE ISSUE*).

20 *Hearings* at 327-32.

21 See 115 CONG. REC. 12562 (daily ed. Oct. 14, 1969) (republishing of I.A.C.P. resolutions).

22 The Department recommends deletion of authority for a title I grand jury to complain to the Attorney General about the performance of a federal prosecutor or investigator. *REPORT* at 103. The Department also recommends revision of title X's provisions for a repository of conviction records. *Justice Department Comments at Hearings on S. 30 Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (May 21, 1970) (the testimony at the hearings is not officially bound as this article goes to press) [hereinafter cited as *Justice Department Comments*].

23 *Hearings* at 107-8.

24 *THE CHALLENGE OF CRIME IN A FREE SOCIETY, REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE* 191 (1967) [hereinafter cited as *CHALLENGE OF CRIME*].

25 On the number of families, see *REPORT* at 36 n.5.

in New York, New Jersey,²⁶ Illinois, Florida, Louisiana, Michigan, Pennsylvania, and Rhode Island. The internal organization of these families is patterned after the ancient Mafia groups of Sicily. They are, however, more than mere criminal cartels.

The final report in 1965 of the Permanent Subcommittee on Investigation's examination into the internal structure of organized crime put it this way:

There exists in the United States today a criminal organization that is directly descended from and is patterned upon the centuries-old Sicilian terrorists society, the Mafia. This organization, also known as Cosa Nostra, operates vast illegal enterprises that produce an annual income of many billions of dollars. This combine has so much power and influence that it may be described as a private government of organized crime.²⁷

These groups are chiefly active in syndicated gambling, the importation and distribution of narcotics,²⁸ and loansharking, each an offense which is parasitic, corrupting, and predatory in character. Economically, the price tag of organized crime may be conservatively put at twice that of all other crime combined.²⁹

Organized crime groups, moreover, have not confined their villainy to traditional endeavors, but have increasingly undertaken to subvert legitimate business and unions. For example, a leading young union leader — and founder of the new Independent Party in New York City that was instrumental in the present mayor's election — was identified in the Senate subcommittee hearings on S. 30 by the Department of Justice as a "captain" in the Gambino "family" of La Cosa Nostra.³⁰ More important, these criminals have, in some localities, established corrupt alliances within the processes of our democratic society: with the police, prosecutors, mayors, city councils, courts, and legislatures.

All of this is, of course, disturbing. But the most serious aspect of the challenge that organized crime poses to our society is the degree to which its members have succeeded in placing themselves above the law. From 1960, the date meaningful statistics began to be collected, until March, 1969, the combined efforts of the various federal investigative agencies resulted in only 235 indictments involving 328 defendants identified as members of La Cosa Nostra.³¹ These leaders, moreover, have been notoriously successful in getting off even in those relatively few cases in which the evidence has warranted prosecutions. Our

²⁶ An illuminating and brief recent history of organized crime in New Jersey has been published by the New York Times magazine and inserted into the Congressional Record by Senator Case at 116 CONG. REC. S2299 (daily ed. Feb. 25, 1970).

²⁷ PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE SENATE COMM. ON GOVERNMENT OPERATIONS, ORGANIZED CRIME AND ILLICIT TRAFFIC IN NARCOTICS, S. REP. NO. 72, 89th Cong., 1st Sess. 117 (1965) [hereinafter cited as INVESTIGATIONS SUBCOMMITTEE REPORT].

²⁸ See, e.g., 115 CONG. REC. S10020 (daily ed. Sept. 3, 1969) (author's discussion of 1969 raid on major Mafia narcotics operation in District of Columbia, with affidavit and new article); 116 CONG. REC. S2378 (daily ed. Feb. 25, 1970) (news article and author's remarks on 1970 District of Columbia narcotics raid); *id.* at S2494 (daily ed. Feb. 26, 1970) (same subject).

²⁹ CHALLENGE OF CRIME at 31-35.

³⁰ Hearings at 127.

³¹ *Id.* at 128.

studies indicate that members of La Cosa Nostra have obtained dismissal or acquittal on the charges leveled against them more than twice as often, for their numbers, as ordinary offenders: 69.7 percent as against 34.8 percent.³² Indeed, 17.6 percent of the group of La Cosa Nostra defendants we studied — representing the leadership structure of key families and La Cosa Nostra members indicted by the federal government since 1960 — were able to obtain acquittals or dismissals of cases against them five or more times each. The final report of the Permanent Subcommittee on Investigations' examination into organized crime and narcotics summed it up this way:

The crime leaders are experienced, resourceful, and shrewd in evading and dissipating the effects of established procedures in law enforcement. Their operating methods, carefully and cleverly evolved during several decades of this century, generally are highly effective foils against diligent police efforts to obtain firm evidence that would lead to prosecution and conviction.

The crime chieftains, for example, have developed the process of "insulation" to a remarkable degree. The efficient police forces in a particular area may well be aware that a crime leader has ordered a murder, or is an important trafficker in narcotics, or controls an illegal gambling network, or extorts usurious gains from "shylocking" ventures. Convicting him of his crimes, however, is usually extremely difficult and sometimes is impossible, simply because the top-ranking criminal has taken the utmost care to insulate himself from any apparent physical connection with the crime or with his hireling who commits it.³³

This intolerable degree of immunity from legal accountability must be put to an end. Our society cannot long safely permit the operation within it of an underworld organization as powerful and as immune from social accountability as La Cosa Nostra. The success story of this group is symbolic of the breakdown of law and order increasingly characteristic of our society. To hold the allegiance of the now law-abiding, society must show each man that no man is above the law.³⁴ The loopholes through which the leaders of organized crime now escape the processes of our law must be closed.³⁵ Justice and public safety demand no less, and it is to this end that S. 30 was carefully drafted — with due regard given in each instance to the civil liberties of all our citizens.

B. The Overbreadth Objection

The curious objection has been raised to S. 30 as a whole, and to several of its provisions in particular, that they are not somehow limited to organized

³² See 115 CONG. REC. S14430 (daily ed. Nov. 17, 1969).

³³ INVESTIGATIONS SUBCOMMITTEE REPORT at 2.

³⁴ The relationships among organized crime, other crimes, and other social ills have received valuable examination in recent years. See, e.g., 115 CONG. REC. S9563 (daily ed. Aug. 11, 1969) (replication of testimony of Professor D. Cressey on organized crime and inner-city youth); *id.* at S15634 (daily ed. Dec. 4, 1969) (remarks of Senator Scott on impact of organized crime on ghetto dwellers); 116 CONG. REC. H3845 (daily ed. May 4, 1970) (remarks of Congressman Poff inserting D. Lofton speech on organized crime in the ghetto).

³⁵ General support for effective legislation and enforcement against organized crime has been offered from a number of sources. See, e.g., 115 CONG. REC. S8993 (daily ed. Aug. 1, 1969) (resolution of National Association of Attorneys General).

crime itself,³⁶ as if organized crime were a precise and operative legal concept, like murder, rape, or robbery. Actually, of course, it is a functional concept like "white-collar crime,"³⁷ serving simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances. The danger posed by organized crime-type offenses to our society has, of course, provided the occasion for our examination of the working of our system of criminal justice. But should it follow, as the union and New York City Bar Committee suggest, that any proposals for action stemming from that examination be limited to organized crime?

This line of analysis has a certain superficial plausibility, yet on closer examination one will note that it is seriously defective in several regards. Initially, it confuses the occasion for re-examining an aspect of our system of criminal justice with the proper scope of any new principle or lesson derived from that re-examination. For example, Congressional examination of how organized crime figures have achieved immunity from legal accountability led it to examine the sentencing practices and powers of our federal courts. There it found that our federal judges, unlike many state judges, have no statutory power to deal with organized crime leaders as habitual offenders and give them extended prison terms. Having noted the lack of habitual offender provisions by considering one class of cases, Congress obviously learned that these provisions were also lacking in other classes. Is there any good reason why Congress should not move to meet that need across the board?

One title which exemplifies the distinction between the occasion for developing legislation, and the proper scope of legislation once it is developed, is title III. Title III, of course, codifies and clarifies federal law concerning civil contempt of court, and protects the coercive force of civil contempt imprisonment from being undercut by granting of bail pending any appeal which raises no substantial possibility of reversal. Although it was the great value of civil contempt proceedings in organized crime cases, where witnesses are tempted to an unusual degree to withhold testimony even after being granted immunity, which prompted the development of title III, the power to hold a witness in civil contempt is a traditional and useful one in all kinds of cases. For that reason title III is made applicable to all federal criminal cases.

In addition, the objection confuses the role of the Congress with the role of a court. Out of a proper sense of their limited lawmaking function, courts ought to confine their judgments to the facts of the cases before them. But the Congress, in fulfilling its proper legislative role, must examine not only individual instances, but whole problems. In that connection, it has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem. Comprehensive solutions to identified problems must be translated into well-integrated, legislative programs.

36 See, e.g., ACLU January 1970 letter at 1, 5; ABCNY at 37, 48 n.80.

37 See E. SUTHERLAND, *WHITE COLLAR CRIME* (1949). The position of N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 202-35 (1969) calling into question the existence of La Cosa Nostra is cogently analyzed in III *CRIME JUSTICE AND SOCIETY (CRIME IN QUEBEC: ORGANIZED CRIME)* 65-72 (1969) and refuted by the electronic surveillance materials reprinted in J. VOLZ & P. BRIDGE, *THE MAFIA TALKS* (1969).

The objection, moreover, has practical as well as theoretical defects. Even as to titles of S. 30 needed primarily in organized crime cases, there are very real limits on the degree to which such provisions can be strictly confined to organized crime cases. Many of those provisions, such as title I, deal with the process of investigating and collecting evidence. When an investigation begins one cannot expect the police to be able to demonstrate a connection to organized crime, or even to know that a connection exists. It is only at the conclusion of the investigation that organized crime involvement can be shown and verified, if at all. Therefore, to require a general showing that organized crime is involved as a predicate for the use of investigative techniques would be to cripple those techniques. On the other hand, each title in S. 30 which is justified primarily in organized crime prosecutions has been confined to such cases to the maximum degree possible, while preserving the ability to administer the act and its effectiveness as a law enforcement tool.

Lastly, and most disturbingly, however, this objection seems to imply that a double standard of civil liberties is permissible. S. 30 is objectionable on civil liberties grounds, the union and city bar committee suggest, because its provisions have an incidental reach beyond organized crime. Coming from the Civil Liberties Union in particular, this objection is indeed strange. Has the union forgotten that the Constitution applies to those engaged in organized crime just as it applies to those engaged in white-collar or street crime? S. 30 must, I suggest, stand or fall on the constitutional questions without regard to the degree to which it is limited to organized crime cases. If the bill violates the civil liberties of those engaged in organized crime, it is objectionable as such. But if it does not violate the civil liberties of those who are engaged in organized crime, it does not violate the civil liberties of those who are not engaged in organized crime, but who nonetheless are within the incidental reach of provisions primarily intended to affect organized crime.

Laid bare for all to examine, therefore, this objection can be seen to be little more than rhetoric whose only effect can be to hinder rational and deliberate consideration of this legislation.

The objections to S. 30 were not, however, confined to general criticisms of the supposedly unwarranted overall effect of the statute. The union undertook to offer detailed criticism of each and every provision in the proposed statute. Indeed, the union was alone among those who appeared in the hearings held before the Special Subcommittee on Criminal Laws and Procedures in offering opposition to each and every provision of the proposed statute. The city bar was somewhat more selective, but similarly onesided. I turn now, therefore, to a consideration of many of their particular objections.

C. Specific Objections

TITLE I — SPECIAL GRAND JURY

Title I of S. 30 establishes special grand juries in the major metropolitan areas of our nation lying in judicial districts having in excess of four million in

population. This would include Massachusetts, the eastern and southern districts of New York, New Jersey, the eastern and western districts of Pennsylvania, the southern district of Florida, the eastern district of Michigan, the northern and southern districts of Ohio, the northern district of Illinois, and the northern and southern districts of California.³⁸ Where the Attorney General determines a need in other locations, special grand juries may also be convened on a case-by-case basis. These grand juries are required to meet at least once each eighteen-month period. All grand juries are broad-based in composition under present law; special grand juries will also elect their foreman and deputy foreman, as is currently the petit jury practice. To insure that there is no arbitrary hampering of grand jury efforts, the jury is given the right to seek review of any dispute between the jury and the judge or the prosecutor.

The relatively greater degree of independence which a special grand jury will have under title I will permit the grand jury to indict or report upon a situation in which a prosecutor or court, for political or other reasons, would prefer that action not be taken. History has shown the wisdom of insulating grand juries from political influence. It was a "runaway grand jury" which in 1935 reported that the New York County prosecutor's office was not sufficiently diligent in pursuing organized crime investigations, and requested that Governor Lehman appoint a special prosecutor. The Governor's response was to appoint Thomas E. Dewey as a special prosecutor. As we all know, that appointment was the first step in a process by which the initial grand jury and its successors eventually indicted a number of political and organized crime leaders.³⁹ A historian, Prof. Richard D. Younger, examined that experience and the experience of a number of other grand juries in a long and scholarly article, and stressed that grand juries must "remain independent of both court and prosecutor."⁴⁰ He concluded that "Today, grand juries remain potentially the strongest weapon against big government and the threat of 'statism.'"⁴¹

I believe that the history of our nation, and of other nations, reveals that a government which is deprived of the support of its citizens cannot effectively combat activity which is deemed criminal. Grand juries established under title I, selected at random from the community and free of external or internal pressures, will be properly regarded as objective citizenry in their evaluation of criminal activities in their community. They, of course, will be guided by the prosecutor in their investigations, and their findings will be subject to review by the judge, but the grand jury will not be controlled. They are empowered to report their findings on the standing of their community with respect to organized crime and official corruption and misbehavior. They will be empowered to make suggestions for legislative and executive measures which will alleviate these community problems, thus passing on the benefit of their investigations.

Who can be more qualified to evaluate the problems of drug traffic in the ghettos than the citizens who are exposed to this depravity on a daily basis?

38 ANNUAL REPORT: ADMINISTRATIVE OFFICE OF COURTS 340-41 (1969).

39 See the preface to GRAND JURY ASSOCIATION OF NEW YORK COUNTY, *THE PEOPLE'S BIG STICK* (1963).

40 Younger, *The Grand Jury Under Attack*, III, 46 J. CRIM. L.C. & P.S. 214, 224 (1955).

41 *Id.* at 225.

I do not believe that we can stop the drug traffic or solve any other problem associated with organized crime without the cooperation and participation of those who are the victims of the criminal activity.

These citizens also need to be given an institutional voice in the community. Title I of S. 30 revives, therefore, the grand jury reporting powers that were a chief reason for the grand jury's creation in England at the Assize of Clarendon in 1166. Originally, the grand jury was an administrative device to keep the king in touch with the state of affairs in each community, to ensure that his officials performed their functions correctly, and to accuse those who violated the king's peace. This was and is citizen participation in government at its most basic level. As we are all aware, the difficulty of a central government in evaluating the needs and problems of local communities is as great today as it has ever been.

Grand jury report powers have been retained from common law or have been statutorily enacted in several of our states. Twenty-one states⁴² have legislation similar to the New York statute which, in *Jones v. People*,⁴³ was construed to authorize reports. Six states explicitly authorize such reports by statute.⁴⁴ Others have sanctioned them on a common law basis.⁴⁵

Practice and law, however, have varied from place to place and from time to time, making generalization about either practice or law difficult to make with assurance of accuracy. The shifting development of the law in New York is

⁴² *Alabama*, ALA. CODE tit. 30, §§ 76-82 (1959); *Alaska*, ALASKA STAT. § 12.40.030 (1962); *Arizona*, ARIZ. REV. STAT. ANN. § 13-1531 (1956); *Arkansas*, ARK. STAT. ANN. §§ 43-907 to -911 (1964); *California*, CAL. PENAL CODE §§ 914.1, 915, 917, 920-22, 925, 927-29 (1970); *Georgia*, GA. CODE ANN. §§ 59-305 to -310, 59-313 to -316, 59-401 (1965); *Idaho*, IDAHO CODE ANN. §§ 19-1101, 19-1109 to -1110 (1948); *Indiana*, IND. ANN. STAT. § 9-824 (1956); *Iowa*, IOWA CODE ANN. §§ 771.1-3 (1950); *Michigan*, MICH. COMP. LAWS ANN. §§ 767.3-4 (1968); *Missouri*, MO. ANN. STAT. § 540.020 (1953); *Montana*, MONT. REV. CODES ANN. § 95-1405 (1969); *Nevada*, NEV. REV. STAT. §§ 172.105, 172.115, 172.125, 172.175, 172.185 (1967); *New Mexico*, N.M. STAT. ANN. §§ 41-5-16 to -17 (1964); *New York*, N.Y. CODE CR. PROC. §§ 245, 253, 254 (1958); *North Dakota*, N.D. CENT. CODE §§ 29-10-18 to -20 (1960); *Oklahoma*, OKLA. STAT. ANN. tit. 22 § 331 (1969); *South Dakota*, S.D. COMP. LAWS §§ 23-30-1 to -16 (1967); *Tennessee*, TENN. CODE ANN. §§ 40-1605 to -1608 (1955); *Utah*, UTAH CODE ANN. §§ 77-18-7, 77-19-1 (1953); *Washington*, WASH. REV. CODE ANN. §§ 10.28.090-110 (1961).

⁴³ 181 N.Y. 389, 92 N.Y.S. 275, 74 N.E. 226 (1905).

⁴⁴ *California*, CAL. PENAL CODE §§ 929-30, 933, 939.9 (1970); *Georgia*, GA. CODE ANN. § 59-317 (1965); *Nevada*, NEV. REV. STAT. § 172.115 (1967); *New York*, N.Y. CODE CR. PROC. § 253-a (McKinney Supp. 1969); *Oklahoma*, OKLA. STAT. ANN. tit. 22 § 346 (1969); and *Utah*, Utah Sess. Laws 1967, p. 575.

⁴⁵ In 1952, Chief Justice Arthur T. Vanderbilt in *In re Presentment by Camden County Grand Jury*, 10 N.J. 23, 89 A.2d 416, 443 (1952), for example, upheld, over civil liberties objections grounded on a fear of possible abuse of the rights of individuals, the power of the grand jury to file reports, observing:

A practice imported here from England three centuries ago as a part of the common law and steadily exercised ever since under three successive State Constitutions is too firmly entrenched in our jurisprudence to yield to fancied evils.

Court-developed rules restrict the power to issue reports, making its exercise consistent with a high regard for civil liberties. See *In re Presentment by Camden County Grand Jury*, 34 N.J. 378, 196 A.2d 465 (1961). For an example of a New Jersey grand jury report dealing with organized crime, see 115 CONG. REC. S15751 (daily ed. Dec. 5, 1969).

In similar fashion, the Supreme Court of Florida in upholding the report writing power of grand juries in that state in *In re Report of Grand Jury*, 11 So. 2d 316, 319 (Fla. 1943) observed:

It is a means whereby the people participate directly in the administration of their business and aids to a knowledge of why the grand jury has become such an important agency among free peoples.

illustrative of the general picture. There are records of a New York grand jury as early as 1665.⁴⁶ Nevertheless, attempts have been made to abolish the grand jury in New York as a means of instituting criminal prosecutions. A most recent unsuccessful attempt was made in the 1938 constitutional convention. In addition, attempts have been made to abolish its report writing function. In 1946, for example, Governor Thomas E. Dewey vetoed a bill designed to curb this power, saying that such reports were "one of the most valued and treasured restraints upon tyranny and corruption in public office."⁴⁷ More recently, the Court of Appeals of New York in *Wood v. Hughes*⁴⁸ overruled its own *Jones* decision, noted *supra*, and curbed the New York grand jury's power to write reports critical of specific individuals. The response of the people of New York, through their state legislature, however, was promptly to enact comprehensive legislation authorizing such reports, but under limitations designed to overcome the civil liberties objections voiced by the court.⁴⁹ Such reports are now filed on a regular basis in New York.⁵⁰

The effectiveness of such reports as an instrument of reform was affirmed at the hearings on S. 30 by Frank S. Hogan, district attorney of New York County.⁵¹ Mr. Hogan set out several examples of grand jury reports, and evaluated these reports, as follows:

Since 1947, some 20 reports have been submitted by various grand juries of New York County disclosing either the noncriminal misconduct of public officers or the existence of conditions in public agencies or areas of public interest which required corrective legislative or administrative action. I cite a few instances of the exercise of this grand jury power which, I believe, demonstrate its effectiveness.⁵²

I have obtained copies of grand jury reports from New Jersey and elsewhere. On June 3, 1970, for example, I placed a copy of a New Jersey report, upheld after challenge in court, in the *Congressional Record*⁵³ so that each member of the Senate could observe the work product of such a grand jury. At that time, however, I pointed out that the reports authorized by title I would be subject to even greater restrictions than those now obtaining in New Jersey. I believe, in short, that in title I we have fairly balanced the public need for disclosure with the individual's need for anonymity.

Despite the proven value of state grand jury reports, the report writing functions of federal grand juries have been substantially curtailed by district court level decisions, although grand juries continue to issue and district courts continue to accept reports; the Supreme Court itself has never had occasion

46 See HAMLIN AND BAKER, SUPREME COURT OF JUDICATURE OF THE PROVINCE OF NEW YORK 1691-1704, 141 (1952).

47 PUBLIC PAPERS OF GOVERNOR THOMAS E. DEWEY, 130-41 (1946).

48 9 N.Y.2d 144, 212 N.Y.S.2d 33, 173 N.E.2d 21 (1961).

49 N.Y. CODE CR. PROC. § 253-a (McKinney Supp. 1969).

50 For an example of a New York report, see 116 CONG. REC. S122-24 (daily ed. Jan. 19, 1970). At that point in the Congressional Record appear also a Pennsylvania grand jury report and a brief discussion by the author of such reports.

51 Hearings at 353-54.

52 *Id.* at 353.

53 116 CONG. REC. S8238 (daily ed. June 3, 1970).

squarely to pass on the propriety of the report writing power.⁵⁴ The recent report of the January 1970 grand jury in the Northern District of Illinois critical of identified members of the Chicago Police Department and the raid they conducted on a Black Panther Party Headquarters is illustrative of the practice. The decision of United States District Judge Edward Weinfeld in *Application of United Electrical Workers*⁵⁵ is illustrative of the law. There, Judge Weinfeld held beyond the power of the grand jury the issuance of a report which stated that named officials of a union were "Fifth-Amendment Communists" and recommended to the National Labor Relations Board that the certification of the union be withdrawn.⁵⁶

It was in this context that the President's Commission on Crime and the Administration of Justice in 1967 undertook as a part of its study of crime in the United States to evaluate our nation's past efforts to arrest and reverse the growth of organized crime. The Commission began by observing in its *The Challenge of Crime in a Free Society*:

Investigation and prosecution of organized criminal groups in the 20th century has [*sic*] seldom proceeded on a continuous, institutionalized basis. Public interest and demands for action have reached high levels sporadically, but, until recently, spurts of concentrated law enforcement activity have been followed by decreasing interest and application of resources.⁵⁷

It also commented:

And yet the public remains indifferent. Few Americans seem to comprehend how the phenomenon of organized crime affects their lives. They do not see how gambling with bookmakers, or borrowing money from loan sharks, forwards the interests of great criminal cartels. Businessmen looking for labor harmony or non-union status through irregular channels rationalize away any suspicions that organized crime is thereby spreading its influence. When an ambitious political candidate accepts substantial cash contributions from unknown sources, he suspects but dismisses the fact that organized crime will dictate some of his actions when he assumes office.⁵⁸

Finally, the Commission specifically found that a lack of public and political commitment to end the menace of organized crime was one of six major contributing causes to the failure of our society to deal with organized crime. The Commission observed:

The public demands action only sporadically, as intermittent, sensational disclosures reveal intolerable violence and corruption caused by organized crime. Without sustained public pressure, political office seekers and office holders have little incentive to address themselves to combatting organized crime. A drive against organized crime usually uncovers political corruption; this means that a crusading mayor or district attorney makes

⁵⁴ *But cf. Hannah v. Larche*, 363 U.S. 420, 422 (1960).

⁵⁵ 111 F. Supp. 858 (S.D. N.Y. 1953).

⁵⁶ Specifically excluded from the holding were "reports of a general nature touching on conditions in the community." These, Judge Weinfeld observed, served "a valuable function and may not be amenable to challenge." *Id.* at 869.

⁵⁷ CHALLENGE OF CRIME at 196.

⁵⁸ *Id.* at 188.

many political enemies. The vicious cycle perpetuates itself. Politicians will not act unless the public so demands; but much of the urban public wants the services provided by organized crime and does not wish to disrupt the system that provides those services. And much of the public does not see or understand the effects of organized crime in society.⁵⁹

Finding that "[o]rganized crime succeeds only insofar as the Nation permits it to succeed,"⁶⁰ the Commission proposed an "integrated package" of proposals touching on both governmental and private action. Included among these proposals was the recommendation that grand juries should be permitted by law to file public reports.⁶¹

I consider title I an implementation of several recommendations by the President's Crime Commission, including the Commission's statement that "[w]hen a grand jury terminates, it should be permitted by law to file public reports regarding organized crime conditions in the community."⁶²

It has been suggested, however, by Senator Charles E. Goodell⁶³ and by the New York City Bar Committee⁶⁴ that this recommendation of the Crime Commission did not include reports that might comment on specific individuals, and it must be conceded that the text of the Commission's report itself is ambiguous. Nevertheless, when it is read in the context of its "legislative history" it is difficult, I suggest, to interpret it in so limited a fashion. The Commission's recommendation here was based on the work of its Task Force on Organized Crime, which had before it a review of the law that specifically recommended that the "right to file reports should be restored" in federal law.⁶⁵

That review of the law made it clear that existing federal law permitted the filing of general reports not identifying individuals. The word "restored" could only be taken to mean, therefore, that the existing right under federal law to file general reports should be expanded to authorize the filing of reports which commented on specific individuals. Even so interpreted, the Crime Commission recommendation, of course, is contrary to the policy of the Civil Liberties Union, which goes so far as to oppose even the filing of reports "regarding organized crime conditions in the district."⁶⁶

Indeed, the union and the New York City Bar Committee both oppose enactment of title I. The union apparently objects primarily to the provisions for the filing of reports, while the bar committee objects both to the relatively great degree of independence of the special grand jury and to its power to file reports. In addition, both organizations oppose the title I amendment to section 3500 of title 18 of the United States Code.

The New York City Bar committee's objection to providing increased

59 *Id.* at 200.

60 *Id.* at 209.

61 *Id.* at 200.

62 *Id.*

63 115 CONG. REC. S16161 (daily ed. Dec. 9, 1969).

64 ABCNY at 10.

65 See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 83-85 (1967) [hereinafter cited as TFR ON ORGANIZED CRIME].

66 AGLU January 1970 letter at 2.

independence from the court and prosecutor for federal special grand juries is based on the bar's ignorance of the need for such independence. The bar committee states "[w]hile such independence might be required if corruption of the court or the prosecutor were to threaten the federal grand jury's effectiveness, we are not aware that such conditions have been shown to exist at the federal level."⁶⁷

On the contrary, Congress has, I suggest, ample grounds for determining that a need exists for the creation of special federal grand juries with substantial independence of the prosecutor and court. The President's Crime Commission in 1967 concluded that:

. . . on the Federal level, and in most State jurisdictions where organized crime exists, the major problem relates to matters of proof rather than inadequacy of substantive criminal laws From a legal standpoint, organized crime continues to grow because of defects in the evidence-gathering process. . . .

Grand juries. A compulsory process is necessary to obtain essential testimony or material. This is most readily accomplished by an investigative grand jury or an alternate mechanism through which the attendance of witnesses and production of books and records can be ordered. . . . The possibility of arbitrary termination of a grand jury by supervisory judges constitutes a danger to successful completion of an investigation.⁶⁸

The Commission recommended, therefore, that:

Judicial dismissal of grand juries with unfinished business should be appealable by the prosecutor and provision made for supervision of such dismissal orders during the appeal.

The automatic convening of these grand juries would force less than diligent investigators and prosecutors to explain their inaction. The grand jury should also have recourse when not satisfied with such explanations.⁶⁹

Those specific conclusions and recommendations were not limited by the Commission to state grand juries. Instead, they were based upon the general conclusion that evidence-gathering techniques are inadequate ". . . on the Federal level, and in most State jurisdictions where organized crime exists"⁷⁰

The basis of the Crime Commission recommendations for grand jury independence in experience with federal courts was elaborated further (although the bar committee makes no reference to this fact) by the Deputy Director of the Crime Commission, Professor Henry S. Ruth, Jr., when he testified before the Senate subcommittee on the relationship between S. 30 and the Crime Com-

67 ABCNY at 9-10.

68 CHALLENGE OF CRIME at 200.

69 *Id.*

70 *Id.* Their applicability to federal and state grand juries is emphasized by an examination of the documents supporting the Commission's basic report. They were adopted by the Commission verbatim from the report of the Task Force on Organized Crime. TFR ON ORGANIZED CRIME at 16. The Task Force, in turn, based them explicitly upon the discussion of federal and state grand jury law and experience in its Appendix C. TFR ON ORGANIZED CRIME at 16 n.126-27 and at 83-85.

mission's recommendations. Professor Ruth, who now occupies a high law enforcement position for the city of New York and who previously has served as Director of the National Institute of Law Enforcement and Criminal Justice, as a professor of law, and as an organized crime prosecutor for the Department of Justice, stated that "... S. 30's title I implements these Commission proposals," and described them as checks on "... the local United States Attorney or a dismissal action by a District Court judge."⁷¹

In response to a question, he went on to describe two illustrations of the federal need for increasing independence of grand juries.

... We had a Federal grand jury in Philadelphia investigating a vote fraud situation in a Federal primary, and the chief judge in Philadelphia, in the Federal district court, thought the grand jury had been going on long enough and one day he came along and he just discharged them. The grand jury, I understand, was a bit upset, and the U.S. Department of Justice was a bit upset, and there was nothing anyone could do about that.

The other situation which comes to mind was mentioned in my statement in *U.S. v. Cox* where the judge and the grand jury wanted to indict two defendants for perjury, but the prosecutor did not want to, and, indeed, the U.S. attorney refused to sign the indictment.⁷²

The cases described by Professor Ruth, like the events and circumstances concerning federal prosecutions in Louisiana which were reported to the House subcommittee in the testimony of Mr. Aaron Kohn, Managing Director of the New Orleans Crime Commission and member of the National Chamber of Commerce Advisory Panel on Crime Prevention and Control, are of course merely illustrative of the need for provisions such as title I's at the federal level. The specific known instances of improper judicial or executive dominance of grand juries merely show that no government or court, at any level, can be confident it is immune from corruption or improper influence. Title I recognizes the need for some degree of prevention and control over prosecutors and trial courts in the vital area of grand jury proceedings. Corruption has existed in federal executive departments and in the federal judiciary, though fortunately it has not been common. The existence of those conditions and the need for enhancing the independence of grand juries were shown before the President's Crime Commission and in the Senate hearings. The Congress has, I suggest, an ample basis of experience on which to enact title I's provisions enhancing the independence of special grand juries.

The Civil Liberties Union expresses the general viewpoint of the New York City Bar Committee as well as itself, when it described title I's report writing powers as a "procedure . . . fundamentally unfair and inherently abusive."⁷³

The arguments advanced to support this contention are not new. They are but a stale rehash of material culled from the files of the union, which has

⁷¹ *Hearings* at 333.

⁷² *Id.* at 339-40.

⁷³ AGLU January 1970 letter at 1; see also *ABA Testimony* (recommending deletion of power to criticize or exonerate individuals).

opposed grand jury activity in New York, where such reports have been routine since the turn of the century.

The specific contentions now advanced by the union and the New York City Bar Committee have been cogently analyzed and refuted, particularly in the context of the present New York grand jury report statute — on which title I is based—in an article published in the *Columbia Law Review*.⁷⁴ I shall not repeat all the arguments of the author in favor of grand jury reports, or attempt to rebut all the criticisms to which the reporting power is being subjected, but I do wish to add to these basic materials some comments addressed to certain specific objections raised by the New York City Bar Committee and the Civil Liberties Union. They may be a useful supplement to the basic analysis found in the law review article.

The New York City Bar Committee finds the traditional secrecy of grand jury proceedings to be of questionable fairness, and considers the fairness issue aggravated where the grand jury has the power to file reports. The bar states that those factors mean that “the public has no way of evaluating the basis for a charge, and that its publication in the press may be tantamount to a ‘conviction.’”⁷⁵

This objection is unsound on more than one count — but that the objection is made at all is ironic, since the secrecy of grand jury proceedings is designed in part as a means of protecting witnesses and suspects from prejudice through disclosure to the public that their activities are being investigated.⁷⁶

Further, ample means are provided for evaluation of a grand jury report, which is not a “charge” of crime but a set of findings regarding noncriminal conduct. First, the public official whose conduct is to be criticized in the report has the absolute right to require the appearance of witnesses before the grand jury to present his side of the story, and can file a rebuttal to the grand jury report to be published as an appendix to it.

Then, the court supervising the grand jury studies both the evidence against the subject of the report and the evidence which he adduced before the grand jury, to see whether the report is supported by the evidence. The court’s determination on that question is subject to appellate review, and the report may not be published until there has been a final judicial decision. Thus, a great deal of “evaluation” of the report is done before it ever reaches the public.

Then, when the report is made public, the simultaneous publication of the report and the official’s rebuttal, combined with any written opinions handed down by the courts reviewing the grand jury report, provide the public with more than adequate means of evaluating the accuracy of the report. The New York City Bar Committee’s description of the report as “tantamount to a ‘conviction’” is extreme, to say the least, when applied to a report on non-criminal conduct returned after such thorough procedural safeguards.

⁷⁴ Kuh, *The Grand Jury “Presentment”: Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103 (1955). That article appears in the Congressional Record, along with the author’s reply to Senator Goodell’s criticisms of grand jury report powers, at 115 CONG. REC. S17089 (daily ed. Dec. 18, 1969).

⁷⁵ ABCNY at 10.

⁷⁶ See generally *Jenkins v. McKeithen*, 395 U.S. 411, 441 n.5 (1969) (Harlan, J., dissenting).

Another traditional feature of grand jury procedure which the New York City Bar Committee finds questionable, especially for a grand jury with report power, is "[t]he non-adversary nature of the proceedings."⁷⁷ Here I note that the Supreme Court itself in *In Re Groban*⁷⁸ remarked that a "... witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by . . . counsel."⁷⁹ Nevertheless, the City Bar's statement that "[t]here is no opportunity . . . to be represented by counsel"⁸⁰ tells less than the whole truth, since the right to counsel traditionally is limited only to the extent that a witness's attorney is not allowed inside the grand jury room with him — he may leave the grand jury room at any time to consult with counsel — and the Court in *United States v. Capaldo*,⁸¹ termed this practice a "reasonable and workable accommodation."⁸² This practice is also followed in New York.⁸³

It is true that the subject of a report is not permitted to confront and cross-examine witnesses who appear before a grand jury, but it is not true that the title I procedures, which are customary for the state grand juries which under existing law have the power to file reports, impair the fairness or accuracy of grand jury reports.

The Supreme Court itself appears to have rejected the argument made by the New York City Bar Committee, since in the case of *Hannah v. Larche*⁸⁴ it observed:

[It has never] been considered essential that a person being investigated by the grand jury be permitted to come before that body and cross-examine witnesses who may have accused him of wrongdoing. . . . [T]he grand jury merely investigates and reports. It does not try.⁸⁵

The New York City Bar Committee's objection, therefore, makes the mistake of equating a grand jury proceeding, which determines only whether an indictment or report will be filed, with a trial which determines whether a defendant is guilty of crime and subject to punishment. As the Supreme Court made clear in the *Hannah* case, administrative agencies must grant cross-examination and confrontation only when their proceedings serve the purposes of adjudication or rulemaking. Proceedings for the purpose of investigation or factfinding, whether conducted, as the Supreme Court pointed out in *Hannah*, by an administrative agency or a grand jury, need not involve cross-examination and confrontation of witnesses.

A third feature of grand jury procedure which the New York City Bar Committee finds especially objectionable where a grand jury has the power to report is the immunity of grand jurors from libel suits and their alleged "immunity from the political processes."⁸⁶ The latter apparently refers to the fact

77 ABCNY at 10.

78 352 U.S. 330 (1957).

79 *Id.* at 333.

80 ABCNY at 10.

81 402 F.2d 821 (2d Cir. 1968).

82 *Id.* at 824.

83 *People v. Ianniello*, 21 N.Y.2d 418, 288 N.Y.S.2d 462, 235 N.E.2d 439 (1968).

84 363 U.S. 420, 449 (1960).

85 *Id.*

86 ABCNY at 10.

that grand jurors are selected more or less at random from citizens of the community and serve as grand jurors for a relatively brief period — two features which ordinarily are considered to make grand jurors unusually responsive to community sentiment rather than the contrary.

The New York City Bar Committee believes that those factors, combined with the inability of the grand jury to indict the subject of a report for the “non-criminal misconduct” described in its report, deprive the person reported upon of an “opportunity for vindication at trial.”⁸⁷ The Civil Liberties Union makes what appears to be the same point, when it says that the subject of a grand jury report “has no adequate means of defending himself.”⁸⁸

It is ironic that the New York City Bar Committee complains of the absence of an indictment, as a means of vindication, quite apart from the fact that an indictment would harm the defendant by exposing him to the possibility of conviction and punishment. In the first place, an indictment publicly accuses a defendant of far more reprehensible conduct, often, such as a violent or corrupt felony, than does a grand jury report under title I, which can report only upon “noncriminal misconduct, malfeasance or misfeasance in office.”

In the second place, the returning of a federal indictment is governed by far fewer procedural safeguards than the filing of a report under title I: the court may not judge the sufficiency of evidence upon which the indictment is based,⁸⁹ there is no appeal from the decision that the indictment shall be made public, and a defendant named in an indictment has no right to append to it a detailed reply. The indictment may be dropped by the prosecutor at any time,⁹⁰ depriving the defendant of his supposed right to “vindication at trial.”

In the third place, even the one defendant out of about ten who eventually is found not guilty at trial hardly obtains “vindication.” The public is well aware that the state is subject to a number of handicaps at a criminal trial which often prevent it from proving an offense beyond a reasonable doubt although the defendant actually committed the offense, and often although reliable evidence of that fact is available but inadmissible. Because the public largely understands those handicaps, a “not guilty” verdict hardly “vindicates” the defendant in the public mind or removes the effect on his reputation of a public indictment.

A report filed under title I, on the other hand, evaluated and published under the safeguards described above, and alleging only noncriminal misconduct, exposes the subject of a report to far less danger of undeserved harm to his reputation than does the returning of an indictment against a defendant.

The New York City Bar Committee makes a fourth and final claim that there are questionable aspects of grand jury procedure, made more questionable where grand juries are authorized to issue reports. The committee alleges that “there are no objective standards governing the grand jury’s conduct” concerning the filing of a report.⁹¹ The American Civil Liberties Union makes a similar allegation, saying that “there is no limitation on the nature of the ‘misconduct’ ”

87 *Id.*

88 ACLU January 1970 letter at 1.

89 *Costello v. United States*, 350 U.S. 359 (1956).

90 *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965).

91 ABCNY at 10-11.

sufficient for making one the subject of a report.⁹² That criticism is not accurate, and the attitude it reflects is inconsistent with the maintenance of high standards of public service.

Title I's phrase "noncriminal misconduct, malfeasance or misfeasance in office" actually is more restrictive than the comparable phrases in the New York grand jury report statute, on which the title I provisions are largely based. The city bar committee fails to draw the reader's attention to this tightening of the New York statute, despite the fact that the committee takes title I to task later in its report on the bill for alleged departures from the procedural provisions of the New York statute — which I discuss below — and despite the fact that the Senate hearings on S. 30 show clearly the occasion for this narrowing of the standard found in the New York statute. Prof. William Greenhalgh, representing the National Association of Counties, recommended that:

A better, more specific, and purpose-related definition be supplied to define "non-criminal misconduct, nonfeasance, or neglect in office" to insure that the intent of the legislation is to relate to the purpose of the grand jury report toward organized crime control, and not, as it is possible under the present language, to issue a report against a local public official who misses 10 zoning meetings, or a Federal legislator who misses 10 roll call votes. We also suggest that consideration be given to more clearly expressing the organized crime control intent of this bill by the possible substitution of the words "malfeasance or misfeasance" for "non-feasance" as within the purview of the organized crime investigative grand jury report. The reason we state this is because these two words traditionally connote some degree of "mind-bearing on evil intent."⁹³

As Professor Greenhalgh's testimony indicates, the key terms in the phrase "non-criminal misconduct, malfeasance or misfeasance in office" have received development and elaboration at common law, and the standard is sufficiently specific for a statute of this type. The condemnation of that standard by the New York City Bar Committee and the Civil Liberties Union also ignores the teaching of New Jersey's Chief Justice, Arthur T. Vanderbilt, who rejected objections to grand jury reports such as the complaints raised against title I, and stated:

There are many official acts and omissions that fall short of criminal misconduct and yet are not in the public interest. It is very much to the public advantage that such conduct is revealed in an effective, official way. No community desires to live a hairbreadth above the criminal level, which might well be the case if there were no official organ of public protest. Such presentments are a great deterrent to official wrongdoing . . . [and] inspire public confidence in the capacity of the body politic to purge itself of untoward conditions.⁹⁴

The complaint by the New York City Bar Committee that title I "eliminates or diminishes" safeguards found in the New York statute on grand jury

⁹² ACLU January 1970 letter at 1.

⁹³ *Hearings* at 331.

⁹⁴ *In re Presentment by Camden County Grand Jury*, 10 N.J. 23, 66, 89 A.2d 416, 444 (1952).

reports, and so is objectionable,⁹⁵ is almost wholly inaccurate and, so far as it reflects actual differences between title I and the New York statute, is not a sound basis for objecting to enactment of title I.

For example, the city bar committee notes that federal grand juries ordinarily need not have the testimony they hear recorded, and objects to the filing of a report based upon evidence which was not recorded.⁹⁶ In fact, however, in most federal districts it is already the practice to record all grand jury testimony verbatim, but in any case, title I's provisions for review of the evidentiary basis for any grand jury report explicitly require the court to examine the report "and the minutes of the special grand jury" prior to entering an order accepting the report. It is not true, therefore, that the testimony taken before a grand jury convened under title I need not be stenographically recorded. Thus, there is no difference in this respect between the New York statute and title I.

Another difference which the New York City Bar Committee claims to find between the New York grand jury reports statute and title I is that the committee considers the New York statute's provision for judicial review of whether a grand jury report is supported by a "preponderance of the evidence" as an effective safeguard, but considers that safeguard "greatly diminished" in value when incorporated in title I, since federal grand juries can consider hearsay evidence while New York State grand juries cannot. Without any supporting citation, the New York City Bar Committee simply asserts that "[t]here are few guidelines for the district court to follow in weighing hearsay or double hearsay testimony."⁹⁷

Actually, of course, there are ample "guidelines" and precedents for evaluation of the reliability of hearsay and multiple hearsay evidence, and state and federal trial and appellate courts engage in weighing such evidence constantly. The numerous exceptions to the hearsay rule itself, such as the federal shop-book rule,⁹⁸ are themselves examples of evidence which is admissible but which may have reduced reliability depending on the circumstances of its out-of-court making, and which consequently must be evaluated as to credibility by the district court. Another example of judicial review of the reliability of hearsay evidence is illustrated by the case of *United States v. Shiver*.⁹⁹ In that case, a statement of pure hearsay was admitted in evidence on the issue of guilt or innocence since the defendant's counsel did not object to its admission. The court of appeals stated:

This testimony presents the problem of considering the weight to be given to hearsay evidence admitted without objection.

The general rule is that . . . hearsay evidence may properly be considered in determining the facts, [and] . . . [t]he rule followed in this circuit is that such evidence is to be given its natural probative effect as if it were in law admissible.¹⁰⁰

95 ABCNY at 12-14.

96 *Id.* at 13 n.15.

97 *Id.* at 14.

98 28 U.S.C. § 1732 (1964).

99 414 F.2d 461 (5th Cir. 1969).

100 *Id.* at 463.

The court of appeals went on to do exactly that, weighing the reliability of the evidence in view of all the circumstances, and found that the evidence in that case to be insufficient to establish guilt beyond a reasonable doubt.

The city bar committee's statement also flies in the face of voluminous state and federal experience with judicial review of determinations made by administrative agencies. Federal administrative agencies, for example, can base their decisions in large part upon hearsay evidence.¹⁰¹ The use of hearsay evidence by such agencies has in no way prevented courts from reviewing agency determinations under the "substantial evidence" rule. In view of those precedents and others, the bald assertion by the New York City Bar Committee that "there are few guidelines for the district court to follow in weighing hearsay or double hearsay testimony," without citation to any supporting authorities or to the opposing precedents, is not instructive.

A third alleged difference between the New York grand jury report statute and title I is that, according to the New York City Bar Committee, "there is no provision made for the taking of an appeal" from a court order approving a title I report.¹⁰² The most that can be said for this objection is that no harm would be done by making the right of appeal more explicit on the face of the statute. Already, however, title I's grand jury report provisions refer to "an appeal," and a fair reading of title I leads to the conclusion that proceedings concerning a grand jury report are civil proceedings, and thus are covered by the provisions of the Federal Rules of Civil Procedure concerning appeals.

The New York City Bar Association Committee complains next that "[u]nder the New York statute the court must be satisfied that a report purporting only to exonerate a public official or proposing recommendations for legislative, executive or administrative action 'is not critical of an identified or identifiable person.'"¹⁰³ The committee finds title I's deletion of the words "or identifiable" to be a substantial change in the standards, largely negating the procedural safeguards provided by title I for reports alleging misconduct by identified persons.

In fact, however, there is little difference between the terms "identified" and "identifiable" when they are considered in context. The city bar committee makes clear that it considers the subject of a grand jury report to have been "identified" within the meaning of title I only if ". . . his name was . . . specifically mentioned in the report."¹⁰⁴ The ordinary meaning of the word "identified," of course, covers identification by any means sufficient to establish clearly to what individual a report refers. It is this normal meaning of the term "identified" which is intended in title I, and that meaning is only slightly narrower than the meaning of the term "identifiable."

Title I needs this more precise term than the language used in the New York statute, since title I, unlike the New York statute, authorizes not only reports concerning misconduct by governmental officials but also reports on general

¹⁰¹ Administrative Procedure Act, 5 U.S.C. § 556(d) (Supp. III, 1968); 45 C.F.R. § 702.8(a) (1970); *Morelli v. United States*, 177 Ct. Cl. 848 (1966); *NLRB v. Imparato Stevedoring Corp.*, 250 F.2d 297 (3d Cir. 1957); *NLRB v. Amalgamated Meat Cutters Local 127*, 202 F.2d 671 (9th Cir. 1953).

¹⁰² ABCNY at 14.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

organized crime conditions. The word "identifiable" could be read so broadly as virtually to eliminate the publication of reports on general organized crime conditions. While the narrower standard found in the New York statute is appropriate there, where general condition reports cannot be filed, the narrower standard is necessary in title I, since opening general condition reports to challenge by individuals who might for publicity reasons say that they are "identifiable" by general revelations would prevent the use of such reports. The standard used in title I poses no real threat to the safeguards applicable to reports which identify specific individuals, whether by name, job designation, or other clearly inferred means.

A key difference between the New York statute on grand jury reports and title I, which the city bar committee considers an important objection to enactment of title I, relates to the hearsay rule. The New York statute requires a court to accept a report only if it is supported by "the credible and legally admissible evidence," while title I permits a report to be supported by hearsay. This difference between the New York statute and title I simply reflects the broader difference mentioned above, that New York permits grand jury indictments to be based only upon evidence which would be admissible at trial, while federal grand juries can indict on the basis of hearsay.¹⁰⁵ Of course, there are some who oppose the use of hearsay by grand juries for indicting, as well as for filing reports, and would like to see the New York rule extended to the federal courts. The federal rule, however, permitting the use of hearsay as the basis for an indictment, is the majority rule in the states.¹⁰⁶ It recognizes the logical value that hearsay has, especially in a proceeding which does not adjudicate guilt but results only in an accusation or the filing of a report on noncriminal misconduct. Indeed, grand jury use of hearsay is even more appropriate as the basis for a grand jury report than as the basis for an indictment, since a report receives judicial review prior to its publication.

The Civil Liberties Union's objections to the quantity of evidence which title I permits to support a grand jury report also are invalid. The union objects to the use of the standard "preponderance of the evidence" as a basis for the filing of a grand jury report, but gives only one reason for its opposition to that standard: that "only one side may present evidence."¹⁰⁷ However valid this objection might have been at the time, since title I was, of course, amended on the Senate floor to give the subject of a grand jury report an absolute right to require the hearing of witnesses to present his version of the facts, it is now no longer true that "only one side may present evidence."

In addition, the union misstates title I when it objects to the issuance of reports "when there is insufficient evidence to support indictments."¹⁰⁸ This phrase misconceives the nature of grand jury reports. A grand jury report is not a substitute for an indictment in a case in which the evidence of crime is insufficient. Grand jury reports are filed when the evidence is sufficiently clear to

¹⁰⁵ *United States v. Blue*, 384 U.S. 251 (1966); Note, *Validity of Federal Indictments and Warrants Based on Hearsay Evidence*, 65 YALE L.J. 390 (1956).

¹⁰⁶ *Id.*

¹⁰⁷ ACLU January 1970 letter at 2.

¹⁰⁸ *Id.* at 1.

establish the facts, but the facts established show *noncriminal* misconduct, rather than crimes. Grand jury reports alleging the commission of *crimes* are not permitted.

The distinct and complementary roles played by grand jury indictments and reports are illustrated by the recent developments in New Jersey, where the mayor of Newark was indicted for extortion and income tax evasion (he was convicted this spring on the extortion charge), and a grand jury report was filed alleging failure of the city administration to maintain high standards of diligence in law enforcement and the administration of city government.¹⁰⁹ If the grand jury which returned the indictments heard sufficient evidence indicating that the mayor was guilty of extortion and tax evasion, then it acted properly, since the indictments serve the purpose of permitting criminal prosecution. The indictments do not, however, begin to match the grand jury report as a means of alerting the community to the prevailing low standard of administration of municipal government.

In considering the adequacy of title I's report procedures generally, it is important to keep in mind the essential function of grand jury reports. They are designed to educate and instruct the community on matters of community interest, in much the way that reports of legislative committees and independent government commissions serve to inform the public. It is interesting to note that such commissions seldom labor under procedural restrictions even comparable in strictness to the safeguards which the city bar and the union find insufficient in title I. One example of such a commission, which exercises broad powers of investigating and reporting under minimal procedural restrictions, is the U.S. Civil Rights Commission.¹¹⁰

The Civil Rights Commission was established by the 1957 Civil Rights Act.¹¹¹ The process of authorizing the establishment of the Commission began with the 1956 House civil rights bill, H.R. 627. That bill was reported out of the House Judiciary Committee without any reference to the procedures to be used by the Commission in conducting its hearings. During the debate on the floor of the House, however, the bill was amended to contain provisions regulating the procedure of the Commission hearings. That year, though, the bill died in the Senate.

In the 1957 session of Congress, two bills similar to the 1956 bill became prominent, one containing the relatively full procedures passed in 1956 by the House and the other, introduced in the House of Representatives by Congressman Emanuel Celler, then as now chairman of the House Judiciary Committee, containing watered-down procedural protections. For example, the Celler bill contained no provision for confrontation or cross-examination, or for judicial review of Commission findings. It was the Celler bill, however, which eventually became law, despite adverse comment concerning the right of cross-examination

¹⁰⁹ The report and a New Jersey decision upholding it are set out at 116 CONG. REC. S28238 (daily ed. June 3, 1970).

¹¹⁰ The following arguments concerning the Civil Rights Commission and its relationship to title I of S. 30 have been developed more fully in remarks and debates on the Senate floor. See 116 CONG. REC. S6323 (daily ed. Apr. 30, 1970); *id.* at S10947 (daily ed. July 9, 1970); *id.* at S11268-76 (daily ed. July 14, 1970).

¹¹¹ 71 Stat. 634 (1957).

in both the Senate and the House of Representatives, and it was the Celler bill whose procedural safeguards were sustained by the Supreme Court against due process objections in *Hannah v. Larche*.¹¹² Indeed, the Court sustained the Commission's procedures in part by drawing an analogy between them and the grand jury. I suggest, in short, that the procedures of title I are more consistent with basic fairness than those of the Commission,¹¹³ and those of the Commission have been upheld. I do not see why those of title I should be rejected.

The relative freedom of the Civil Rights Commission from procedural limitations, moreover, is typical of legislative committees and other government commissions. Since the grand jury reporting function under title I is similar to the reporting and public investigating functions of those bodies, but is exercised under far greater procedural restrictions, it is inconsistent to oppose enactment of title I, while supporting these other agencies. When the false equation between grand jury reports and trials of guilt or innocence of criminal charges is rejected, it is seen that grand jury reports, as permitted and regulated by title I, are an appropriate and unusually careful means of alerting the public to public problems.

Next, grand jury reports are opposed by the city bar committee and the Civil Liberties Union on the ground that a grand jury is an "arm of the court," and that therefore its filing of a report violates the doctrine of "separation of powers."¹¹⁴ This argument overstates the doctrine of separation of powers, which actually is a flexible and qualified doctrine recognizing a great deal of overlap in the functions of the three branches of government. Each branch of government exercises some powers which would be appropriate to another branch. For example, administrative agencies exercise powers which appear appropriate to executive, legislative, and adjudicative bodies: they adjudicate controversies, and make rules having the force of law, as well as administer federal statutes. Nevertheless, arguments that their exercise of those powers violates the doctrine of separation of powers were repudiated in the 1930's.

Similarly, it is common for courts to recommend enactment of legislation in the course of their written opinions. See, for example, the opinion of Judge Augustus Hand in *United States v. Polakoff*,¹¹⁵ in which he notes the handicap of law enforcement at that time labored under without wiretap authority, expresses his opinion that it could be constitutional, and invites congressional action. Such recommendations, when made by judges themselves, are consistent with separation of powers, in part because the courts lack power to implement their legislative recommendations. The grand jury, similarly, lacks that power. In addition, grand juries, like administrative agencies, are more hybrid in their nature than courts themselves, in view of their close association with prosecuting officers.

112 363 U.S. 420 (1960).

113 The author's amendment to the Civil Rights Commission Authorization Act, S.2455, imposing on the Commission only one of title I's procedural safeguards, the requirement that a defamatory public report of the Commission include as an appendix any answer to the charges filed by the person defamed, was debated and adopted by the Senate on July 14, 1970, by a vote of 44 to 40, over the opposition of several Senators who had opposed authorizing grand jury reports even under all of title I's safeguards. 116 CONG. REC. S11268-76 (daily ed. July 14, 1970).

114 See, e.g., ABCNY at 14-15.

115 112 F.2d 888, 890-91 (2d Cir. 1940), cert. denied 311 U.S. 653 (1940).

The special grand jury created by title I, because of its special degree of independence from the court and prosecutor, is even less an "arm of the court" than an ordinary grand jury, and its filing of reports recommending legislative, executive or administrative action is consistent with separation of powers.

The New York City Bar Committee's attempt to articulate and support the contention that grand jury reports are harmful, moreover, is misleading and unpersuasive. The city bar committee, for example, describes¹¹⁶ a decision by Judge Weinfeld in the federal Southern District of New York expunging a grand jury report,¹¹⁷ without noting that title I of S. 30 would also have prohibited the publication of the report expunged in that case, since the report criticized private individuals rather than public officials, and since the report was not prepared and published under the strict procedural limitations of title I. In addition, the city bar committee omitted to mention that Judge Weinfeld specifically excluded from his holding "reports of a general nature touching on conditions in a community."¹¹⁸ Reports of that type, Judge Weinfeld observed, serve "a valuable function and may not be amenable to challenge."¹¹⁹ The city bar committee follows that example with another, from Missouri, again without pointing out that the report was returned by a grand jury not subject to the procedural restrictions found in title I.¹²⁰

The committee also quotes at length¹²¹ from the decision of the New York Court of Appeals in the case of *Wood v. Hughes*.¹²² The material quoted is a strong condemnation of grand jury reports identifying individuals. The city bar committee's use of it, however, is deceptive, since it fails to mention that the people of New York, through their state legislature, responded to the *Wood* decision by promptly enacting comprehensive legislation authorizing reports critical of identifiable individuals, under limitations designed to overcome the civil liberties objections voiced by the court.¹²³

Although the *Wood* case was set aside by the New York legislature, I recognize that the views expressed in that case may still remain the views of some judges of the New York Court of Appeals. It must be remembered, however, that eminent authorities support both sides of this question — though that fact cannot be gleaned from a reading of the bar committee statement. District Attorney Frank S. Hogan of New York County, one of the nation's most esteemed prosecutors, stated: "In simple logic — it would seem that if a grand jury does not find actual crime but does find misconduct in public office it can and should do something about it."¹²⁴ And as New Jersey Chief Justice Arthur T. Vanderbilt stated in 1952, in a decision upholding the grand jury report power over civil liberties objections, grounded on a fear of a possible abuse of the rights of individuals:

116 ABCNY at 11.

117 Application of United Electrical Workers, 111 F. Supp. 858 (S.D. N.Y. 1953).

118 *Id.* at 869.

119 *Id.*

120 ABCNY at 11.

121 *Id.*

122 9 N.Y.2d 144, 154, 212 N.Y.S.2d 33, 39, 173 N.E.2d 21, 26 (1961).

123 N.Y. CODE CR. PROC. § 253-a (McKinney Supp. 1969).

124 Quoted in GRAND JURY ASSOCIATION OF NEW YORK COUNTY, *THE PEOPLE'S BIG STICK* at 15 n.49 (1963).

A practice imported here from England three centuries ago as part of the common law and steadily exercised ever since under three successive State Constitutions is too firmly entrenched in our jurisprudence to yield to fancied evils.¹²⁵

That the evils are fancied rather than real is apparent not merely from an examination of the criticisms of title I by the Civil Liberties Union and the New York City Bar Committee, but also from the hearing record of my Senate subcommittee. We attempted to obtain from opponents of title I examples of abuse of report writing powers circumscribed by provisions comparable to title I. The Committee on Federal Legislation of the New York County Lawyers Association, for example, also opposed title I's authorization of federal grand jury comment on specific individuals¹²⁶ but the spokesman for the committee conceded that he had no concrete experience to show that the New York law was not working well.¹²⁷ The American Civil Liberties Union opposed the report writing power¹²⁸ but was asked to provide for the record any indication of abuse where reports are filed, and failed to provide any.¹²⁹

Apart from the merits of permitting grand jury reports which criticize identified individuals, it is incorrect to describe title I as a drastic change in existing federal law — it might better be described as a clarification of the law, in view of the divergent federal practices and precedents. One might compare, for example, the dictum of the Supreme Court in *Hannah v. Larche*,¹³⁰ that a grand jury investigates and reports, and the detailed and specific report recently filed by a federal grand jury and ordered released by a federal judge concerning the fatal shooting incident in Chicago between police and members of the Black Panther Party, with the decision of Judge Weinfeld in *Application of United Electrical Workers*.¹³¹ Title I resolves this split of practice and authority in favor of grand jury reports, as a majority of the states do to at least some degree, and adds unusually strict safeguards against abuse of grand jury powers and against unwarranted and inaccurate publication of reports.

The provision of title I which would amend section 3500 of title 18 of the United States Code, concerning pretrial disclosure to a defendant of statements in the possession of the Government, also has received unfair criticism by the city bar committee and the Civil Liberties Union. The union, for example, claims that this provision of title I would abandon the trend set by recent decisions such as the case of *Dennis v. United States*.¹³² The union fails to note, however, that the court in *Dennis* relied upon section 3500 as analogous authority for its decision in that case, and falsely implies that the guiding principles of the *Dennis* case and of title I are at odds. Likewise, the New York City Bar Committee

125 In re Presentment by Camden County Grand Jury, 10 N.J. 23, 89 A.2d 416, 443 (1952).

126 *Hearings* at 216.

127 *Id.* at 239.

128 *Id.* at 456-59.

129 *Id.* at 481.

130 363 U. S. 420 (1960).

131 111 F. Supp. 858 (S.D. N.Y. 1953).

132 384 U.S. 855, 870-71 (1966).

misstates the effect of Rule 16(b) of the Federal Rules of Criminal Procedure.¹³³ Actually, Rule 16(b) expressly provides that it does not authorize the discovery of statements made by Government witnesses to Government agents except as provided in section 3500.

The present state of the law governing disclosure of statements is intolerable, since there are unjustifiable differences in the ways that various kinds of statements are treated for discovery purposes, and since various federal circuits have adopted various rules for making discovery in particular situations.¹³⁴ This provision of title I would provide the needed uniformity of treatment among various kinds of statements, and would clarify the law so as to obtain uniformity of treatment from one federal circuit to another.

The need for a clarification of the law is most urgent, since the present uncertain state of the law leads unnecessarily to litigation of collateral issues and reversal of convictions on grounds not necessarily related to guilt or innocence.¹³⁵ The harm done by the present state of flux and uncertainty in the law is well illustrated by the *Harris* case,¹³⁶ which reversed a conviction for robbery and assault with a pistol. A footnote to the opinion of the dissenting judge in that case reveals that the defendant committed another armed robbery and assault with a sawed-off shotgun before he was tried for his earlier crime. Having been convicted of both robberies and both aggravated assaults, Harris appealed both convictions and now has obtained reversal of one because the law on pretrial discovery was unclear. I think we should clarify that law now, and put an end to injustices to society such as occurred in the *Harris* case.

On the whole, title I would effect major improvements in existing federal law, and has won impressive support from a variety of organizations. The claim by the New York City Bar Committee that the U.S. Judicial Conference, the New York County Lawyers Association, and the National Association of Counties all urged that title I "be rejected in its present form"¹³⁷ is moreover, false. The judicial conference has never expressed a view concerning title I "in its present form." The judicial conference did disapprove an earlier draft, but stated no specific reasons for its disapproval, so there is no basis for drawing an inference as to its position on title I "in its present form."¹³⁸ Indeed, to my knowledge the conference has never reviewed title I in the form in which it passed the Senate.

The New York County Lawyers Association, it is true, objected to the concept of grand jury reports identifying individuals. As noted above, however, the association conceded that it had no "concrete experience" on which to base its fears of abuse, and its opposition did not extend to exonerating reports or

¹³³ ABCNY at 17.

¹³⁴ Compare *United States v. Hernandez*, 290 F.2d 86 (2d Cir. 1961) with *United States v. Micele*, 327 F.2d 222 (7th Cir. 1964), cert. denied, 377 U.S. 952 (1964); *Ogden v. United States*, 303 F.2d 724 (9th Cir. 1962); *United States v. Bertucci*, 333 F.2d 292, 297 (3d Cir. 1964), cert. denied, 379 U.S. 839 (1964); *Berry v. United States*, 295 F.2d 192 (8th Cir. 1961), cert. denied, 368 U.S. 955 (1962).

¹³⁵ See, e.g., *United States v. McGowan*, 423 F.2d 413 (4th Cir. 1970); *Harris v. United States*, No. 21,511 (D.C. Cir. Mar. 18, 1970).

¹³⁶ *Harris v. United States*, No. 21,511 (D.C. Cir. Mar. 18, 1970).

¹³⁷ ABCNY at 9.

¹³⁸ The earlier disapproval is set out at 115 CONG. REC. S13976 (daily ed. Nov. 10, 1969).

general crime condition reports. Finally, the National Association of Counties, supporting the central thrust of title I, opposed only certain provisions of the initial draft. At the same time, the Association made constructive suggestions for modifications. Those modifications were accepted by the Senate Judiciary Committee, something the bar association fails to note, and the modifications now are part of the bill passed by the Senate. The National Association of Counties, therefore, supports, not opposes, title I.

Indeed, what is remarkable about the public comments on title I is the degree to which associations of public officials who could be made the subjects of such reports have, in their desire for effective law enforcement and improvement of government, endorsed both the grand jury report provisions and the remainder of title I's grand jury provisions.

The Department of Justice supports these provisions fully.¹³⁹ The Association of Federal Investigators testified that they "applaud" giving the public the "whole picture" and "strongly endorse" title I.¹⁴⁰ The National Association of Counties testified in the Senate hearings that there is "no greater deterrent to evil, incompetent, and corrupt Government than publicity," and endorsed the report provisions with proposed modifications.¹⁴¹ The International Association of Chiefs of Police has endorsed S. 30, including title I.¹⁴² As one considers whether grand jury reporters are needed, and whether the procedures in title I for their issuance provide the subject of a report with fair safeguards, the support of those groups is especially significant.

An amendment was offered on the Senate floor to strike the provisions of title I for reports on identified officials, and was defeated by a vote of 59 to 13.¹⁴³ I submit that, when inaccurate claims about "fancied evils" are put to one side, and the need for direct influence by citizens over the conduct of public officials is recognized, it will be agreed that title I provides effective and fair means for improving the quality of government.

TITLE II — GENERAL IMMUNITY

Title II of S. 30 is a comprehensive immunity provision designed to replace more than fifty immunity statutes now in operation. When S. 30 was originally introduced its scope was limited to grand jury and court proceedings. It was designed to implement the recommendation of the President's Crime Commission that such a provision was not only necessary in the general administration of justice, but essential in the fight against organized crime.¹⁴⁴ During the course of the hearings, however, the National Commission on the Reform of Federal Criminal Laws issued a report recommending that comprehensive reform and codification action be undertaken in this field.¹⁴⁵ Accordingly, title II was re-examined in this context, and the decision was reached to go forward and to

139 *Hearings* at 369.

140 *Id.* at 276.

141 *Id.* at 330-31.

142 115 CONG. REC. S12562 (daily ed. Oct. 14, 1969).

143 116 CONG. REC. S478 (daily ed. Jan. 23, 1970).

144 CHALLENGE OF CRIME at 200-1.

145 *Hearings* at 287.

properly treat the overall problem in the administration of justice. Title II now provides for judicial, administrative and congressional immunity grants, subject to carefully framed safeguards for individual liberties, where information which may be necessary to the public interests is likely to be refused to be provided on the basis of the privilege against self-incrimination.

The relation between the privilege against self-incrimination and immunity grants has been examined by our courts over a considerable period of time. In *Counselman v. Hitchcock*¹⁴⁶ the Supreme Court invalidated an immunity statute which only prevented evidence from being used in subsequent court proceedings. The court stated: "It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court."¹⁴⁷

In response, Congress passed a "transaction immunity" statute, which provided that the person compelled to testify could not be prosecuted, under any circumstances, for the criminal activities concerning which he had testified.¹⁴⁸ In *Brown v. Walker*,¹⁴⁹ this statute was upheld, despite the argument that was made that the principle of *Counselman* should be extended to prevent self-degradation as well as self-incrimination. The court answered this contention:

[T]he authorities are numerous and very nearly uniform to the effect that, if the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value.¹⁵⁰

The court also stated:

Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others who are desirous of seeking shelter behind his privilege.¹⁵¹

Immunity legislation remained at this point until 1964. In that year, the Supreme Court handed down *Malloy v. Hogan*¹⁵² and *Murphy v. Waterfront Commission*.¹⁵³ In order to make state immunity statutes valid, the court held that they must also protect against federal prosecution.¹⁵⁴

Drawing upon recently developed criminal procedure rulings on the derivative suppression of evidence, the court stated:

[W]e hold the constitutional rule to be that a state witness may not

146 142 U.S. 547 (1892).

147 *Id.* at 564.

148 Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 (1893).

149 161 U.S. 591 (1896).

150 *Id.* at 605.

151 *Id.* at 600.

152 378 U.S. 1 (1964).

153 378 U.S. 52 (1964).

154 The effect of this holding on federal immunity theory was noted in TFR ON ORGANIZED CRIME at 87.

be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.¹⁵⁵

In a footnote, Mr. Justice Goldberg went on to state that "the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."¹⁵⁶

This is the use-restriction immunity that is embodied in title II. Under it, once a witness has testified, he can only be prosecuted for the acts concerning which he has been immunized if the prosecution can establish "an independent, legitimate source for the disputed evidence."¹⁵⁷

Since *Murphy*, the highest courts of New Jersey¹⁵⁸ and California¹⁵⁹ have embraced this theory of immunity. In so doing, they specifically relied on the precedents in the U.S. Supreme Court.

The President of the United States on April 23, 1969, in his message on organized crime, commended the basic concept of title II to the Congress, stating:

I commend to the Congress for its consideration . . . [the proposal under which] . . . a witness could not be prosecuted on the basis of anything he said while testifying, but he would not be immune from prosecution based on other evidence of his offense.¹⁶⁰

In a concurring opinion in *Murphy*, Mr. Justice White stated that "[i]mmunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination."¹⁶¹

This was but another way of saying that we ought not tolerate anything which gives, in the words of Mr. Justice Holmes in *Heike v. United States*,¹⁶² a "gratuity to crime."

In light of present derivative-suppression techniques, and Supreme Court decisions, to refuse to enact use-immunity legislation is to give a "gratuity to crime." In a society which is besieged by organized crime, Congress is in no position to hand out such gratuities. Title II would revoke the gratuity that a member of organized crime enjoys under present immunity legislation and substitute for it carefully drafted legislation that both reforms and codifies the law in this field.

The New York City Bar Committee declines to take a position at this time on title II, but the American Civil Liberties Union objects to title II on

155 *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964).

156 *Id.* at n.18.

157 *Id.*

158 *Zicarelli v. New Jersey State Comm'n of Investigation*, 55 N.J. 249, 261 A.2d 129 (1970). Congressman Poff has discussed that decision and placed it in the Congressional Record at 116 CONG. REC. H1600 (daily ed. Mar. 9, 1970).

159 *Byers v. People*, — Cal.2d —, 80 Cal. Rptr. 553, 458 P.2d 465 (1969).

160 H.R. Doc. No. 91-105, 91st Cong., 1st Sess. 5 (1969).

161 378 U.S. at 107.

162 227 U.S. 131, 142 (1913).

several grounds. Most basically, the union states that “[i]n 1892 the Supreme Court held a similar immunity statute unconstitutional because it protected only against use of evidence but not against prosecution. *Counselman v. Hitchcock*, 142 U.S. 547 (1892).”¹⁶³ The union clearly implies that title II, since it gives immunity against use of compelled evidence and its indirect fruits rather than immunity against prosecution, is of doubtful constitutionality.

In the first place, the union’s statement of the *Counselman* holding is grossly misleading, when it states that the immunity statute struck down in 1892 was “similar” to title II. In fact, they were different in the most important respect: the invalidated statute protected only against use of the witness’ own words against him, while title II protects against use not only of the witness’ words but also of *evidence indirectly obtained* through investigation based on his testimony. That difference appears to be crucial under the *Murphy* case discussed above. Indeed, the highest courts of California and New Jersey, which within the past year have held immunity which is similar to title II to be constitutional, have relied upon the *Murphy* decision and have considered that difference to be vital. The union fails to cite the *Murphy* case or the state cases, and even states that “nothing has happened” since 1966 to support the constitutionality of use restriction immunity — apparently considering the decisions by the highest courts of two states to be “nothing.” In the present state of the precedents there is virtually no basis for the union’s constitutional objection to title II, and the strongest grounds for the opinion that title II is sound and constitutional.

The union goes on to question the constitutionality of title II on the ground that a witness who is immunized under its provisions receives protection only “in any criminal cases.” The union recognizes that those are the precise words used in the fifth amendment itself, but notes that that phrase in the fifth amendment has been interpreted to include a variety of penalty or forfeiture proceedings, and expresses fear that “title II is intended to apply” to something less. It seems obvious, especially in view of the full discussion of this point in the hearings,¹⁶⁴ that the reason why title II uses the phrase found in the Constitution is that it is intended that the interpretations placed on the fifth amendment also be placed on the statute. There is no better way to assure that result than the method used by the Judiciary Committee and the Senate in drafting and passing title II.

In view of that specious complaint by the Civil Liberties Union concerning the draftsmanship of title II, it is amusing to read the union’s statement that title II “replaces a host of carefully drawn and limited specific immunity provisions.”¹⁶⁵ The truth of the matter is described in the comment to the draft immunity provision proposed by the National Commission on Reform of Federal Criminal Laws, on which title II is based:

In summary, and reserving for the next section an analysis of problem areas in existing immunity legislation, it can be said that federal immunity

163 AGLU January 1970 letter at 4.

164 *Hearings* at 298-300.

165 AGLU January 1970 letter at 3.

legislation has developed haphazardly. Congress has made a series of ad hoc responses to the need to support particular statutory programs with a power to compel testimony. There is no general federal immunity statute. There is no uniform immunity statute for the independent regulatory agencies. There is no uniform immunity statute for the executive branch. There is no uniform immunity statute for criminal law enforcement. Nor is there uniform provision for consultation before one agency authorizes an immunity which may adversely affect the criminal law enforcement program under a statute administered by another agency.¹⁶⁶

Enactment of title II thus would replace a large group of statutes which, contrary to the assertion of the union, are diverse and poorly drafted, with a comprehensive immunity statute. Title II has had the benefit, also, of the careful study and draftsmanship which went into the project as a part of the work of the National Commission on Reform of the Federal Criminal Laws, which prepared an extremely thorough and detailed analysis and justification of the proposal now found in title II.¹⁶⁷

In that study by the National Commission will be found, incidentally, analysis of the question whether a court should be empowered to disapprove an immunity grant proposed by a prosecuting officer.¹⁶⁸ The Civil Liberties Union objects to the provision of title II placing the decision whether to grant immunity in the hands of the prosecuting officer but, in view of the full discussion of the issue in the National Commission's study, it is necessary in this article only to make two points. First, the prosecuting officer is, for reasons stated in the Commission study, in a far better position than a court to judge whether paying the price of immunity is warranted, in terms of the value of the expected testimony to the investigative effort. Second, the risk of abuse by a prosecuting officer is minimized by the fact that the immunity grant confers immunity only from use of the evidence and its fruits, rather than from prosecution.

Title II, which has passed the Senate as a part of S. 30 and has been favorably reported by the House Judiciary Committee,¹⁶⁹ promises to improve the conduct of the business of the Congress, courts, and administrative agencies, by making available needed testimony which otherwise would be withheld, while at the same time preventing the unnecessary immunizing of criminals from responsibility for their conduct, when that conduct can be proven by untainted evidence. It deserves the support of all those who are serious about moving against crime.

TITLE III — RECALCITRANT WITNESSES

Neither the compulsory process of the grand jury nor a grant of immunity assures that the testimony of the witness will be obtained. When a witness is not in a position to invoke the privilege against self-incrimination, this does not mean that he will give his full cooperation during the investigation. At this point,

166 *Hearings* at 296.

167 *Id.* at 280-327.

168 *Id.* at 312-13.

169 H.R. REP. No. 91-1188, 91st Cong., 2d Sess. (1970). Use-restriction immunity was also approved by both Houses of Congress in the adoption of H.J. Res. 1284, 91st Cong., 2d Sess. (1970) which concerned the powers of the President's Commission on Campus Unrest.

however, the investigation may be continued through use of the contempt power.

The contempt power has roots that run deep in Anglo-American legal history, and under modern law there is no question that courts have the power to enforce compliance with their lawful orders.¹⁷⁰ Current federal laws expressly confirm this ancient power. When subpoenaed before a grand jury, the witness must attend. The grand jury, however, has no power as such to hold a witness in contempt if he refuses to testify without just cause. To constitute contempt the refusal must come after the court has ordered the witness to answer specific questions. Two courses are open when a witness then refuses to testify after a proper court order: civil or criminal contempt.

Under civil contempt, the refusal is brought to the attention of the court, and the witness may be confined until he testifies; he is said to carry, as the Court of Appeals noted in *In Re Nevitt*,¹⁷¹ "the keys of [the] prison in [his] own pocket." Usually, where contempt is clear, no bail is allowed when an appeal is taken. The confinement cannot extend beyond the life of the grand jury, although the sentence can be continued or reimbursed if the witness adheres to his refusal to testify before a successor grand jury.¹⁷²

Under criminal contempt, after a hearing, the witness may be imprisoned, not to compel compliance with, but to vindicate the court's order. Federal law requires a jury trial if the sentence to be imposed will exceed six months.¹⁷³ No other limit is set.

Title III of S. 30 seeks to codify the civil contempt aspect of present law as it applies to grand jury and court proceedings in the area of the refusal to give required testimony. Here it is worth noting, too, that absent a valid privilege, in the words of the Supreme Court in *Piemonte v. United States*,¹⁷⁴ "[t]he public has a right to every man's evidence." Upon such a refusal, the court is explicitly authorized to order the summary confinement of the witness, and it is provided that ordinarily no bail shall be given to the witness pending the appeal, since this would undermine the coercive effect of the court's order and result in undue delay.¹⁷⁵

This is a vital investigative tool for the forces of law enforcement. The testimony of Mr. Paul Curran, chairman of the New York State Commission of Investigations, during subcommittee hearings on this title, underlines the necessity for such a provision:

With this grant of immunity must be coupled the right of compulsory process to produce the witness, and also the right, most importantly, to take appropriate and meaningful action against recalcitrant witnesses. They must know that if, after receiving immunity, they do not testify, they will go to jail until such time as they are prepared to testify. This provision of S. 30 for . . . [a] jail term will make it clear that the Government really means business.¹⁷⁶

170 See generally TFR ON ORGANIZED CRIME at 88.

171 117 Fed. 448, 461 (8th Cir. 1902).

172 *Shillitani v. United States*, 384 U.S. 364, 371 (1966).

173 *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

174 367 U.S. 556, 559 n.2 (1961).

175 See, e.g., *United States v. Coplion*, 339 F.2d 192 (6th Cir. 1964).

176 *Hearings* at 178.

The contempt power is most vital in organized crime cases, where investigators and courts often are confronted with witnesses who have sworn allegiance to La Cosa Nostra's code of silence. One of legitimate society's infrequent glimpses of the pervasiveness of that code was afforded last year when the De Cavalcante electronic bugging transcripts were made public by a federal court, and the head of Philadelphia's Mafia family was overheard telling the head of a New Jersey family:

The idea is, the main thing is that, that's why I say, he signed a statement, that is bad. Because no friend of ours is supposed to sign any kind of statement with the law. Never. Plead guilty, because there is a deal made that by pleading guilty, instead of getting ten years, he gets two; however, he pleaded guilty, instead of getting ten, he got one. So there's a deal there, but you still don't sign a statement, even though you plead guilty, you don't sign a confession.

Title III also amends title 18, chapter 49, United States Code, section 1073, entitled "Flight To Avoid Prosecution or Giving Testimony" to include flight to avoid contempt proceedings. The pertinent changes in section 1073 read as follows:

Whoever moves or travels in interstate or foreign commerce with intent either . . . (3) to avoid contempt proceedings for alleged disobedience of any lawful process requiring attendance and the giving of testimony or the production of documentary evidence before an agency of a State empowered by the law of such state to conduct investigations of alleged criminal activities, shall be fined not more than \$5,000 or imprisoned not more than five years or both.

The need to make this change in the Federal Fugitive Felony Act was recently brought to light in organized crime investigations in New Jersey. Concerned over a growing awareness of the sinister influence of organized crime in the state, the New Jersey Legislature in 1968 created a state commission of investigation, which was modeled on New York's successful commission. In a hearing held in July of 1969, two mob figures, Robert "Bobby Basile" Ochipinti and Frank Cocchiario, both lieutenants of Cosa Nostra boss Simone Rizzo "Sam the Plumber" De Cavalcante of New Jersey, after being subpoenaed by the commission, walked out of the state house in Trenton during a break in the hearing and fled the state to avoid a contempt charge for refusing to answer questions. Unlike a witness who flees to avoid grand jury or court testimony, these two mobsters could not be picked up by the FBI for unlawful flight. Instead, the time-consuming process of state extradition had to be undertaken.

This defect in the law may be easily remedied. With the addition of but a few words to the statute, it will be possible to use the FBI to help states such as New Jersey, now seeking to clean its own house, to help themselves.

Both the New York City Bar Association Committee and the American Civil Liberties Union raise questions about the length of confinement which can result where a witness commits a civil contempt under title III. The city bar committee members divided on the question whether confinement for civil

contempt, which is permitted under existing law and would be continued under title III, becomes punitive if a witness can be imprisoned for the life of a title I special grand jury, which can extend up to as long as three years, rather than just for the life of a regular grand jury, which under present law can extend up to eighteen months.¹⁷⁷

The Civil Liberties Union was less restrained, and stated that the long life of a title I grand jury, coupled with the union's failure to find in title III a requirement that the grand jury investigation in question remain in progress for the duration of the civil contempt imprisonment, made imprisonment of a witness under title III "punitive," rather than coercive of testimony. For those reasons, the union opposed title III.

Those objections are not valid. As the city bar committee notes,¹⁷⁸ existing law permits civil contempt confinement for refusing to answer questions before a grand jury for the remaining life of the grand jury, which can extend as long as eighteen months. Existing law also, however, permits a witness who remains in jail for refusing to testify until a grand jury is discharged, and then is released upon its discharge, to be reconfined if he repeats his refusal to answer questions before a successor grand jury.¹⁷⁹ Therefore, title III does not substantially increase the likelihood of lengthy incarceration for civil contempt.

It is true, of course, under existing law as well as under title III, that in a particular case of extended confinement a time might come when continued incarceration became punitive rather than coercive. Any limitation upon such confinement for civil contempt, however, would be determined, as Judge Friendly indicated in *United States v. Doe*,¹⁸⁰ by consideration of all the circumstances in an individual case, not by an evaluation of the face of the governing statute. Indeed, under title I, the grand jury must show that it has unfinished business before it can secure an extension of its term beyond eighteen months. This showing would tend to guarantee that a period of extended civil commitment was, in fact, sought because there was a continuing thwarting of the grand jury's investigation. Actually, therefore, a witness would find his rights protected to a greater degree where a special grand jury rather than a general grand jury was involved.

The Civil Liberties Union and the city bar committee object to title III also on the ground that it establishes an unsound standard for the granting or denial of bail pending appeal by a witness confined for civil contempt.¹⁸¹

When considering what criteria ought to govern the granting of bail pending appeal of a civil contempt confinement, it should be kept in mind that the issue of bail arises only after a witness is found, through a procedure which is thorough and most rigorous for the Government, to have been guilty of civil contempt. That procedure is very similar to the one outlined in *In Re Hitson*.¹⁸² That case involved witnesses before a grand jury who refused on grounds of self-

177 ABCNY at 18-19.

178 *Id.* at 18.

179 See *Shillitani v. United States*, 384 U.S. 364, 371 n.8 (1966).

180 405 F.2d 436, 438 (2d Cir. 1968).

181 ABCNY at 18-21.

182 177 F. Supp. 834 (N.D. Cal. 1959).

incrimination to answer, after being duly sworn, questions regarding matters being investigated by the grand jury.

Title III does not, of course, modify the procedure described in *Hitson*. Title II, on witness immunity, does so only to the extent of permitting prospective grants of immunity to be made in certain cases. Those procedures preserve a full opportunity for the witness to raise any objections and defenses he has to the civil contempt proceedings. He is found to have committed civil contempt only after full litigation of the relevant issues. It is at that point that the issue of bail arises.

Title III's standard for bail in such cases is that a judge shall deny bail "unless there is substantial possibility of reversal." The city bar committee, after quoting that standard from title III, goes on to allege that the Senate report "suggests that this language is intended to deny bail in all cases, since the report's general description of title III states that it would authorize 'confinement, without bail, until compliance is made with the order of the court.'"¹⁸³ The phrase quoted by the bar committee was taken from the portion of the committee report entitled "Scope of Amendment," which purported to be nothing more than the barest summary of the principal provisions of S. 30, and which summarized title III in only two sentences.¹⁸⁴ The section of the committee report entitled "Section-By-Section Analysis" stated explicitly, as did the face of title III itself, that title III permits the granting of bail "where there is a substantial possibility of reversal."¹⁸⁵ Thus, it is difficult to explain how the bar committee could misstate the effect of title III's bail provision as it did.

The city bar is, perhaps, even more misleading in its statement of existing law on bail in civil contempt cases than in its statement of the meaning of title III. At three places in the body of the bar committee's report on title III it states or directly implies that rule 46(a)(2) of the Federal Rules of Criminal Procedure, providing that "bail may be allowed pending appeal — unless it appears that the appeal is frivolous or taken for delay," applies to civil contempt cases.¹⁸⁶ The bar committee also asserts that title III violates "the spirit" of the Bail Reform Act, title 18 United States Code, section 3143,¹⁸⁷ although it concedes that the Bail Reform Act is confined to criminal cases and so has no application to civil contempt cases.¹⁸⁸ The bar committee's recognition that the Bail Reform Act does not apply to civil proceedings makes all the more remarkable its failure to acknowledge that rule 46 similarly does not, of its own force, have any application to civil proceedings.

The city bar committee raises inaccurate and careless objections¹⁸⁹ to the way in which *United States v. Coplon*¹⁹⁰ and *United States v. Testa*¹⁹¹ were cited in the section-by-section analysis in the Senate report on S. 30. It is true, as the committee states, that the *Coplon* court applied a standard argued by the

183 ABCNY at 19.

184 REPORT at 32.

185 *Id.* at 149.

186 ABCNY at 7, 19, 20.

187 *Id.* at 17, 19.

188 *Id.* at 19 n.32.

189 *Id.* at 19.

190 339 F.2d 192 (6th Cir. 1964).

191 326 F.2d 730 (3d Cir. 1963), *cert. denied* 376 U.S. 931 (1964).

government to be analogous to that in federal criminal rule 46(a)(2), and that the *Testa* court did not discuss the issue of bail pending appeal. The Senate report, however, did not cite those cases for "the standard announced" in them, or for the manner in which they "discussed" the issue of bail. The report, instead, cited them as examples of "what is now present practice."¹⁹² Thus, the city bar committee's statement that the Senate report is "erroneous"¹⁹³ is itself erroneous.

The important question, of course, is whether the standard for granting or denying bail stated in title III is a sound one, in view of the interest of the public in the efficacy of civil contempt, and the interest of a witness in avoiding confinement for conduct which later will be found not to constitute contempt of court.

One should note, at the outset, that even for bail pending appeal of a criminal conviction, a defendant does not necessarily receive bail even though it is determined that his appeal is not "frivolous or taken for delay." That phrase provides a prohibition against the granting of bail for frivolous or dilatory appeals, but the granting of bail for substantial appeals remains entirely discretionary — there is no right to bail, even under the criminal provisions of rule 46.

The question, then, is only how broad the prohibition against the granting of bail, the denial of discretion to allow bail in extreme cases, shall be. I submit that the substance of the two standards — criminal rule 46's standard of "frivolous or taken for delay," and title III's standard of "substantial possibility of reversal" — is the same in each case. What is different between title III and criminal rule 46 is not the substance of the standard, but the burden of showing whether the standard is or is not satisfied in each case. Criminal rule 46 places on the Government the obligation to show that the appeal is frivolous or dilatory, while title III places a comparable burden on the individual in contempt of court.

That burden, in my opinion, belongs on the witness once he has been held in civil contempt. In the first place, the basis of the contempt already has been probed in the trial court under the rigorous procedures mentioned above. In the second place, civil contempt is unique in that its effectiveness is largely undermined if the witness found in contempt can take an appeal, regardless of its lack of merit, and remain free on bail. The purpose of holding him in contempt is to compel him to testify, but as time passes and the investigation either proceeds without the needed evidence or grows stale, the purpose of the contempt holding is defeated. At the suggestion of the Department of Justice,¹⁹⁴ a requirement that the appeal be disposed of within thirty days, and sooner if practicable, was inserted, so that the need to protect the effectiveness of civil contempt could be reconciled, as far as possible, with the interest of the individual witness. Of course, where there is a substantial possibility of reversal, bail can be granted in any case.

The city bar committee also makes the unfounded claim that a district judge who finds a witness to be in civil contempt will have more difficulty under title III's standard, than under the standard applied in the *Coplon* case, in

192 REPORT at 149.

193 ABCNY at 19.

194 REPORT at 109.

rendering an unprejudiced decision as to whether or not to grant bail.¹⁹⁵ As is noted above, it is not so much the substance of the standard as the burden of satisfying it that has been changed by title III, while any issue of prejudice would go not to the procedure but to the substance of the judgment that the district judge must make about the accuracy of his contempt finding. More important, the authority in title III for bail pending appeal of the civil contempt finding is intended "to permit an appellate court to act to alleviate a manifestly erroneous confinement."¹⁹⁶ The Senate committee report made it explicit that the bail authority was aimed primarily at the appellate court, rather than the trial court, but the city bar committee's suggestion of district court prejudice makes no reference to that passage in the committee report.

Finally, omitted entirely from the bar association's discussion is rule 23 of the Federal Rules of Appellate Procedure, which governs bail in habeas corpus appeals, an appellate procedure that is, like civil contempt, civil and not criminal in character. Rule 23 makes the question of bail solely one of discretion; it set no standard whatsoever. It is, in short, seriously misleading to convey the impression that rule 46 or the Bail Reform Act expresses the full range of present federal policy toward bail.

TITLE IV — FALSE DECLARATIONS

Title IV of S. 30 represents an effort to insure that truthful testimony will be given in our grand juries and courts.

Organized crime's defeat of investigations and prosecutions through the fabricated story has occasioned our re-examination of the law in this area. However, the reforms implemented by these rules of pleading and evidence ought not be artificially limited to organized crime cases. At present, federal law interposes several impediments to securing truthful testimony. As we all are aware, the usual standard of proof in a criminal prosecution is proof beyond a reasonable doubt. Meeting that standard, however, is not sufficient to secure a conviction for perjury.¹⁹⁷ If the proof is circumstantial and not direct, no conviction may be obtained. For reasons rooted in medieval law — possessing no contemporary relevance — the testimony of one witness, no matter how trustworthy, reliable or sufficient — standing alone — is not legally adequate for a perjury conviction.

The American Civil Liberties Union refers to those two special rules for perjury cases, and the additional rule that the Government can obtain a conviction for perjury in the making of two manifestly contradictory statements under oath only if it can prove which of the two statements is false, as "time-tested" and "historic" rules.¹⁹⁸ The union does not mention that as long ago as 1953, as a result of the studies of a special Commission on Organized Crime,¹⁹⁹

195 ABCNY at 20.

196 REPORT at 149.

197 See generally TFR ON ORGANIZED CRIME at 88-91 (statistics on conviction and case analysis).

198 ACLU January 1970 letter at 6.

199 ABA COMM. ON ORGANIZED CRIME, REPORT 50-52 (1951); see also *ABA Testimony* (recommending that the two sections of the Model Perjury Act be substituted for the language of title IV).

the American Bar Association and the National Conference of Commissioners on Uniform State Law had recommended their abrogation.²⁰⁰ These rules are more accurately described as anachronistic and outmoded. Time has shown them to be ineffective to accomplish the purposes which are supposed to justify them, and destructive of the sound administration of justice.

Since the irrelevance of the special perjury rules to the needs of the modern administration of justice becomes particularly apparent upon an examination of the history upon which those rules are based, some of that history was summarized in the Senate committee report:

The first statutory reference to the crime of perjury appeared in 1495, 3 Hen. 7, c. 1 (1495). The Star Chamber read this act as authorizing punishment for perjury. Although the crime was theoretically cognizable in the ordinary criminal courts, it was dealt with almost exclusively in the Star Chamber, where the proceedings were presided over by the Lord Chancellor and conducted according to the ecclesiastical law under which a quantitative notion obtained of the credit to be accorded to the testimony of a witness under oath. From this notion, the so-called two witness rule developed, that is, two witnesses to the same fact are necessary to establish it. Lord Chief Justice Hardwicke in *Rex v. Nunez*, Cas. T. Hard 265, 95 Eng. Rep. 171 (K.B. 1736), summed up the rule: "One man's oath is as good as another's." When the Star Chamber was abolished in 1641, the principles it had established in perjury prosecutions were carried over into the common law.

In perjury cases Federal courts today still follow the two witness rule and its corollary, the direct evidence rule, which requires a conviction for perjury to be based on direct not circumstantial evidence. The two witness rule, however, is misnamed. Under modern law, it no longer requires the testimony of two witnesses; it merely provides "that the uncorroborated oath of one witness is not enough to establish the falsity of the (testimony of the) accused . . ." *Hammer v. United States*, 271 U.S. 620, 626 (1926). The corroborating evidence need not independently establish the falsity of the testimony; it is enough if it furnishes a basis to overcome the oath of the accused and his presumption of innocence. The rule has no application, however, to elements of perjury other than falsity.²⁰¹

The President's Crime Commission examined this issue thoroughly. It had before it a study explaining the history of the special rules for perjury cases, and demonstrating that those rules impede sound perjury prosecutions yet fail to accomplish their purpose of preventing abusive prosecutions.²⁰² On the basis of its study of the problem, the President's Crime Commission concluded that federal perjury law should abandon the ancient, restrictive rules on perjury prosecutions, as some of the states have done.²⁰³ The Crime Commission reported that the incidence of perjury is higher in organized crime cases than in routine criminal matters. We all know that perjury prosecutions are rarely successful. The effect of this lack of success upon the initiation of prosecutions is obvious. Again, we can easily infer the likelihood of perjury in instances of organized crime prosecutions,

200 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 403-9 (1952).

201 REPORT at 58.

202 TFR ON ORGANIZED CRIME at 88-91.

203 CHALLENGE OF CRIME at 201.

due to well-established witness-intimidation efforts of the underworld. The Department of Justice endorsed this provision, stating that “. . . we are inclined to agree with the recommendation of the President's Commission that abolition of these rules is desirable.”²⁰⁴

There are at least two other barriers to obtaining truthful testimony. Under present law, even if a witness makes two statements which are so patently contradictory that one or the other must be false, the prosecution must nevertheless prove which of the statements is false and then prove an intentional falsehood.²⁰⁵ In accord with the Commission recommendation, the committee rightfully retained the requirement that an intent to falsify be shown. However, if one of two statements logically must be false, then title IV recognizes that fact.²⁰⁶

The last impediment to the telling of truth is that under present federal law one is not allowed to recant, correct untruthful statements, and escape prosecution.²⁰⁷ Therefore, at present a witness is discouraged from correcting untruthful testimony. Title IV would allow one to avoid criminal liability by correcting his testimony, so long as it is not already apparent by other testimony that he is lying, or so long as he has not substantially misled the proceeding by his original untruthful testimony.

Title IV encourages truth by facilitating the prosecution of those who have lied, and by encouraging the correction of testimony without fear of prosecution. Congress should do everything in its power to make certain that there are no impediments to truthful testimony in the administration of justice in the federal courts — in all cases as well as the more serious organized crime cases.

Since the thorough consideration of the history and merit of the restrictive rules for perjury cases by the Senate committee and by the President's Crime Commission was a matter of record when the Civil Liberties Union submitted its letter of January 20 to every Senator, it is remarkable that the Union dismissed that experience simply by referring to the ancient rules as “time-tested” and “historic” — terms which could scarcely rebut the considered conclusions of the Senate Subcommittee and the Crime Commission, or the evidence upon which those conclusions were based.

Still more remarkable is the manner in which the Civil Liberties Union misuses a relevant decision by the U.S. Supreme Court, when it states: “It [title IV] does away with the historic two-witness rule. See *Weiler v. United States*, 323 U.S. 607 [*sic*] (1944).”²⁰⁸

The New York City Bar Committee compounds the error by quoting at length from the *Weiler* decision.²⁰⁹ The passage quoted by the city bar committee

204 *Hearings* at 371.

205 *See, e.g.*, *United States v. Nessenbaum*, 205 F.2d 93 (3d Cir. 1953).

206 The following states now have contradictory statement provisions: CAL. PENAL CODE § 118a (West 1970); LA. REV. STAT. ANN. § 14.124 (1950); MD. ANN. CODE art. 27 § 435 (1957); MINN. STAT. ANN. § 609.48(3) (1964); N.H. REV. STAT. ANN. § 587:1-b (Supp. 1969); N.J. STAT. ANN. § 2A:131-5 (1969); N.Y. PENAL LAW § 210.20 (1967); OKLA. STAT. ANN. tit. 21, § 496 (Supp. 1969); TENN. CODE ANN. § 39-3301 (1955); UTAH CODE ANN. § 76-45-1 (1953); VA. CODE ANN. § 18.1-276 (1950).

207 *Cf. United States v. Norris*, 300 U.S. 564, 573-74 (1937).

208 ACLU January 1970 letter at 6.

209 ABCNY at 22.

makes the point that the two-witness rule is "deeply rooted in past centuries." It notes that opponents of the rule argue that it interferes with the administration of justice while its proponents argue, "not without persuasiveness," that the two-witness rule protects honest witnesses from hasty and spiteful perjury prosecutions; and it goes on to conclude, based upon that discussion of the issue, that the Supreme Court "cannot reject as *wholly unreasonable*" the two-witness rule.²¹⁰ (Emphasis added.) The city bar committee, however, fails to quote the paragraph of the opinion immediately following the two paragraphs quoted in the city bar committee statement:

Whether it logically fits into our testimonial pattern or not, the government has not [in the litigation of the *Weiler* case] advanced sufficiently cogent reasons to cause us to reject the rule. As we said in *Hammer v. United States, supra*, [271 U.S. 620] 626-27, "The application of that rule in federal and state courts is well nigh universal. The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice."²¹¹

Thus, the Supreme Court declined to reject the two-witness rule less on the basis of its intrinsic merit, as to which the court stated opposing arguments and concluded only that the rule was not "wholly unreasonable," but more on the basis that the rule was one of long standing and had not been changed by affirmative legislation. Now, however, the President's Crime Commission and a committee of the U.S. Congress have devoted extensive study and consideration to the question, and have found in fact that the two-witness rule neither is "satisfactory in practice" nor "fits into our testimonial pattern." The rule has also been rejected in state law.²¹² The very foundation which was lacking in the *Weiler* case, and led the Supreme Court there to decline, as a court, to change a rule of law which had not been changed by the Congress, now has been supplied by legislative action and thorough study. The *Weiler* case, therefore, represents insufficient authority against congressional abrogation of the two-witness rule, and was improperly employed by the Civil Liberties Union and the New York City Bar Committee.

The provision of title IV dealing with "manifestly contradictory declarations" is subjected, both by the Civil Liberties Union and by the New York City Bar Committee, to a criticism which is so inaccurate and unfounded that the criticism reflects less on the propriety of enacting title IV, than it does on the care with which its critics considered it before voicing their opinions. It reveals, in addition, the extraordinary degree to which the City Bar Committee appears to have served only as an echo of the Civil Liberties Union's position, rather than as an impartial committee of a professional association evaluating proposed legislation.

The criticism, as voiced by the Civil Liberties Union, is that title IV

relieves the Government of the obligation to prove that a statement was

²¹⁰ *Id.*

²¹¹ *Weiler v. United States*, 323 U.S. 607, 609-10 (1944).

²¹² *See, e.g.*, N.J. STAT. ANN. 2A:131-6 (1969).

in fact "knowingly false," by permitting a conviction to be based on nothing more than allegedly "contradictory declarations." Such a procedure is inconsistent with the presumption of innocence.²¹³

The city bar committee raised the same criticism by stating:

First, it must be made more clear that willfulness must be established, even where falsity is shown through inconsistent statements. Requiring conviction upon proof of inconsistent statements would, in effect, fail to recognize the possibility of an innocent inconsistency or contradiction and take the issue of reasonable doubt away from the jury.²¹⁴

The specific meaning of the city bar committee's objection was made more clear in the footnote to that suggestion, which stated: "This could be accomplished by inserting the word 'knowingly' before the word 'made' in each of the first two sentences of Section 1623(c)."²¹⁵

The inaccurate and prejudicial character of this criticism of title IV becomes apparent when the words of title IV itself are examined:

In any prosecution under this section, the *falsity* of the declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made manifestly contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. (Emphasis added.)

Thus, according to the explicit terms of title IV, the only element of the offense which is established when the specified conditions are met as to inconsistent statements is the element of "falsity." The same point is repeated in the Senate committee report, which states that "[p]roof of falsity may also be made by showing logical inconsistency."²¹⁶ Falsity is, of course, only one of a number of elements of the offense created by title IV. This is apparent when the paragraph of title IV establishing the prohibition and the punishment for its violation is read:

Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States *knowingly* makes any materially *false* declaration . . . shall be fined not more than \$10,000 or imprisoned not more than five years, or both. (Emphasis added.)

Thus, knowledge and falsity are distinct elements of the offense. Regardless of whether falsity is proven by inconsistency of two statements of the witness or by some other means, the defendant's knowledge remains an issue in the case to be proven beyond a reasonable doubt. To put it another way, to make the change in title IV suggested by the city bar committee in its footnote would result in nothing but redundancy, and to raise the objection, as the union and

213 ACLU January 1970 letter at 6.

214 ABCNY at 23.

215 *Id.* at n.37.

216 REPORT at 149.

bar committee did, can result in nothing but prejudice to the consideration of title IV.

It is worth noting, incidentally, that even if title IV did not require proof of knowledge in a case involving two inconsistent statements, the provision would not be, as the union claims, "inconsistent with the presumption of innocence."²¹⁷

It is the requirement of criminal intent, not the presumption of innocence, which such a bill would attempt to abolish. The "presumption of innocence" is a phrase by which one refers to the burdens of prosecution and proof borne by the Government in a criminal case.²¹⁸ Since the Civil Liberties Union must have been aware of that distinction, its escalation of an issue regarding the element of criminal intent — which the union erroneously thought to be involved in title IV — into an issue of violation of the presumption of innocence must be taken as a technique of rhetoric rather than analysis.

The city bar committee takes title IV to task also in terms of its draftsmanship, calling for "more carefully drafted limitations and protections" than those now found in title IV.²¹⁹ When specific changes in drafting which are suggested by the city bar committee are examined, however, confidence in the draftsmanship of title IV is restored. The city bar committee suggests that falsity should be inferred from inconsistency of two statements only where the statements are "irreconcilably inconsistent and material."²²⁰ In order to accomplish that, the city bar committee recommends that title IV

be amended to conform with the N.Y. Penal Law § 210.20 (McKinney 1967), which requires that the defendant's declarations "are inconsistent to the degree that one of them is necessarily false" and that "the circumstances are such that each statement, if false, is perjurally so. . . ."²²¹

I submit that title IV provides exactly the same thing in fewer words by requiring that the two statements be "manifestly contradictory . . . [and] material to the point in question." Indeed, the language used in title IV is based both upon the New York law and upon the Model Penal Code²²² approved by the American Law Institute. I find in its draftsmanship no grounds for criticism for title IV.

The Civil Liberties Union makes another objection to title IV, which is so misleading that it, too, deserves comment:

Finally, although title IV properly bars prosecution if a witness admits in a continuous proceeding the falsity of a contradictory statement in that proceeding, it limits that bar to situations where at the time of the admission the false statement "has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed." These conditions are too vague and subjective to provide sufficient notice and guidance to a person as to whether he is committing a crime. Indeed,

217 AGLU January 1970 letter at 6.

218 See *United States v. Nimerick*, 118 F.2d 464, 468 (2d Cir. 1941), *cert. denied*, 313 U.S. 592 (1941).

219 ABCNY at 6; *accord*, *ABA Testimony*.

220 ABCNY at 22.

221 *Id.* at 23.

222 See MODEL PENAL CODE § 241.1 (Proposed Official Draft, 1962).

if contradictory statements standing alone are sufficient for a conviction beyond a reasonable doubt, then it is difficult to see how the same contradictory statements, once made, have not made manifest that the falsity has been or will be exposed. As a result no admission would be soon enough to bar prosecution.²²³

The last two sentences in that paragraph of the ACLU's statement are accurate, but are not a basis for rejecting or modifying title IV. The union simply points out that once a witness has made two manifestly contradictory statements the inconsistency has become manifest, so the witness is unable under title IV to obtain protection from perjury prosecution by recanting and telling still a third version of the events, or by reiterating one of the two inconsistent statements he has given previously. Existing federal law gives a witness no right to recant and obtain protection from perjury prosecution, so it is scarcely a sound criticism of title IV to complain that it does not permit a witness, who has already given two inconsistent versions of an event, to obtain complete immunity from perjury prosecution by repeating one of them or coming up with still another version of the event.

The rest of the paragraph quoted from the ACLU statement is equally invalid as a criticism of title IV but, what is worse, it is even more misleading. It states that the criteria governing whether or not recantation is effective — which are whether or not the perjury already has substantially affected the proceeding, and whether or not it has become manifest that the falsity has been or will be exposed — are “too vague and subjective to provide sufficient notice and guidance to a person as to whether he is committing a crime.” Those criteria do not, it is obvious, define a “crime.” Instead, they determine whether or not a witness has repudiated his previous crime of perjury early enough so that his recantation should be allowed to bar his prosecution for the perjury. The recantation provision does not, as the union implies, deal with the case of a witness who first tells a true version of an event, and then changes his mind and wishes to perjure himself about the event. That kind of duplicity can hardly be called “recantation.” Instead, the recantation provisions of title IV establish the right of a witness to protect himself from prosecution for perjury he has already committed, by righting the wrong before it has harmed the proceedings during which he lied. As criteria governing the right to establish a defense, rather than as a prohibition of conduct deemed criminal, the criteria in title IV are amply specific and clear.

The Congress has, of course, already abolished the two-witness and direct evidence rules for some false statement prosecutions — e.g., 18 U.S.C. § 1001 (1964). The attempt by the city bar committee to distinguish that statute from title IV²²⁴ is not persuasive. It stresses the supposed danger of spiteful perjury prosecutions, which, as the President's Crime Commission study showed, is not substantially reduced by the special rules applied in common law perjury prosecutions. In any case, any difference in the incidence of spiteful prosecutions under section 1001 and under ordinary perjury provisions is speculative at best.

223 ACLU January 1970 letter at 6.

224 ABCNY at 23-24 n.39.

If there were any such difference, it would appear to be outweighed by the increased danger of unwarranted perjury prosecution of truthful witnesses created by the fact that prosecutions under section 1001 are not restricted, as the city bar committee points out,²²⁵ to formal statements made under oath. The city bar committee's other attempts to distinguish section 1001 from title IV seem to display a lack of appropriate regard for the importance of the federal judicial system, not only in organized crime cases but in other criminal and civil cases as well. The city bar committee points out that the purpose of section 1001 "is to prohibit false statements of all kinds which might impede the exercise of federal authority . . . and to protect vital government functions from deceptive practices."²²⁶ False testimony, of course, impedes the exercise of federal judicial authority just as it impedes the exercise of authority by administrative agencies. The federal courts review determinations made by such agencies, and perform so many other "vital government functions" which are subverted by deceptive practices that the courts obviously need the protection of effective perjury provisions as much or more than do the departments and agencies covered by section 1001. That protective purpose is exactly the one underlying title IV, which in my view promises major improvement in the administration of justice in the U.S. courts.

TITLE V — WITNESS PROTECTION FACILITIES

Title V, providing witness facilities, was drafted in response to the overwhelming difficulty of insuring that witnesses in organized crime cases are produced alive and unintimidated at trial. If witnesses have a duty to give to society the benefit of their testimony, then surely society owes them every protection it can offer. Title V affords broad power to the Attorney General to care for witnesses and their families so long as there is jeopardy to the life or person of a witness or a member of his family. The Attorney General may offer these facilities to witnesses, but of course cannot require them to accept his offer.

This title is also in response to a recommendation of the President's Crime Commission.²²⁷ It has the full support of the Department of Justice. It is not necessary for me to recount horror stories showing the extent of torture and terrorism practiced by organized crime in its efforts to prevent unfavorable testimony. Suffice it to note the testimony of the Attorney General that between 1961 and 1965, the organized crime program, despite attempts to offer protection, lost 25 informants.²²⁸ More need not be added. All lawyers are well aware of the need to protect government witnesses against retribution by mob enforcers.

The only criticism of title V has been raised by the American Civil Liberties

225 *Id.*

226 *Id.*

227 CHALLENGE OF CRIME at 204.

228 *Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st sess., pt. 3, at 1158 (1965). For indications that this problem is continuing, see also 116 CONG. REC. H1564 (daily ed. Mar. 5, 1970) (remarks of Congressman Poff and insertion of New York Times article on murders of narcotics informants); *id.* at H6363 (daily ed. July 6, 1970) (remarks of Congressman Steiger on deaths of witnesses in Addonizio case).

Union which stated that "It would be desirable to make it perfectly clear that no witness can be unwillingly confined or detained in such facilities."²²⁹

That already is "perfectly clear." Title V's section dealing with those facilities expressly authorizes the Attorney General only to "offer" witnesses the opportunity to use the facilities. The Senate committee report adds that "[t]here is no requirement that any one accept such an offer by the Attorney General."²³⁰

All that this criticism of S. 30 reveals is the extreme character of the opposition to the bill offered by the American Civil Liberties Union.

TITLE VI — DEPOSITIONS

Title VI deals with the taking of depositions to preserve evidence in federal criminal cases. Such a measure was included in S. 30 when it was introduced, and its provisions were revised and improved considerably while the bill was in committee.

The proposed section would expand the present right of a defendant under rule 15 of the Federal Rules of Criminal Procedure to seek court permission to take the deposition of his own witnesses, and would extend the same right to the Government. Like rule 15, the section would permit such depositions only for the purpose of preserving a party's own evidence, not for the purpose of discovering the opponent's evidence. At the same time, the proposed section contains full guarantees of the defendant's rights to counsel and to cross-examination of the deponent. Title VI is designed to fill a gap in our criminal procedure which sometimes is important in other than syndicate cases, but most frequently is a frustrating problem in organized crime prosecutions.

The leaders of organized crime daily conduct their criminal activities and shady businesses by intimidating citizens and bribing officials. In the rare case in which the Government can overcome the difficulties in gathering evidence and can obtain an indictment, it is an all too common step for the Mafia boss to resort to the same techniques, intimidation and bribery of witnesses, in order to obtain a dismissal of the charge or a not guilty verdict. Should witnesses prove stubborn and honest, some organized crime figures have shown little hesitation to murder witnesses. Senator Tydings, in giving the subcommittee testimony based in part on his own experience as U.S. attorney for Maryland, aptly stated:

Unimplicated witnesses have been, and are now, regularly bribed, threatened, or murdered. Scores of cases have been lost because key witnesses turned up in rivers in concrete boots. Victims have been crushed — James Bond like — along with their automobiles by hydraulic machines in syndicate-owned junkyards.²³¹

Title VI is designed to protect that evidence, and evidence in other cases in danger of destruction or loss, in two ways.

By authorizing the taking and recording of evidence under full guarantees

²²⁹ ACLU January 1970 letter at 6.

²³⁰ REPORT at 150.

²³¹ Hearings at 161.

of counsel and cross-examination, title VI would preserve the evidence which a witness had to offer in a form which could be used at trial if and only if the evidence became otherwise unavailable. In addition, by preserving the evidence which an individual could give, title VI would largely eliminate any incentive of a defendant or his organized crime associates to threaten, injure, or kill the witness. Indeed, depositions may be more effective than stone walls and guards in protecting the lives of informants and other citizens with information concerning organized crime.

The ACLU begins its attack upon title VI with a most unfair summary of its provisions. The ACLU says, in support of an objection that title VI is too broad, that "[t]itle VI provides for the taking of pre-trial depositions from witnesses when 'due to exceptional circumstances it is in the interest of justice.'"²³²

This summary fails to disclose that the title further limits the taking of depositions by authorizing their taking only on federal court order and only "after the filing of an indictment or information." Both of these additional limitations appear on the face of title VI, so there is no justification for the ACLU's overstatement of the scope of title VI. The error is particularly surprising when it is compared with the care with which the ACLU pointed out the limitations on deposition authority in the existing provisions of rule 15 of the Federal Rules of Criminal Procedure. In its only two summaries of rule 15, the ACLU was careful to specify that rule 15 authorizes the taking of a deposition "only in limited specified circumstances." When equal care is used in studying and analyzing title VI, the objections to it are found to be groundless.

The ACLU charges that title VI "adopts a vague standard" to be used in determining whether or not a deposition may be taken. Again, the ACLU is guilty of misstatement by omission. In its statement of the criteria for the taking of a deposition it fails to mention that depositions are further limited to the purpose of preserving evidence, and cannot be taken simply because, for example, the Government might wish to obtain discovery of the defendant's evidence. The New York City Bar Committee notes that limitation on title VI, but joins the union nevertheless in urging that the title fails adequately to specify the conditions under which depositions may be taken.²³³

The criterion for taking a deposition which requires that "due to exceptional circumstances it . . . [be] in the interest of justice" that the deposition be taken and preserved is not, as the city bar and ACLU state, excessively vague. Phrases such as this one are commonly used in procedural statutes and rules. For example, rule 33 of the Federal Rules of Criminal Procedure authorizes a district court in a criminal case to grant a new trial "if required in the interest of justice." Against such precedents and usage supporting the propriety of standards similar to title VI's the city bar and ACLU offer only the bald and unsupported assertion that title VI's criteria are "vague."

The standards adopted by title VI for taking of depositions are supported by more than precedent. They are sustained also by the practical necessity that courts be given powers flexible enough to protect the interests of both society

232 ACLU January 1970 letter at 7.

233 ABCNY at 7.

and the defendant. The use of a standard such as "the interest of justice" is necessary in making procedural decisions such as authorizations for depositions, since such decisions ordinarily depend upon too great a variety of circumstances to permit more detailed specification of the relevant factors. This need has been sadly demonstrated in individual cases such as the one described in the statement of Mr. Frank Hogan, the district attorney of New York County, to the Senate subcommittee concerning the deposition provisions of S. 30:

Had there been in existence in New York State, for instance, the authority to take depositions from prosecution witnesses in the public interest, the testimony of one Peter LaTempa, who died on January 12, 1945, from poisoning while in jail, would have been available in 1946 at the trial of Vito Genovese and four co-defendants for the crime of murder and would have thus precluded the direction of an acquittal by the court. But under New York law, the authority to take testimony from a prosecution witness can only be exercised when a witness is about to leave the state or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial. If power to take depositions had been as broad as that which would be authorized in the public interest by the proposed amendment, the outcome of the Genovese case might have been different.²³⁴

Thus, the criteria in title VI are necessary and appropriate ones, the federal district courts are used to applying such standards, and the courts of appeal are accustomed to reviewing the exercise of discretion under such standards on procedural subjects.

The ACLU also complains that title VI is largely justified in the Senate Judiciary Committee Report by problems in cases concerning organized crime, but that the applicability of the title is not limited to organized crime cases. The fact is, however, that depositions are often desirable in cases not involving organized crime, and the committee report, though it stresses organized crime cases because of the great contribution depositions can make to their prosecution, points out that title VI should and would apply to cases not involving organized crime. The report specifies that title VI "will abrogate present Fed. R. Crim. P. 15 . . . and it is intended to reflect present practice under rule 15."²³⁵

Rule 15, of course, is applicable to every federal criminal case, whether involving organized crime or not.

Furthermore, it would be practically impossible to draft title VI in such a way as to confine its operation to organized crime cases. The special need for deposition authority in cases which do involve organized crime arises sometimes primarily from the characteristics and conduct of the defendant, and sometimes primarily from the nature of the precise charge and evidence against him. For example, a Mafia leader who is disposed to use violence, threats, bribery, or influence to destroy testimony against him will be as willing to use those means in a case against him not connected with his organized crime operations, such as a child molesting charge, as he will be in a prosecution for, say, extortion. However, obviously, the Congress should not attempt to write a deposition

²³⁴ *Hearings* at 353.

²³⁵ *REPORT* at 151.

law which automatically discriminates among criminal defendants on the basis of their past history and membership in criminal syndicates. Such distinctions must be applied, and they already are applied under existing rule 15 when, for example, a defendant needs a deposition because organized crime retaliation threatens a defense witness whose testimony would expose syndicate operations. However, such distinctions must continue to be applied through the exercise and review of judicial discretion, not through the creation by Congress of automatically different pretrial procedures for different defendants. Title VI, like rule 15, relies to some degree upon judicial discretion to apply such distinctions. Only through judicial discretion can depositions be authorized for every case in which they are needed, many but not all of which will involve organized crime, and not for cases in which depositions are not needed.

Another criticism of title VI offered by the ACLU is that title VI would "carry us unduly close to a 'paper record trial,'" especially in view of "the absence of any provision in title VI governing the use of a deposition." The ACLU concludes that depositions under title VI "will tend to impair a defendant's constitutional right to cross-examine witnesses" unless "a defendant is given substantially greater rights to pretrial discovery," since the ACLU feels that the taking of a deposition forces "defense counsel to cross-examine Government witnesses long before trial, and hence long before it has been possible to learn the full scope of the evidence."²³⁶

The New York City Bar Committee echoes these objections by the union. The bar committee decries the lack of an explicit provision in title VI dealing with the criteria for admissibility of a deposition in a criminal case. It argues that a defendant's opportunity to cross-examine at the taking of a deposition is inadequate, and calls, as the union does, for greater pretrial discovery for defendants in cases where depositions are taken.²³⁷

This criticism is a grave one, because of its constitutional implications and its superficial plausibility. However, examination of the criticism shows it to be utterly groundless.

In the first place, there is no basis for the feeling on the part of the critics of title VI that the supposed risk of a "paper record trial" is "heightened by the absence of any provision in title VI governing the use of a deposition."²³⁸ The committee report is most explicit on this question: "Admissibility of depositions . . . is to follow previous law." Furthermore, the provisions of existing rule 15 governing use of depositions at trial merely codify preexisting rules of admissibility of depositions, so even if the report did not state that the rule 15 standards of admissibility are to be maintained, nevertheless those standards would continue to apply.

There is no reason why the congressional intent, that the standards of admissibility found in existing law continue to apply, must be stated on the face of title VI. On the contrary, it is common practice to make no reference to existing law when there is no congressional intent to change it. Where extra clarity is desired concerning that intent, it is possible just to insert in the con-

236 ACLU January 1970 letter at 7.

237 ABCNY at 24-26.

238 ACLU January 1970 letter at 7.

gressional history a statement that the existing law will continue to govern that subject, as the Senate Judiciary Committee did when it stated, in its report, that "[a]dmissibility of depositions . . . is to follow previous law."²³⁹ In view of that clear expression of intent, the failure to carry forward from rule 15 into title VI the sketchy provisions of rule 15 incorporating a massive and complex body of decisional law, both constitutional and supervisory, concerning the admissibility of depositions and analogous extrajudicial statements, has no significance.

Since the Senate Judiciary Committee Report does make it so clear that title VI carries no intention of altering the law on admissibility of depositions, this statement, found in a footnote to the New York City Bar Committee's report is misleading:

While the Report does mention the distinction between the standards governing the taking of a deposition and those for using a deposition, the single example it gives of the latter hardly establishes minimal constitutional requirements:

"A lawfully obtained deposition may not, for example, be substituted, without more, for the testimony of a witness otherwise present, able and willing to testify as to the same matters at trial." Senate Report at 152.²⁴⁰

The statement from the Senate report quoted by the city bar committee obviously made no attempt to raise a negative inference that depositions are admissible in evidence in every case other than the abstract hypothetical briefly described there. For the city bar committee to create and then criticize such a negative inference, in spite of the clear expression of intent in the Senate Committee report that title VI does not alter existing law concerning admissibility, is unnecessarily to stir up constitutional fears regarding a measure which does not legislate regarding constitutional rules of admissibility. This escalation of the issues raised by title VI is exemplified in the bar committee's succeeding footnote as well, where it clearly implies that unless title VI legislates concerning the admissibility of depositions, their admissibility will have to be developed in "constitutional litigation."²⁴¹ Actually, of course, the federal and state courts develop rules of admissibility on nonconstitutional bases, such as the power of federal appellate courts to supervise the administration of justice in lower federal courts, and the traditional power of courts to develop rules for the admissibility of evidence in their proceedings. The bar committee is guilty, it appears, of seeing legal issues exclusively in constitutional terms.

Clearly, the already existing standards of admissibility do not authorize a "paper record trial." Instead of merely using that phrase, the ACLU, if it desires repeal of the traditional common law rules of evidence exemplified in rule 15, should say so openly and make a persuasive case why it considers the existing rules of evidence unconstitutional. Clearly, the ACLU has not made that case insofar as title VI is concerned.

The New York City Bar Committee has, at least, made explicit its desire

239 REPORT at 151.

240 ABCNY at 25 n.40.

241 *Id.* at n.41.

that the Congress overrule existing law concerning the admissibility of extra-judicial testimony. The bar committee states that "We believe that absence of a Government witness from the jurisdiction should rarely, if ever, permit the Government to use his deposition at trial."²⁴² That belief appears to reject the existing law concerning what constitutes "unavailability" of a witness.²⁴³

While the city bar committee is more explicit than the union in stating its desires it is not, however, superior in the degree to which it defends them. The committee states no reasons why absence of a Government witness from the jurisdiction, coupled with the efforts to procure his attendance (which the city bar committee acknowledges appear already to be required by existing law²⁴⁴), no longer should constitute "unavailability" as much as physical inability to testify admittedly does.

This failure of the city bar committee even to attempt to justify its position should be contrasted with the careful documentation by the Senate Judiciary Committee of the need for enactment of title VI's authority to take depositions, which would be admissible, if existing law governing admissibility is maintained, in a case where a witness was outside the jurisdiction and could not be brought before the court by the Government's most diligent efforts. This showing of the need for enactment of title VI was augmented recently by the experience of the Justice Department with the prosecution in Tucson of three reputed Mafia leaders. In that case, Joseph Bonnano, the alleged former boss of a New York La Cosa Nostra family, and Charles Battaglia and Peter Joseph Notaro, two alleged La Cosa Nostra members, were charged with conspiracy to obstruct justice by obtaining false testimony from a former police sergeant.

All three defendants were, however, acquitted last March 4, because an essential but reluctant witness, who had corroborated the Government's case in testimony before the grand jury that returned the indictment, disappeared before the trial. The testimony of that witness, Floyd Max Shumway, obviously was in danger of loss before trial, and could have been preserved if title VI had been law at the time. Since Congress had not yet enacted title VI, no deposition could be taken, and the jury was needlessly deprived of the opportunity to hear crucial evidence. The Bonnano case exemplifies the kind of situation in which the city bar committee would deny the Government any way of preserving the testimony of such a witness and using it in court if he disappeared the way Mr. Shumway disappeared. The bar committee's position on this point is, in my view, indefensible when compared with existing law.

The ACLU resorts again to hysterical language when it claims that title VI would "force defense counsel to cross-examine Government witnesses long before trial, and hence long before it has been possible to learn the full scope of the evidence." The court can control the timing of the deposition and the trial, so there is no basis for the suggestion that a "long" time would pass.

Nor is the union's insistence, joined by the city bar committee, that the taking of a deposition by the Government be conditioned on the Government's making pretrial discovery of its case to the defendant, warranted by existing

²⁴² *Id.* at 26.

²⁴³ *See, e.g.*, Barber v. Page, 390 U.S. 719 (1968); CAL. EVIDENCE CODE § 240(4)-(5).

²⁴⁴ ABCNY at 25 n.41.

practice or sound reason. The defense counsel's alleged ignorance of "the full scope of the evidence" when he cross-examines the witness at the deposition under title VI is the same as it is under existing rule 15, where one codefendant takes a deposition and another codefendant finds that he must cross-examine before the trial. The situation is also very similar to that arising in every criminal trial when the Government's first witness takes the stand. The defense counsel often must cross-examine the first witness with the same degree of knowledge of the charge and evidence in the case as a defense attorney now has under rule 15 and will have under title VI.

There are some cases in which it is true that, as the city bar committee states, the prosecutor makes an opening statement at the beginning of the trial and sheds light upon the Government's case which assists the defendant's counsel in cross-examining the first witness — though the committee cites no authority holding that the lack of an opening unconstitutionally or excessively impedes cross-examination.²⁴⁵ It is equally true, however, that the prosecutor ordinarily is under no legal obligation to make such an opening statement, or, if he does so, to make it comprehensive. Depending upon the evidence which the witness to be deposed has to give and the relationship of that evidence to the criminal case, and depending in addition upon the tactics pursued by the prosecutor at the beginning of trial, there will be many cases in which the supposed protection of an opening statement is illusory, and the lack of full pretrial discovery creates as many supposed difficulties for a defendant whether a deposition has or has not been taken.

The ACLU and the city bar committee can hardly be credited when they advance a proposition which would invalidate not only existing rule 15 but normal procedures in criminal trials. In effect, this amounts to a contention by the ACLU and the city bar that the Constitution directly requires full pretrial discovery for a defendant regardless of whether or not depositions are taken. Such a contention repeatedly has been rejected by the courts,²⁴⁶ and is hardly an appropriate issue to be examined in the course of considering a mere change in deposition provisions.

The contention that the taking of a deposition places a burden upon defense counsel's ability to cross-examine not only is incorrect, but it ignores a positive advantage which a defense counsel who has attended the taking of a deposition of a Government witness has at trial in certain situations. For example, if the deponent is available at trial and testifies against the defendant, his deposition cannot be offered by the Government in place of his testimony but can be used by the defense counsel to cross-examine him and expose any inconsistencies in his accounts of the facts. As another example, if neither the witness' own testimony nor the deposition is used at the trial by the Government, still the defense counsel in effect has obtained discovery of some Government evidence concerning the case by attending the deposition, and can use his knowledge in cross-examining the Government's other witnesses.

Since circumstances such as these vary from one case to another and from

²⁴⁵ *Id.* at 25.

²⁴⁶ *See, e.g.,* *Cicenia v. Lagay*, 357 U.S. 504 (1958) (discovery of confession not required by due process).

one witness to another, the most that can be said against the admissibility of depositions is that it is possible that cross-examination as to a particular witness in a particular case at a deposition may be constitutionally "inadequate." "Adequacy" of the opportunity to cross-examine is the constitutional criterion, since the Supreme Court has stated that ". . . an adequate opportunity for cross-examination may satisfy the [confrontation] clause even in the absence of physical confrontation [before the trial jury]."²⁴⁷ For that reason, the Supreme Court has held that the sixth amendment confrontation right is not violated by admission in evidence in a criminal trial of testimony given in a prior criminal trial of the same defendant for the same charge by a witness who died between the two trials.²⁴⁸

The principle applicable to prior testimony applies equally to a deposition taken with full cross-examination and assistance of counsel in preparation for a criminal trial.²⁴⁹ That has been the conclusion of the many states which give both to the prosecution and to the defense the right to take depositions when justice requires their use, and provide that such depositions may be used when the witnesses are unavailable.²⁵⁰

That conclusion also finds support in the proposed Federal Rules of Evidence,²⁵¹ the Uniform Rules of Evidence²⁵² and the Model Code of Evidence promulgated by the American Law Institute. No authority to the contrary was cited in the city bar committee's report, in the union's formal statement to the subcommittee during the hearings on S. 30,²⁵³ or in the union's latest statement. The admissibility of depositions consistently with the Constitution also has been supported in the subcommittee hearings by Prof. Henry Ruth of the University of Pennsylvania and by the Department of Justice.

It is not the adequacy of the opportunity to cross-examine in some hypothetical case which governs the issue of constitutional admissibility; it is the adequacy of the opportunity to cross-examine the particular witness in the particular case.²⁵⁴ Since there clearly are cases in which, even without unusual pretrial discovery, the opportunity to cross-examine the witness at the deposition is "adequate," it is fallacious for the union and bar committee to oppose the enactment of title VI on the ground that there may be other cases in which the opportunity to cross-examine turns out to have been inadequate and the deposition is excluded from evidence at trial.

While the constitutionality of using depositions taken as prescribed in title VI is clear, the most objectionable aspect of the criticism of the title on this ground by the city bar and union is its irrelevance. Title VI, as I noted above, does not prescribe that depositions are to be admitted in evidence, but leaves

247 *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (dictum); see also *Pointer v. Texas*, 380 U.S. 400, 407 (1965).

248 *Mattox v. United States*, 156 U.S. 237 (1895).

249 Cf. *California v. Green*, 90 S. Ct. 1930 (1970).

250 See, e.g., OHIO REV. CODE ANN. § 2945.50 (Anderson Supp. 1969); ORE. REV. STAT. § 45.250 (1969); VT. STAT. ANN. tit. 13, § 6721 (Supp. 1969); WIS. STAT. ANN. § 887.06 (1966).

251 Rule 8-04(b)(1).

252 Rule 63(3).

253 *Hearings* at 454-78.

254 See *California v. Green*, 90 S. Ct. 1930 (1970).

that issue entirely up to existing law. The right of confrontation and cross-examination can be violated in only one way: by the admission of evidence during a trial. The *taking* of a deposition authorized by title VI — as opposed to the *using* of a deposition, concerning which title VI is silent — is a mere preparation and cannot possibly violate the constitutional principles to which the ACLU and city bar seek to divert attention. The constitutional objection thus is a classic red herring used in an attempt to defeat a sound and necessary proposal.

Nor is it valid to argue, as the bar committee does, that the proposal, whatever its merits, should be considered not by the Congress but by the advisory committee which the Congress has authorized to initiate consideration of proposed changes in the Federal Rules.²⁵⁵ That delegation of authority by the Congress was not, as the city bar committee notes in the same place, an exclusive one; and the Congress has in no way deprived itself of the power to initiate, consider and enact changes in the rules of procedure. The Congress itself, through its committee system, has a hearing process which is more than adequate, and there is no reason for the Congress to defer to its delegate where questions are involved concerning criminal procedure. Recently Congress has enacted reforms dealing with bail²⁵⁶ and jury selection²⁵⁷ in criminal cases, both of which could have been handled instead by the rulemaking process. No objection was raised, then, to the way in which these reforms were adopted, so it is strange that such an objection is now raised against enactment of title VI. The desirability of extension of the existing deposition authority to include the Government as well as defendants has been carefully considered in the Senate Judiciary Committee, whose resolution of the matter was approved overwhelmingly as a part of S. 30 on the Senate floor.

TITLE VII — LITIGATION CONCERNING SOURCES OF EVIDENCE

Title VII is designed to regulate motions to suppress evidence in federal criminal cases.

Title VII recognizes that suppression of evidence litigation is a major cause of undue expense, delay and distraction of emphasis in criminal cases; that present rules for disclosure of information in connection with suppression claims result in the revelation of information which is irrelevant to the claims and seriously harms specified public interests; and that when the suppression motions concern evidence of events occurring years after the acts which are the bases of the motions, the adverse results are aggravated, the motions cannot reliably be resolved, and it is virtually certain that the evidence is not suppressible.

To remedy this disturbing situation, title VII requires the opponent of a suppression motion to admit or deny the occurrence of the unlawful act which the moving party claims renders the challenged evidence inadmissible. It also provides that disclosure of information in connection with a suppression motion is not required unless the information may be relevant and disclosure is in the

255 ABCNY at 26.

256 18 U.S.C. § 3148 (Supp. IV, 1969).

257 28 U.S.C. §§ 1861-71 (1964), as amended, 82 Stat. 53 (1968).

interest of justice, and forbids consideration of a claim that evidence of an event is inadmissible because indirectly derived from an unlawful act occurring more than five years before the event. The combined effect of these provisions should be to mitigate many of the objectionable aspects of suppression litigation.

The most common situation which would be affected by title VII is a criminal trial in which a defendant who at some time, perhaps in the distant past, was the victim of illegal but unrelated police conduct seeks to delay and confuse the trial of whether he is innocent or guilty by filing, extensively litigating, and, if necessary, appealing a claim that the evidence to be used against him by the Government was in some way derived from the police violation.

Under present law, the defendant can pursue such a diversionary tactic with great success, since the Supreme Court last year established a broad and absolute rule for such cases in *Alderman v. United States*.²⁵⁸ In the *Alderman* case, the Court held that, once a defendant who claims that evidence against him is the indirect fruit of electronic surveillance has established that his own interests were unconstitutionally invaded, he must be given confidential materials in the government's files to aid him in establishing that evidence against him was derived from the surveillance. The Court declined to place any limitation upon the rule or to permit a trial court to screen the Government's confidential files for possible relevance, even in cases where the surveillance bears no possible relationship to the defendant's crime.

Because the *Alderman* decision is unqualified, it encourages defendants who at any time have been unlawfully surveyed to file motions to suppress the evidence in every case against them, however unrelated to the surveillance, knowing that the motion is certain to bring them either disclosure of confidential files or, if disclosure would be too harmful to the Government, dismissal of the charges against them. Thus, *Alderman* has begun to make a significant contribution to the delay of criminal cases, which already had begun to reach crisis proportions. The President's Commission on Crime in the District of Columbia, for example, found that great increases in pretrial motions were a major cause of a doubling from 1960 to 1965 of the time required to prosecute a district felony case, and suggested that in view of "excessive" delays in criminal cases, greater priority should attach to efforts aimed at accommodating judicial and legislative requirements regulating the conduct of trials and securing the rights of defendants with the goal of expeditious handling of criminal cases.²⁵⁹ Title VII is just such an effort. Unlike the *Alderman* decision itself, title VII accommodates the interests of a defendant with those of society, and promises justice to both parties to a criminal case.

The urgency of the need for the enactment of title VII has been stressed by the Department of Justice. The Department supports the measure and has informed the Senate subcommittee that the sort of disclosure required by the *Alderman* decision often leads unnecessarily to flight by suspects who are under investigation, destruction of evidence, harm to the reputations of innocent third parties, danger to undercover agents and citizen informants, and deterrence of

258 394 U.S. 165 (1969).

259 REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 256-68 (1966).

witnesses from coming forward with evidence. The Department also revealed that, in their experience, protective court orders to limit disclosure to defendants and their counsel have not been effective.²⁶⁰

The existing law is an exercise in futility. It has been applied, for example, in *Aiuppa v. United States*²⁶¹ to require disclosure to an organized crime figure who, after being overheard during an organized crime surveillance, was picked up by a forest ranger for violating migratory bird laws. The notorious cases of Cassius Clay and James Hoffa were remanded to the district courts for hearings under *Alderman*. After ordering and supervising full disclosure and then sitting through full hearings in which the defendants tried to establish links between their electronic surveillance and the evidence in their cases, both of the courts concluded that there was absolutely no relationship. Indeed, the judge in the Clay case, after evaluating what the disclosure and hearing had contributed to his consideration of the motion to suppress, concluded that he could reliably have made his ruling on the motion after a simple in camera inspection.

The need for remedial legislation is well illustrated by the progress of the Government's case against Felix (Milwaukee Phil) Alderisio following the Supreme Court's reversal of his conviction for committing extortion in Colorado in 1959. He was a codefendant of Alderman himself, and the Supreme Court remanded Alderisio's case for full disclosure of the confidential files and a new hearing on his claim that the evidence against him was the indirect fruit of electronic surveillance.

The district court, after extensive disclosure and 2½ days of defense interrogation of numerous FBI agents and supervisors connected with the surveillance, found that "there is absolutely no relevancy in any of the material from any of the logs of the electronic surveillance to any evidence offered at the trial of this case," and reaffirmed Alderisio's four and one half-year prison sentence for the extortion.²⁶²

Alderisio, still pursuing the dilatory tactics he had used since the extortion case began, appealed the district court's latest decision and secured a new hearing. However, on January 30, 1970, the case finally was closed. Alderisio agreed not to seek further review of the extortion conviction, and to plead guilty to a charge of possessing — as a convicted felon — 33 firearms confiscated from his home, and no defense to one of 21 counts of bank fraud — both committed while he was free during the extortion proceedings, which had begun when he was indicted in 1964. In return, he obtained the Government's agreement to drop the other 20 fraud counts and to let the new 2-year sentence on the gun charge and 5-year fraud sentence run concurrently with the extortion term.

260 The Department's experience has been confirmed by the recent publication of several sets of material obtained through electronic surveillance in newspapers and magazines. *See, e.g.*, 115 CONG. REC. S6092-96 (daily ed. June 9, 1969) (LIFE publication of Mafia surveillance transcripts and Pearson and Anderson publication of embassy surveillance); 116 CONG. REC. S127-35 (daily ed. Jan. 19, 1970) (republication and discussion by author of news articles on court ordered disclosures of DeCavalcante and DeCarlo surveillance transcripts); *id.* at S1207-8 (daily ed. Feb. 4, 1970) (republication of New York Times article on DeCarlo disclosure).

261 394 U.S. 310 (1969).

262 *United States v. Alderman*, Crim. No. 17377 (D. Colo., July 7, 1969), *rev'd*, (10th Cir., Mar. 31, 1970) [in camera hearing on relation between "logs" and "airtels" ordered].

Since the new sentences are concurrent, they will add only 80 to 120 days to Alderisio's time in prison.

Alderisio, who has been identified as an enforcer and leader of loan sharking and gambling operations for La Cosa Nostra in the Chicago area,²⁶³ thus used the dilatory tactics title VII would curb to postpone beginning his punishment for extortion until ten years after the crime and five years after indictment, remaining free in the meantime to commit bank fraud and a gun violation punished by only 80 to 120 days' imprisonment — and this despite the fact that his motion to suppress was groundless. He now practically concedes he was guilty of all three crimes. The FBI, the Justice Department, and the federal courts, on the other hand, spent a fortune and ten years obtaining his imprisonment. Society got a raw deal, and Alderisio, as the *Chicago Sun-Times* reported, said, as he walked grinning from the court, "I just made the best deal of my life."²⁶⁴

Worst of all, one result of the existing law is that some criminals are given a "license to steal" — and to murder, rape, rob, and destroy — for their entire lives. An organized crime figure, or an ordinary thief, may be overheard incidentally during unlawful surveillance of a spy ring or a foreign embassy.²⁶⁵ The Government may be absolutely unable to disclose the fact of the surveillance or the location of the electronic device. However, the criminal presently has an absolute right to examine the transcript and, when the transcript is not disclosed, to obtain dismissal of any state or federal charge against him for any crime committed at any time. Therefore, he can go on to commit any crimes he chooses, as often as he pleases, with complete immunity from punishment and control. Title VII eliminates that intolerable dilemma, and revokes the criminal's license to terrorize law-abiding citizens.

The ACLU sets the tone of its comments on the provisions of title VII by referring to them as "novel" and as creating "a drastically altered procedure." Unfortunately, those phrases also set an example of inaccuracy and unfairness in the ACLU's comments on title VII — an example followed by the remainder of the union's comments and, to a great degree, by the report of the New York City Bar Committee.

In fact, enactment of title VII would not produce a great change in the procedures for considering motions to suppress evidence. Both the existing procedures, laid down by the Supreme Court in *Alderman* and the procedures proposed in title VII seek to insure that a criminal defendant whose rights have been violated by the Government can examine the direct product of that violation where doing so will aid him in establishing that the violation has led to the evidence against him. The only difference between the *Alderman* rule and title VII's rule is that title VII withdraws slightly from the absoluteness of *Alderman*. In an effort to protect the rights of society and of individuals who are not de-

263 INVESTIGATIONS SUBCOMMITTEE REPORT at 35.

264 *Chicago Sun Times*, Jan. 13, 1970, at 6.

265 The legality of electronic surveillance without court supervision for national security purposes is an open question. See 18 U.S.C. § 2511(3) (Supp. IV, 1969); S. REP. NO. 1097, 90th Cong., 2d Sess. 94 (1968). If it generally is lawful, nevertheless, a particular surveillance might be constitutionally "unreasonable" depending upon the circumstances. If reasonableness in that context is subject to determination only by the executive, still the executive might have no alternative thought to concede unreasonableness in a given case.

defendants, where the defendant has no legitimate need to examine confidential government files, title VII establishes two minimal limitations upon the *Alderman* rule, thus making that rule more flexible while preserving its basic thrust toward protection of the interests of a criminal defendant.

One of those two limitations permits a trial judge to screen material to be shown to a defendant under the barest of standards — disclosure is required where the material “may be relevant” and its disclosure is “in the interest of justice.” This limitation is a return to the pre-*Alderman* procedure, under a criterion even more favorable to the defendant,²⁶⁶ and so cannot fairly be described as “novel” or “drastic.” This screening procedure is a time-tested one, far more sensible and practical than an absolute requirement of invariable disclosure.

The second limitation also is based upon analogous existing law, and hardly can be called drastic. It provides that any claim that an illegal Government wiretap or other act, occurring more than five years prior to commission of the defendant’s crime, led the police to evidence of that crime is so farfetched that it is obviously dilatory and shall not be considered. Both the logic of the situation and the experience of the Justice Department establish that such a limitation must be placed on the *Alderman* rule, since otherwise defendants being tried for 1985 crimes, for example, will use *Alderman* to obtain transcripts of 1965 electronic surveillances on the incredible theory that the Government used the 1965 “bug” to gain evidence of the crime not even committed until twenty years later.

Title VII would not, as the union²⁶⁷ and city bar committee²⁶⁸ assert, alter or undermine the exclusionary rule announced in *Weeks v. United States*²⁶⁹ and extended to state criminal trials in *Mapp v. Ohio*.²⁷⁰ The committee and union’s conclusion that it does so rests upon their view of the exclusionary rule as a flat and absolute rule. They disregard a great deal of existing case law showing that the right to have illegally obtained evidence suppressed is not absolute or unqualified, but only a means to the end of preventing invasions of interests protected by the Bill of Rights, a practical technique for deterring unconstitutional Government action. It is, in addition, only one of several such deterrents, which include criminal prosecution of offending officers and private actions for civil damages. This is true especially where electronic surveillance, the type of evidence gathering to which title VII can be expected to have its greatest application, is involved. Congress enacted in 1968 title III of the Safe Streets Act,²⁷¹ which contains a complex of other deterrents against unlawful electronic surveillance, ranging from steep private civil liquidated damages to immunity legislation and severe criminal penalties.

Since the exclusionary rule is only a means to the end of deterrence, and only one of several means at that, albeit assumedly the most effective one, any proposed application of the suppression rule must be evaluated by a process of balancing. It is necessary first to estimate the degree to which the proposed

266 See *Alderman v. United States*, 394 U.S. 165, 181 (1969).

267 ACLU January 1970 letter at 7-8.

268 ABCNY at 27.

269 232 U.S. 383 (1914).

270 367 U.S. 643 (1961).

271 Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 197.

application of the suppression rule would increase or decrease the deterrence of unlawful conduct, and then to balance that increase or loss of deterrence against the effect the proposed application of the suppression rule would have on countervailing interests:

The courts, including the U.S. Supreme Court, have engaged in that balancing process where suppression issues were involved in a variety of cases. In *Nardone v. United States*,²⁷² the decision in which the Court first formulated the "fruit of the poisonous tree" metaphor, Mr. Justice Frankfurter put the issue in these terms:

Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution as the law of the land. In a problem such as that before us now, two opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by Constitution and laws. . . .²⁷³

In following this balancing policy, the Supreme Court has, for example, restricted the retrospective effect of the *Mapp* decision by weighing the degree to which retrospective application of the decision would increase deterrence of unlawful police conduct against "the effect on the administration of justice of a retrospective application of *Mapp*."²⁷⁴ The countervailing interest recognized in that quotation from the *Linkletter* case — the interest in the effective administration of justice — is a basic interest underlying title VII which seeks to protect the courts against delay and waste of resources through dilatory and abusive litigation over motions, to protect the prosecutive and investigative efforts of the executive branch from subversion through disclosure of confidential files to defendants, and to protect the interests of third parties in maintaining their privacy and reputations against the harm done when raw government files are made available unnecessarily to other litigants or to the public.

The legitimacy of weighing the burdens imposed upon the courts by suppression litigation against the interest of criminal defendants in obtaining suppression of evidence is illustrated by the decision of the Supreme Court in *Desist v. United States*.²⁷⁵ The Supreme Court there ruled that its decision in *Katz v. United States*,²⁷⁶ holding electronic surveillance to be a search and seizure within the meaning of the fourth amendment and subject to its exclusionary rule, would be applied prospectively only. In reaching that conclusion, the Court pointed out:

the determination of whether a particular instance of eavesdropping led to the introduction of tainted evidence at trial would in most cases be a difficult and time-consuming task, which, particularly when attempted long after the event, would impose a weighty burden on any court.²⁷⁷

272 308 U.S. 338 (1939).

273 *Id.* at 340.

274 *Linkletter v. Walker*, 381 U.S. 618, 636-38 (1965).

275 394 U.S. 244, 251 (1969).

276 389 U.S. 347 (1967).

277 394 U.S. 251 (1969).

The *Alderman* decision itself declined to expand the existing exclusionary rule by eliminating the requirement that a defendant who seeks to suppress evidence obtained by a violation of the Constitution has been a victim himself of the violation. The Supreme Court in the *Alderman* case stated that the rules excluding evidence at trial are not extended to other situations unless the additional deterrence of unlawful official conduct would be so great as to "justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."²⁷⁸

Another illustration of the qualified nature of the suppression rule is the decision by the U.S. Supreme Court in *Walder v. United States*.²⁷⁹ In an opinion by Mr. Justice Frankfurter, the Court there recognized an exception to the suppression rule, permitting illegally obtained evidence to be used by the Government to rebut affirmative deception by a defendant testifying in his own behalf.

Just this year the Supreme Court of California²⁸⁰ and the U.S. Court of Appeals for the Second Circuit²⁸¹ have found in the qualified and flexible nature of the constitutional suppression rule room for permitting parole authorities to consider illegally obtained evidence when determining whether or not to revoke parole.²⁸²

The city bar committee and the Civil Liberties Union fail to cite and discuss these analogous precedents, and to present any arguments as to why revision of the *Alderman* rule, unlike the applications of the suppression rule considered in those Supreme Court and other court decisions, would have so great an impact on the efficacy of the suppression rule that the benefits to the administration of justice are outweighed.

In addition, the city bar committee and union fail to analyze and discuss the reason underlying those decisions. As expressed by Professor Anthony Amsterdam, that reason basically is that as the exclusionary rule is applied "time after time its deterrent efficacy reaches a point of diminishing returns, and beyond that its continued application" causes unwarranted harm to other interests; for that reason, we must recognize both the value and the limitations of the exclusionary rule as a restraint on overzealous officials: "As it serves this function, the rule is a needed, but grudgingly taken, medication; no more should be swallowed than is needed to combat the disease."²⁸³

Without explaining their disregard for that teaching of logic and experience, the city bar committee and Civil Liberties Union treat the suppression rule as an eternal and absolute truth, the recitation of which demonstrates the supposed impropriety of title VII. Their unwavering reliance upon the suppression rule, as if the existence of the rule itself answered the question of whether the ap-

278 *Alderman v. United States*, 394 U.S. 165, 175 (1969).

279 347 U.S. 62 (1954).

280 *In re Martinez*, 1 Cal.3d 641, 83 Cal. Rptr. 382, 463 P.2d 734 (1970).

281 *Sperling v. Fitzpatrick*, No. 33780 (2d Cir. May 12, 1970).

282 *See also United States v. Schipani*, 7 CRIM. L. RPT. 2244 (E.D. N.Y. June 4, 1970) (evidence obtained in violation of defendant's rights ordinarily is admissible in sentencing).

283 Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389 (1964).

plication of the rule can be regulated in the manner attempted by title VII, calls to mind the comment of Blackstone regarding excessive reliance upon the death penalty: "It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty."²⁸⁴

Rather than applying the remedy of suppression without discrimination, we should follow the teaching of Blackstone and the example of the Supreme Court. We therefore should evaluate the constitutionality and wisdom of the two principal provisions of title VII to which the city bar committee and union object as the Supreme Court has evaluated similar issues: by measuring the likely impact of enactment of the particular provision upon the effectiveness of the general suppression rule as a deterrent to illegal official conduct, and then by balancing that against the impact upon countervailing interests.

The first step in undertaking such analysis is, of course, accurately to understand the meaning of title VII, and dispassionately to analyze the effect which enactment of each of the provisions opposed by its critics would have upon the suppression sanction and upon other interests.

Instead, though, the provision of title VII setting up a five-year period of limitations in connection with suppression motions receives from the union and the New York City Bar Committee treatment running the gamut from inflammatory epithets, through misstatement of the content of the provision, to shallow and inaccurate analysis of its validity.

The ACLU describes the five-year provision as arbitrary. Of course, every legislative act specifying a period of time — such as a statute of limitations on prosecution, a period of time within which procedures must be followed, or a maximum period of imprisonment — always selects that period of time from among alternatives a number of which would be defensible. To call such a provision arbitrary is to make no contribution to analysis of the legislation. What is worse, however, the ACLU and city bar committee actually misstate the plain meaning of the five-year provision in two important respects.

First, the ACLU fails to note that the provision prevents consideration of a motion to suppress evidence only where the motion is aimed at the indirect, rather than the direct, product of an unlawful Government act. The five-year provision does not in any way change existing law preventing the use in evidence of the direct product of the Government's illegality, such as the transcript itself of an unlawful electronic surveillance. The ACLU fails to make that point clear, since it does not explain that the word "fruits" means indirect fruits when it says:

As to the fruits of illegal action, Title VII arbitrarily bars any claim of inadmissibility if 5 years have elapsed between the unlawful act . . . and the event as to which the evidence is sought to be admitted.²⁸⁵

The committee report on S. 30 was much more clear on this point, and actually referred the reader to a passage in the ACLU's statement to the subcommittee which had expressly misstated the scope of the provision, pointing

284 4 W. BLACKSTONE, COMMENTARIES *17.

285 ACLU January 1970 letter at 8.

out that it was incorrect to say that the five-year provision permitted admitting in evidence the direct product of an unlawful act.²⁸⁶ In view of the committee report's explicit response to the ACLU's earlier error, it is regrettable that the ACLU did not use language in its more recent statement which would prevent readers from making the same error. This is especially unfortunate in view of the fact that the *Washington Post*, whose editorial criticizing S. 30 apparently was largely drawn from the ACLU's statement, made precisely the error which the ACLU's statement encouraged, saying: "This means that if the police break into your house illegally and seize property wrongfully but do not use it for 5 years, you cannot complain."²⁸⁷

Of course, title VII does nothing of the sort, and it is a disservice for the ACLU, in view of the correction of their error, not to have made clear the limitation of title VII's five-year provision to evidence indirectly obtained.

The second misstatement, in which the city bar committee joins the union, relates to the definition of the relevant five-year period. Under title VII, that period begins when the Government breaks the law by illegally wiretapping or otherwise, and ends when the defendant commits his crime or another relevant event occurs which the Government later attempts to prove at the trial. Title VII provides that, where that period exceeds five years, the motion to suppress indirectly obtained evidence shall not be considered, since it is not plausible that a wiretap, search or interrogation would lead indirectly to evidence of a crime not even committed until over five years later.

The ACLU's misstatement of this aspect of the five-year provision is even more blatant than their misleading statement of its scope. They say title VII provides that "after five years a person no longer has a Constitutional right to exclusion of the fruits of illegal action as evidence of subsequent events."²⁸⁸

This sentence means that the Government can use illegally obtained evidence provided that the trial occurs more than five years after the Government's unlawful action — but that is not what title VII says. Again, this is an error which the ACLU had made in its original statement to the subcommittee on S. 30, and which the committee report had corrected explicitly, with a reference to the page in the hearings at which the ACLU's error appeared. It is the most surprising, therefore, that the ACLU should repeat its error in a formal statement delivered to Senators on the eve of the vote on S. 30 on the Senate floor. What is more, the *Washington Post* again was led into error by the ACLU statement, since its editorial concluded that the police need only wait five years to "use" the illegally obtained evidence.

Worst of all, the uncritical acceptance by the city bar committee of the point of view of the Civil Liberties Union apparently led the bar committee into making the same error. Although at some points in its statement the bar committee correctly describes the starting and ending points of the five-year limitation period, at another point it states that:

by cleansing the indirect fruits of information disclosed under compulsion

286 REPORT at 153.

287 The *Washington Post*, Jan. 30, 1970 § A, at 18, col. 1.

288 ACLU January 1970 letter at 8.

after five years, Subsection 3504(a)(3) would abridge the right of a person not to be compelled to be a witness against himself, as well as undercut the scope and effect of a purportedly unqualified grant of immunity such as that which Title II would provide.²⁸⁹

Finally, the ACLU caps its misstatement of the definition of the five-year period with a reference to "the fruits of illegal action," which assumes that in fact evidence of a crime committed more than five years after the Government's unlawful act is the "fruit" of the unlawful act. The New York City Bar Committee repeatedly employs the same circular argument, claiming that the five-year provision makes "tainted fruit" admissible.²⁹⁰

The five-year provision, of course, simply does not say what the ACLU and city bar state that it says. Title VII, after it defines the proper five-year period, does not provide that the "fruits" of unlawful conduct are sometimes admissible. On the contrary, it makes, in effect, a legislative finding that evidence of an event occurring more than five years after an unlawful seizure is not the fruit of the seizure. The likelihood of any relationship whatsoever is too insubstantial to warrant litigation.

The question is not merely whether the evidence is the fruit of the unlawful seizure but whether, unlawful fruit or not, suppression or admission of such evidence would have a substantial impact upon the degree to which the suppression rule deters unlawful police conduct. Measured by this standard, enactment of the five-year provision of title VII would have no impact upon the efficacy of the suppression rule. It would be foolhardy for a police officer to make an illegal search or surveillance in 1970 in the hope that, on that day, he would discover evidence useful to prove a crime which will not even be committed until 1976, and police will have no incentive to waste their time and resources in that fashion.

Indeed, the principle applied by the five-year provision of title VII already has been specifically recognized by the Supreme Court. The Supreme Court has not, of course, approved a specific period such as five years between an unlawful police act and a later event to be proved, declaring that claims that the unlawful act led to evidence of the later event shall not be considered. Specific rules of that type are the province of the Congress, rather than the courts. The Supreme Court has, however, recognized that the relationship between an unlawful investigative act and evidence derived indirectly from that act can become so "attenuated" that the derivative evidence should not be suppressed, and that even evidence which was obtained by the exploitation of an unlawful investigative act should be admitted in evidence if it was obtained in part from a second, independent source.²⁹¹ In *Nardone v. United States*, Mr. Justice Frankfurter put it this way:

Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof.

289 ABCNY at 33.

290 See, e.g., *id.* at 50, 51, 60, 61, 63, 66 n.15.

291 *Wong Sun v. United States*, 371 U.S. 471, 487 (1963); *Costello v. United States*, 365 U.S. 265, 280 (1961); *Nardone v. United States*, 308 U.S. 338, 341 (1939) ("so attenuated as to dissipate the taint").

As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. . . .

Dispatch in the trial of criminal causes is essential in bringing crime to book. . . . To interrupt the course of the trial for [a suppression hearing] impedes the momentum of the main proceeding. . . . Like mischief would result were tenuous claims sufficient to justify the trial court's indulgence of inquiry into the legitimacy of evidence in the Government's possession. So to read [the suppression rule] would be to subordinate the need for vigorous administration of justice to undue solicitude for potential . . . disobedience of the law by the law's officers. Therefore claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity. . . .²⁹²

Title VII thus can well be viewed as a legislative particularization of the doctrines of attenuation and of the second independent source, already approved by the Supreme Court. The five-year provision is, therefore, consistent with "the spirit of decisions requiring the Government to demonstrate by clear and convincing proof that its case is free of the taint of illegally obtained evidence," in spite of the contrary suggestion by the city bar committee.²⁹³ The five-year period established by title VII is so long that the Congress is warranted in finding that every case in which the five-year period is exceeded is a case in which the challenged evidence was in no way derived from the previous illegal act, or any relationship has become so attenuated that suppression is not required. It still more clearly is within the power of Congress to determine — recalling again that this is the primary issue — that any degree to which application of the five-year provision would expand admissibility beyond existing rules on derivative evidence and attenuation is so slight as to have no substantial impact upon the efficacy of the suppression sanction as a deterrent.

While the extreme length of the limitation period itself is sufficient to support the congressional determination that litigation of such claims is not warranted, the decision of the Senate Judiciary Committee and of the full Senate, when a motion to strike title VII from S. 30 was defeated on the Senate floor,²⁹⁴ is amply supported by the experience of the Department of Justice. The Department, in response to my inquiries, conducted a study of its experience with suppression litigation in the field of electronic surveillance,²⁹⁵ to which the Supreme Court made the *Alderman* decision expressly applicable. This study by the Justice Department amply documents both the harm being done to public and individual interests by the application of the *Alderman* rule without a limitation such as the five-year provision of title VII, and the insignificant impact which enactment of title VII would have upon the ability of defendants to assert and substantiate any valid claims that the evidence against them was indirectly derived from such surveillance. Although the Department's systematic maintenance of unlawful electronic surveillance continued from 1961 to 1965, there has not been a single case in which evidence of an event occurring more than five years after a surveillance has been found to have been tainted by the

292 308 U.S. 338, 341-42 (1939).

293 *ABCNY* at 27.

294 116 CONG. REC. S462-71 (daily ed. Jan. 23, 1970).

295 115 CONG. REC. S5815-16 (daily ed. May 29, 1969).

surveillance. In this connection, the city bar committee raises a question as to the adequacy of the legislative information before the Congress as a basis for enactment of title VII. Had they examined my remarks in introducing S. 2292, from which title VII was derived, they would have seen, in part, the results of the Justice study. It more than adequately provides the necessary factual underpinning for title VII.

Neither have the critics of title VII, including the Civil Liberties Union with its apparent access to data concerning constitutional litigation by defendants in criminal cases, presented to the Congress any actual case in which evidence of an event occurring more than five years after a constitutional violation was found to have been derived from the violation. Even their attempts to pose hypothetical cases of taint which would be covered by the five-year provision²⁹⁶ are so far-fetched and unrealistic as to be ludicrous. The bar association's position may be reduced to little more than the defendant's contention in the third *Nardone* case.²⁹⁷ There, after a third conviction had been obtained even though two previous convictions had been overturned, since wiretap, or wiretap-derived evidence was used, Judge Learned Hand wrote for the Court:

The question therefore comes down to this: whether a prosecution must show, not only that it has not used any information illicitly obtained, either as evidence, or as the means of procuring evidence; but that the information has not itself spurred the authorities to press an investigation which they might otherwise have dropped. We do not believe that the Supreme Court meant to involve the prosecution of crime in such a tenebrous and uncertain inquiry, or to make such a fetich of the statute as so extreme an application of it would demand. On the last appeal the court made it abundantly clear that it did not contemplate a chase after will-o'-the-wisps. "Tenuous claims" are not "sufficient to justify the trial court's indulgence of inquiry into the legitimacy of evidence." The "claims * * * must satisfy the trial court with their solidity." We are not "to subordinate the need for rigorous administration of justice to undue solicitude for potential and, it is to be hoped, abnormal disobedience of of the law." [308 U.S. 338, 60 S. Ct. 268, 84 L. Ed. 307.] Such expressions indicate no disposition towards the refinements inevitable in deciding how far the illicit information may have encouraged and sustained the pursuit. We hold that, having proved to the satisfaction of the trial judge that the "taps" and telegrams did not, directly or indirectly, lead to the discovery of any of the evidence used upon the trial, or to break down the resistance of any unwilling witnesses, the prosecution had purged itself of its unlawful conduct.²⁹⁸

Since the five-year provision, for those reasons, can be expected not even to result in the use of presently inadmissible evidence against any individual, and certainly not to decrease the deterrent efficacy of the suppression rule, there is little to balance against the interest of society in the enactment of title VII, in determining its constitutionality.

In addition, the societal interests involved are important ones and are seriously invaded by application of the flat *Alderman* decision. Those interests have

296 See, e.g., ABCNY at 32 n.57.

297 127 F.2d 521 (2d Cir. 1942), cert. denied 316 U.S. 698 (1942).

298 *Id.* at 523.

been well articulated in the legislative history of S. 30,²⁹⁹ so the city bar committee, in an effort to minimize them, resorts to quoting a statement by the Department of Justice that “‘the factual situation which would be reached by the subsection [containing the five-year provision] is a very limited one.’”³⁰⁰

Examination of the letter from which that quotation was taken, however, makes it clear that the Deputy Attorney General there was not minimizing the impact that enactment of the five-year provision would have to improve the administration of justice, but was stressing the point that the direct product of an illegal investigative act, as opposed to its indirect product, would remain suppressible despite the five-year provision.³⁰¹ Apparently though, the city bar committee considers the avoidance of needless litigation through enactment of the five-year provision to be of minor importance, since in another part of its statement the city bar committee directly implies that it does not believe that conserving Government time and effort from litigation resulting from its own misconduct is a legitimate concern.³⁰² I do not consider the violation even of constitutional provisions by some Government officers to be a valid reason to subject all the citizens of this nation to needless and fruitless punishment, by permitting unlimited dilatory litigation in criminal cases over independent evidence which has been obtained lawfully and the exclusion of which, in any case, would not serve to deter future Government lawlessness. It is only by ignoring both the relevant Supreme Court precedents on other suppression issues, and the interests of society in the sound administration of justice, that the city bar committee can invent a constitutional bar to title VII's five-year provisions.

There are analogous precedents supporting title VII's five-year provision in areas other than suppression of evidence, as well. There are, for example, the statutes of limitations which prevent the bringing of criminal prosecutions and civil lawsuits more than a given period after one becomes entitled to do so. In comparing the five-year provision of title VII with those statutes of limitations, it is important to notice that title VII's five-year provision does not foreclose a “defense,” as the bar committee says it does,³⁰³ which goes to the question of guilt or innocence. The motion to suppress is instead a means to the affirmative enforcement of a right, and in this respect is quite similar to the bringing of a civil suit or criminal prosecution. Indeed, as I noted above, the federal government and some of the states provide, as a remedy for a person who is subjected to unlawful electronic surveillance, not only the remedy of suppression of evidence in any criminal case against him but the additional remedies that the offending officer can be criminally prosecuted and that the person surveyed can bring a civil action for damages against the officer. The statutes of limitations limiting the commencement of such civil actions have been held to be consistent with due process despite the fact that they deprive a person surveyed of a property right — his cause of action — after a given period of time. Note, of course, that under due process no legislature has the right to destroy an existing

299 *See, e.g.*, REPORT at 63-69.

300 ABCNY at 29.

301 REPORT at 135.

302 ABCNY at 28.

303 *Id.* at 33.

cause of action.³⁰⁴ But no one questions the right of the legislature to say that it must be exercised, if at all, within the period of limitation in order that justice may be done on fresh, not stale, claims. This is true despite the fact that his claim for damages, or the criminal case against the officer, may be clearly valid and amply supported by evidence, especially since it is the time when the civil suit is brought or the criminal prosecution against the officer is commenced which determines whether or not the action is barred by the statute of limitations: those periods of limitations are not so defined as to bar implausible claims, only those which have become stale.

The five-year period in title VII is, of course, measured differently. Under title VII, it is not the time of moving to suppress the evidence, but the time when the event occurs which is to be proved by the evidence, which determines whether or not the motion to suppress is barred by the period of limitations. It is for that reason that claims barred by title VII's five-year provision always are implausible. Thus, the validity of the period of limitations found in title VII is a fortiori from the validity of the periods of limitations on criminal prosecutions and civil actions.

Turning, now, from title VII's five-year provision to its provision for in camera screening of material disclosure of which is sought by a defendant, it too survives the balancing test by which the Supreme Court has worked out other limitations on the suppression sanction. Once again, the city bar committee begs the question of the validity of the screening provision by assuming that the evidence which a defendant moves to suppress under that provision is in fact the "fruits of unconstitutionally seized evidence."³⁰⁵ Actually, of course, the screening provision of title VII does not legislate on the question whether evidence is or is not tainted in individual cases: it legislates only concerning the procedure to determine that question of fact. By referring to litigation concerning "the fruits of unconstitutionally seized evidence" when it is arguing whether or not the procedure for determining that question is a sound one, the bar committee assumes its conclusion and undermines its constitutional argument.

The screening provision of title VII sets the criteria to be applied by the court in camera so low that disclosure will be denied or limited only in a few, very extreme cases. Those standards permit disclosure if the judge, after in camera inspection of the information requested to be disclosed, finds that the information "may be relevant to a pending claim of such inadmissibility, and such disclosure is in the interest of justice." This provision of title VII simply recognizes that, in a small but significant number of cases, in camera inspection of files by the trial court is sufficient for a clear and completely reliable determination that there is no possible relevance and that disclosure would be unnecessary and harmful. An example is *Aiuppa v. United States*,³⁰⁶ in which an organized criminal was overheard during an organized crime electronic surveillance and later was prosecuted for violating the migratory bird laws. While cases in which such obviously irrelevant disclosures are requested will be few, they arise often

304 *Angle v. Chicago, St. P., M. & O. Ry.*, 151 U.S. 1 (1894).

305 *ABCNY* at 31.

306 394 U.S. 310 (1969).

enough to make the automatic disclosure requirements of present law a serious problem.

Police authorities, aware of how easy it would be for defendants to satisfy those criteria, hardly will be led to break the law by the remote hope that their offense will yield information which will lead indirectly to relevant evidence of a crime by a defendant, but the possible relevance of which will not be apparent to a trial judge. The ground for suppressing evidence is a showing that the case against a defendant actually was obtained by exploiting governmental illegality, while title VII's ground for refusing to disclose confidential files to the defendant as irrelevant would be a determination by the trial judge that it is impossible that the files could have any relevance to the case against the defendant. It must be remembered that there is a very wide gulf between those two standards. The ACLU and bar committee take a very extreme position when they say that the Congress cannot find any point along that spectrum, however minimal the criterion, which permits the court to screen out obviously irrelevant material. While it certainly would be difficult for a judge to determine absolute relevancy or even probable relevancy *ex parte*, and the likelihood of error might be excessive, there is no reason to think that a standard as low as possible relevancy cannot fairly be applied by the court *in camera*.³⁰⁷

With respect to the provision's second standard for *in camera* screening, that disclosure be in the interest of justice, it is significant that the Supreme Court has recognized the validity of the principle that disclosure of facts useful to an accused in defending himself can be made to depend in part upon a judicial determination of the public interest, as in the case of a defendant seeking to learn the identity of a Government informant.³⁰⁸

The important societal interests protected by the five-year provision are substantially protected by the screening provision as well, and again outweigh the proposal's debatable impact on the deterrent effect of the exclusionary rule.

Congress has constitutional power to substitute the minimal criteria found in the screening provision of title VII for the absolute disclosure rule of the *Alderman* case, since that case was an exercise of the Supreme Court's supervisory jurisdiction, not a constitutional opinion. On the day that Senator Young placed the American Civil Liberties Union's letter in the *Congressional Record*, during the Senate debate on S. 30, I explained on the floor the rationale and precedents under which the Supreme Court's ruling in *Alderman* is found to be not a constitutional decision but an exercise of the Supreme Court's jurisdiction to supervise the administration of federal criminal justice as follows:

Mr. President, let me add a few comments before we quit tonight. It is well within the affirmative power of the Congress to enact proposed section 3504(a) (2) of title VII. It is not, as suggested, unconstitutional. Paragraph (2) would overrule the Supreme Court's decision in *Alderman v. United States*, 394 U.S. 165 (1969), which held that Government records of any illegal electronic surveillance which a criminal defendant has standing to challenge must be given to him without a preliminary judicial determination that they have possible relevance to his case.

307 See *United States v. Sellers*, 7 CRIM. L. RPTER. 2327 (N.D. Ga., June 16, 1970).

308 *McCray v. Illinois*, 386 U.S. 300 (1967); *Roviaro v. United States*, 353 U.S. 53 (1957).

The reason why Congress can reverse the rule laid down by the Alderman case is that that decision was not an interpretation of the Constitution, but an exercise of the Court's power to supervise the administration of Federal criminal justice.

That power was described by Mr. Justice Frankfurter for the Court in *McNabb v. United States*, 318 U.S. 332, 340 (1943), in these terms:

[T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

It is a basic rule of practice of the Supreme Court to place its decisions upon nonconstitutional grounds, such as statutory interpretation or the supervisory power, whenever doing so permits avoidance of a constitutional issue. See, for example, *Peters v. Hobby*, 349 U.S. 331 (1955). It must be presumed, therefore, that the Court followed this practice in the Alderman case unless the contrary can be affirmatively shown.

In its statement of the holding of the case, the Court declared:

We conclude that surveillance records as to which any petitioner has standing to object should be turned over to him without being screened *in camera* by the trial judge. *Alderman v. United States*, *supra* at 182.

Nowhere did the Court explicitly say that this practice was mandated by the fourth amendment. Instead, the Court merely ruled that this practice would "substantially reduce" the incidence of error by guarding against the "possibility that a trial judge acting *in camera* would be unable to provide the scrutiny which the fourth amendment exclusionary rule demands" — 394 U.S. at 184. In short, the fourth amendment guarantees freedom from unreasonable searches and seizures, and this freedom must be enforced by the suppression sanction, but the disclosure rule implementing that sanction is not constitutional doctrine, as it is well settled that the details of implementation of constitutional guarantees often lie below the threshold of constitutional concern. (See *Ker v. California*, 374 U.S. 23, 34 (1963).) The significance of the use of the word "should" in the Alderman holding is emphasized by the Court's later concession that its decision "is a matter of judgment" on which "its view" was that *in camera* inspection by the trial court is inadequate — 394 U.S. 182. Indeed, the Court expressly based its decision in part upon its desire to "avoid an exorbitant expenditure of judicial time and energy," 394 U.S. at 184, a consideration most appropriate in the exercise of the supervisory jurisdiction. Thus, the Court's language indicates that the ruling was supervisory. Nothing in it may be used to make the necessary affirmative showing that the Court was reaching out needlessly to decide a constitutional issue.

A supervisory decision by the Supreme Court is subject to change or overruling by the Congress. Exactly such a course was followed when the Congress enacted the Jencks Act, 18 U.S.C. 3500 (1958), modifying the Supreme Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957). Thus, the Congress is equally free to enact title VII of S. 30 despite the Supreme Court's supervisory decision in the Alderman case.³⁰⁹

The city bar committee sets out in its report on title VII certain quotations from the *Alderman* decision, italicizing phrases which the committee feels indicate that *Alderman* was a constitutional decision. I simply point out that there is other language in the opinion, quoted in my remarks on the Senate floor last January 22, which sustains the opposite view. It is a hallowed rule of Supreme Court adjudication that doubt in such cases is resolved in favor of the conclusion that the Supreme Court did not reach out unnecessarily to decide a constitutional question, since nonconstitutional grounds for the decision were available.³¹⁰

I should elaborate, also, on the analogy which I drew, during my remarks of January 22, between the *Alderman* decision and the decision of the Supreme Court in the *Jencks* case, which the Congress subsequently modified with the Jencks Act.³¹¹ The city bar committee rejects the analogy between title VII and the Jencks Act,³¹² but detailed examination of the *Jencks* decision and the Court's treatment of the Jencks Act supports the analogy.

According to the bar committee:

The analogy fails because, while constitutional questions may have been close to the surface, the *Jencks* decision was based solely on the Court's standards for the administration of criminal justice in the federal courts, 353 U.S. at 668, and did not mention constitutional rights.³¹³

On the contrary, I find the constitutional rights to confrontation and effective assistance of counsel *on the surface*, not merely close to it, in the *Jencks* case, and do not agree that the Court's omission there to cite the Bill of Rights by name constituted failure to "mention constitutional rights."

The *Jencks* opinion, holding that FBI reports should have been disclosed to the defendant so he could determine their value for impeachment of Government witnesses, stated: "The impeachment of that testimony was *singularly important* to the petitioner."³¹⁴

Any discrepancies between the reports and the testimony, the Court noted, would be "relevant to the *cross-examining process* of testing the credibility of a witness's trial testimony. Requiring the accused first to show conflict between the reports and the testimony is actually to *deny the accused evidence relevant and material to his defense*."³¹⁵

Using language strikingly similar to that later used in the *Alderman* case, the Court concluded:

Because *only the defense is adequately equipped to determine the effective use* for purpose of discrediting the Government's witness and thereby furthering the accused's defense, *the defense must initially be entitled to see them* to determine what use may be made of them. *Justice requires no less*.³¹⁶ (Emphasis added.)

310 *Peters v. Hobby*, 349 U.S. 331, 338 (1955).

311 Act of Sept. 2, 1957, Pub. L. No. 85-269, 71 Stat. 595.

312 ABCNY at 32.

313 *Id.*

314 353 U.S. 667 (1957).

315 *Id.*

316 *Id.* at 668-69.

The constitutional underpinning of the *Jencks* decision was further revealed when Mr. Justice Brennan, who had written the Court's opinion in *Jencks*, concurred in the result of the case which upheld the constitutionality of the Jencks Act³¹⁷ and wrote in an opinion joined by three other Justices:

It is true that our holding in *Jencks* was not put on constitutional grounds, for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision; indeed, the Congress recognized its constitutional overtones in the debates on the statute.³¹⁸ (Emphasis added.)

In spite of the *Jencks* decision's deep pervasion by constitutional factors, it was, as history has shown, a supervisory decision. Though *Alderman*, likewise, is related to constitutional rights, it, too, is a supervisory decision. It obviously is not the "mention"³¹⁹ of a specific amendment to the Constitution in a Supreme Court decision which determines whether the decision itself is a constitutional mandate. The language of the *Alderman* decision indicated that it concerned the "details of implementation" of constitutional rights, so it was not necessarily itself of constitutional dimension. In view of the presumption against decision of constitutional questions when other grounds are available, it is clear that the *Alderman* decision was supervisory and that the Jencks Act experience is an instructive precedent on the issue.

The ACLU also makes the incidental argument that "[a]lthough a stated purpose of Title VII is to reduce the burden of suppression motions on the courts, the reinstatement of an 'irrelevancy' requirement inevitably returns to the judiciary the screening burden which *Alderman* sought to remove."³²⁰

The city bar committee makes the same point, and supports it by adding a misinterpretation of the meaning of the screening provision of title VII.³²¹ The misinterpretation is found in the statement that "[s]ubsection 3504(a)(2) was intended to limit disclosure of information to the defense only after a determination has been made that evidence has been illegally obtained."³²² This was not the intent, and there is nothing in the Senate Judiciary report to indicate that the subsection was so intended.

The experience of the federal courts in the past suggests that the city bar committee and union are wrong in their contention that title VII's screening provision will unduly burden the courts, and supports the conclusion reached by the Judiciary Committee, following its study of the problem, and by the Senate.

The threshold criteria for disclosure under title VII can be applied expeditiously and economically by the courts. This is true especially in comparison

317 *Palermo v. United States*, 360 U.S. 343 (1959).

318 *Id.* at 362-63.

319 ABCNY at 32.

320 ACLU January 1970 letter at 8.

321 ABCNY at 28-29 n.47.

322 *Id.* at 28.

with the automatic disclosure rule laid down by the *Alderman* case, which opens up the opportunity for long periods of examination of Government files by attorneys and lengthy evidentiary hearings and arguments.

The federal district courts are accustomed to screening material in camera quickly, efficiently, and economically, in order to determine whether to order disclosure to a party in other contexts, such as a challenge to the scope of a subpoena duces tecum, pretrial discovery under criminal rules 16 and 17(c), disclosure of prior statements of witnesses under the Jencks Act, and the discovery of grand jury testimony. The courts can be expected to apply their experience and techniques developed in those situations to the minimal screening required by title VII.

For any occasional case in which the volume of material to be examined in camera is too great for examination by the trial judge himself, the Department of Justice has made this suggestion:

[A]ssistance could be provided either by another district judge, a procedure approved in *Baker v. United States*, 401 F.2d 958, 978 n. 90 (C.A.D.C.), or by a United States magistrate. Section 636(b)(2) of Title 28 of the United States Code specifies that a United States magistrate may be appointed for the purpose of "assistance to a district court in the conduct of pretrial or discovery proceedings in civil or criminal actions." Unlike a ruling on an issue affecting the reliability of the built-determining [*sic*] process, a ruling affecting the applicability of the exclusionary rule to plainly trustworthy evidence is a function of a nature which appropriately may be delegated. Certainly the deterrent purposes of the exclusionary rule can be served as well by the possibility of an adverse ruling [*sic*] of a magistrate as by the possibility of an adverse ruling of a judge.³²³

For those reasons, application of title VII by the courts will be economical and efficient, far more so than application of the *Alderman* rule.

In the final analysis, of course, the question which of two procedures is more swift and economical is one which the Congress can decide without the constraint of constitutional doctrine. Indeed, the nature of this aspect of the *Alderman* and title VII problem, as the ACLU and bar committee spell it out, is one convincing demonstration of the fact that the *Alderman* decision rested upon considerations of supervisory rather than constitutional dimension, so is subject to reversal by the Congress.

The city bar committee's statement that the screening provisions of title VII would "make it far more difficult to prove that any evidence resulted from an illegal search"³²⁴ is not correct. It is incorrect not only because the two criteria established by the screening provision are minimal, but also because existing law already limits the access of defendants to such confidential materials in some contexts. A trial judge considering a case of electronic surveillance conducted in violation of title III of the 1968 Safe Streets Act has discretion, as the city bar committee points out,³²⁵ whether or not to make available to the defendant "such portions of the intercepted communication or evidence derived therefrom as the

323 *Hearings* at 555.

324 ABCNY at 7.

325 *Id.* at 30 n.53.

judge determines to be in the interests of justice.³²⁶ That provision not only imposes a limitation upon the defendant's access to such files, but does so by reference to a standard also used in the screening provisions of title VII. Other disclosure provisions, such as rule 16 of the Federal Rules of Criminal Procedure, also grant broad discretion to trial judges to examine files in camera, deny or delay disclosure, and make protective orders and provide no standard for the exercise of that discretion.

Neither is the city bar committee's interpretation of the meaning of "interest of justice" consistent with the expressed intent of the Senate Judiciary Committee. The city bar committee concludes that under the screening provisions of title VII:

evidence which would be relevant, and perhaps critical, to a defendant's charge that the case against him was unconstitutionally tainted could nevertheless, be denied him for a variety of reasons, such as danger to the reputation of a third party.³²⁷

On the contrary, it is apparent that evidence which was critical to such a charge always would have to be disclosed since the interest of justice simply could not exalt the reputation of a third party over the constitutional right of the defendant to defend himself. Disclosure would clearly be required, at least of that portion of the files which in fact was critical to the defendant's claim.

Nor is it correct that the screening provision of title VII limits defense access to materials now given to a defendant for purposes other than suppression litigation, such as the defendant's confession, whether coerced or not, and physical property belonging to the defendant and illegally seized.³²⁸ By its terms, title VII's screening provision regulates the making of disclosure only for a determination if evidence is inadmissible on specific grounds. Where the reason for making disclosure is not to aid in the determination of that question, but to vindicate a defendant's property right in seized items or to assist him in preparing to cross-examine witnesses, for example, title VII explicitly has no application. A more careful reading of the screening provision of title VII, including the phrase "disclosure . . . for a determination," would have permitted the city bar committee to avoid making its inaccurate statements regarding supposed conflicts between title VII's screening provision and existing procedures. It should be noted also, when the city bar committee complains about the possibility that a defendant would be denied inspection of his own confession, that the express language of rule 16(e) of the Federal Rules of Criminal Procedure already gives the court discretion to deny the defendant leave to inspect his own confession³²⁹ and establishes no standards for the exercise of that discretion.

Finally, the city bar committee criticizes the screening provision of title VII by noting that it applies to civil proceedings and nonjudicial bodies, such as administrative agencies, as well as to courts. The bar committee goes on to allege that "[i]n many instances, officials or official bodies with little or no

326 18 U.S.C. § 2518 (10) (a) (Supp. IV, 1969).

327 ABCNY at 30.

328 *Id.* at 30-31.

329 *See* United States v. Projansky, 44 F.R.D. 550 (S.D. N.Y. 1968).

expertise would be deciding what information is relevant to constitutional claims and what the 'interest of justice' requires."³³⁰

The bar committee fails to mention that such agencies are subject to judicial review, and that the scope of judicial review of legal questions such as admissibility, and issues of constitutional fact upon which motions to suppress rest, is broad. In addition, it must be recalled that title VII will have no application to any such agency unless the agency applies an exclusionary rule forbidding the consideration of evidence obtained as the direct or indirect product of an unlawful act. Since any such agencies already engage in considering constitutional claims, it hardly is appropriate to claim that they have sufficient expertise to exclude evidence on constitutional grounds but not to decide "what information is relevant to constitutional claims."

Not only does title VII not violate constitutional rights protected by the *Alderman* case, it protects interests of American citizens in privacy and in the safety of their reputations — considerations which the *Alderman* decision completely subordinated to the interests of criminal defendants. The court in *Alderman* relied upon protective orders, by which a court furnishing transcripts to a defendant can prohibit him from disclosing them to others, to protect privacy and reputations. However, protective orders are not an adequate substitute for title VII as a means of preventing unauthorized disclosures.

That is true in part because it is not always practical for the court to make a protective order. When one of the cases remanded by the Supreme Court for further proceedings in the light of its decision in *Alderman* reached the district court again, for example, the court made a protective order at the Government's request. In the court's words: "However, it became apparent that it would be impossible to conduct a public hearing and explore the relevance of the logs in light of the protective order. The order was therefore dissolved, and the logs were admitted into evidence."³³¹

As a result, a transcript of electronic surveillance embarrassing to a third party who was merely referred to rather than overheard in the conversation was made public. That intrusion on his privacy proved to have been completely gratuitous, since after the disclosure and full hearing the district court found not only that the transcripts were "totally innocuous" but that the court could reliably have made that determination on an in camera inspection.

Even where the circumstances of a case do permit the court to make a protective order, the Department of Justice reports that they have been found to be ineffective.³³² For example, national security information dealing with surveillance of a foreign embassy was disclosed in a December 2, 1966, *Washington Post* article in spite of a protective order made by the District Court for the District of Columbia. Such breaches of security do untold harm to the public interest, and, often, to the interests of innocent individual citizens. Disclosures may lead suspects who are under investigation to flee. Evidence may be destroyed. The reputations of innocent individuals may be irreparably harmed, as by the *Life* magazine publication on May 20, 1969, of surveillance transcripts

330 ABCNY at 29 n.50.

331 United States v. Clay, Cr. No. 67-H-94, (S.D. Tex., July 14, 1969).

332 Hearings at 145.

containing unflattering references to national prominent entertainers, named Chicago aldermen, and three judges. The identities of undercover agents and informants may be revealed, and their lives and families endangered. And citizens with evidence of crime may be deterred by the fear of identification from coming forward to aid law enforcement.

In view of the demonstrated inadequacy of protective orders truly to protect public and private interests, they are no substitute for title VII as a means of preventing unwarranted revelation of confidential material.

The ACLU complains that the provisions of title VII would apply "in any federal, state, or local court or agency" where suppression of evidence is sought on the ground that the evidence was obtained through a violation of law "by anyone."³³³ It is understandable that the ACLU, since it opposes title VII entirely, wishes that, if the title is enacted at all, it be made as narrow as possible. However, the ACLU provides no reasons or justifications for limiting the jurisdictions and agencies in which title VII would apply nor the identities of those whose violations of law give rise to claims governed by title VII. On the contrary, treatment of the problem raised by the *Alderman* case requires consistency among jurisdictions, grounds of objections, and the like. As the Senate Judiciary Committee pointed out in its report on title VII:

[A]pplication [of the provisions of title VII] beyond Federal criminal cases to State and civil proceedings is necessary to prevent Federal and State agencies from frustrating one another's policies, to promote cooperation between Federal and local law enforcement officers, and to avoid inconsistent treatment of litigants. Congress has the power to act in this fashion. See *Elkins v. United States*, 364 U.S. 206 (1960); cf. U.S. Const. amend. XIV, § 5; *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Adams v. Maryland*, 347 U.S. 179, 183 (1954); see generally 18 U.S.C. § 2515.³³⁴

This is true despite that fact that the *Alderman* decision was not an interpretation of the Constitution, and therefore is not directly binding upon state courts, since other provisions of law extend exclusionary rules into state and administrative proceedings and suppress products of unlawful conduct by private citizens as well as government officials. For example, some of title VII's most important applications will concern electronic surveillance, covered by title III of the Omnibus Crime Control and Safe Streets Act of 1968. Under title III, section 2515 of title 18 of the United States Code, forbids the use of intercepted communications or their fruits in evidence in any proceeding before any federal or state judicial or nonjudicial authority, and makes that exclusionary rule applicable whether the interception was committed by a public official or not. The Congress cannot be oblivious to the likelihood that states will apply *Alderman* to their proceedings, either in a mistaken belief that the Constitution requires them to do so, or under state lawmaking power. The harm which would result to the federal administration of justice from inconsistent treatment of the *Alderman* issues among federal and state agencies requires that the subject be treated

333 ACLU January 1970 letter at 7.

334 REPORT at 70.

comprehensively and consistently, and the ACLU has presented no rebuttal to this showing of need.

The same is true of the ACLU's complaint that title VII is "an over-reaction" since it goes beyond electronic surveillance.³³⁵ The absolute rule of the *Alderman* case would do harm as great where a defendant or the public were given a number of private letters between two nondefendants which had been seized by the Government, or a confession implicating, perhaps falsely, individuals other than the defendant and the confessor, as where the defendant seeks the transcripts of electronic surveillance. The ACLU itself acknowledges, in the summary of Supreme Court decisions on the exclusionary rule with which it provides background for its criticism of title VII, that the Supreme Court has tended to treat one right like another in determining whether a government violation requires suppression of evidence.³³⁶ Since the Supreme Court does not distinguish for this purpose among electronic surveillance, physical seizure, arrest, interrogation, and other means of obtaining evidence which can lead to suppression at trial, limitation of title VII to electronic surveillance would produce inconsistency and anomaly in the law. Although the *Alderman* decision itself discussed only electronic surveillance, that is the only subject which was presented to the Court in that case. Therefore, we unfortunately cannot infer that the courts will show greater recognition of the competing interests of third parties and society generally where disclosure of Government files concerning other types of evidence is concerned.

In this connection, the ACLU apparently wants to have it both ways: Although they would prefer that title VII be limited to cases involving electronic surveillance, they also attempt to arouse emotions against title VII by asserting that electronic surveillance is especially offensive since "in the case of illegal electronic eavesdropping or wiretapping, the government engages in a deliberate violation of the rules which under the Constitution law enforcement officers are bound to obey."³³⁷

They attempt to contrast this alleged characteristic of electronic surveillance with other constitutional violations by public officers where police complain that under the exclusionary rule the "criminal goes free because the constable blunders."³³⁸ However, this inflammatory distinction is not only irrelevant, but it is inaccurate. Since the *Alderman* rule is absolute and inflexible, it can be applied in many cases where the Government's electronic surveillance was conducted in the good faith belief that it was lawful, and even cases in which the surveillance would have been lawful but for a technical or minor error. This is true, obviously, as to surveillances conducted under title III of the 1968 Safe Streets Act, which applies to electronic surveillance the warrant procedures used for other searches, but with still more technical and complicated procedural requirements.³³⁹ It is even true as to electronic surveillances conducted before

335 ACLU January 1970 letter at 7.

336 *Id.* at 8.

337 *Id.* at 9.

338 *Id.*

339 *See generally* 115 CONG. REC. S9569 (daily ed. Aug. 11, 1969) (republication and discussion by author of first annual report on title III electronic surveillance); 116 CONG. REC. S939 (daily ed. Jan. 30, 1970) (similar remarks by author on first such report of U.S. Attorney

the Safe Street Act became law, such as surveillances conducted under the New York statute through cooperation between federal and state officers.

The ACLU would go still further in confining the operation of title VII. They complain that the title is "not limited to organized crime cases." It is not difficult to imagine the criticisms which the ACLU, opposed in any legislation which would modify the *Alderman* rule to accommodate the public interest, would raise to any definition which attempted to define the complex and subtle concept of "organized crime." Regardless of ACLU's position, moreover, the need for enactment of title VII extends beyond "organized crime" prosecutions, and in any case it would be impossible to prepare a rational definition of such cases in this context. This is true since the need for enactment of title VII springs from a variety of factors, such as, first, the harm to privacy and reputations where the private gossip of hoodlums about innocent public officials and other parties not overheard is disclosed, second, the danger to informants, undercover agents and witnesses where confidential government files are given to ruthless criminals, and, third, the harm to the administration of justice when unnecessary opportunities for dilatory proceedings are furnished to whole classes of professional criminals.

These factors arise in part from the characteristics of the defendants and in part from the content of the evidence to be disclosed. This is obvious from the case, which I described above, in which the *Alderman* case was applied to require that an organized crime figure, who was overheard during a Mafia surveillance, be allowed to inspect the full transcript simply because he later was picked up by a forest ranger for violating migratory bird laws, despite the obvious lack of relationship between the surveillance and his crime.³⁴⁰ If organized crime cases were defined according to the nature of the crime charged, it is highly doubtful that migratory bird violations would be included. On the other hand, it would be offensive to provide one statutory suppression procedure automatically applied to persons suspected as organized criminals and another for all other defendants. Similarly, the *Alderman* case also is applicable to a person who is innocent of any organized crime involvement, stumbles into an organized crime wiretap by dialing a wrong number, and then years later is charged with driving while under the influence of alcohol. Neither the character of the defendant nor the nature of his crime makes the prosecution an organized crime case, yet there is an obvious need for title VII's limitation upon disclosure.

Before I conclude this discussion of the real and imaginary issues raised by the critics of title VII, it might be well for me to touch briefly upon two rather general points raised by title VII's critics as they sought to prove it unconstitutional.

First, the Civil Liberties Union attempts to buttress its constitutional objections to title VII by stating that "[e]ven the Justice Department concedes that constitutional problems may exist under Title VII . . ."³⁴¹ The city bar associa-

General); *id.* at H5557 (daily ed. June 15, 1970) (remarks by Congressman Poff inserting G. Denison article on 1969 annual report); *id.* at S12548 (daily ed. July 31, 1970) (remarks of author inserting Justice Department letter on use of title III).

³⁴⁰ *Aiuppa v. United States*, 394 U.S. 310 (1969).

³⁴¹ ACLU January 1970 letter at 7.

tion committee was more candid, but still tried to get mileage out of the Justice Department testimony, stating that "[t]he Department of Justice recognized that the *potential* application of a *predecessor* of this Subsection to coerced confessions presented *possible* Fifth Amendment problems." (Emphasis added.)³⁴²

A simple comparison of the union's statement with the bar committee's statement raises serious doubts about the reliability of the union as a commentator on title VII. Even the city bar committee's statement fails to attain a desirable level of candor and impartiality, since it omits to mention that the Department of Justice did not press its desire that the scope of title VII be limited in view of its question as to constitutionality, and now fully supports the conclusion reached by the Senate Judiciary Committee that title VII is constitutional and sound.³⁴³ This conclusion was challenged again on the floor of the Senate on January 22, 1970, the ACLU's statement critical of title VII was placed in the *Congressional Record* the same day,³⁴⁴ and the next day the Senate soundly defeated an amendment which would have stricken title VII.³⁴⁵

Second, the union asserts that title VII is based upon assumptions which are "totally inconsistent with our traditional presumption of innocence."³⁴⁶ As I explained above, this type of objection completely mistakes the meaning of the "presumption of innocence." This presumption is a technical, legal concept, applicable only at trial, and in reality constitutes simply a burden upon the Government to come forward with evidence and to prove guilt.³⁴⁷ This limited nature of the presumption is shown by the fact that our law authorizes searches under warrants, bail, and other pretrial restraints and invasions based upon probable guilt. While some laymen mistake the presumption of innocence, and may suppose that it compels the Government unrealistically to close its eyes to the probable consequences of pretrial court orders, actually nothing in the presumption of innocence prevents courts before trial from drawing realistic distinctions among cases where claims are substantial and cases where they are not.

Realism is exactly what is lacking in the statement of the ACLU, and in the remarkably similar complaint of the city bar committee that title VII assumed by the Senate only to apply to mobsters.³⁴⁸ Those critics of title VII close their eyes to the frequency with which criminal defendants use dilatory proceedings, perjury, and other unlawful means to escape punishment. If criminal defendants never resorted to unlawful means of defending themselves — if, indeed, they never committed crimes at all — then a rule as one-sided and inflexible as the *Alderman* rule would be serviceable. Since they do violate laws, and since society must have some protections against such violations, title VII sets up standards and procedures, similar to those now used in other contexts, to distinguish dilatory motions to suppress evidence from substantial ones. Those standards and pro-

342 ABCNY at 31.

343 *Justice Department Comments*.

344 116 CONG. REC. S424 (daily ed. Jan. 22, 1970).

345 *Id.* at S462-71 (daily ed. Jan. 23, 1970).

346 ACLU January 1970 letter at 9.

347 *See United States v. Nimerick*, 118 F.2d 464, 468 (2d Cir. 1941).

348 ABCNY at 27-28.

cedures have received the support of the American Bar Association,³⁴⁹ and would materially improve the administration of justice.

TITLE VIII — SYNDICATED GAMBLING

The general consensus of opinion among law enforcement officials is that gambling is the greatest source of revenue for organized crime. The Permanent Subcommittee on Investigations' examination of gambling and organized crime, the hearings of which I was privileged to chair, concluded that although estimates of the revenue obtained through illegal gambling vary it was generally agreed that the flow of money to bookmakers taking bets on horse races and sporting events totals billions of dollars annually.³⁵⁰

Organized crime, of course, does not limit its illegal gambling operations to horse racing and sporting events. It also includes gambling in the form of lotteries, dice games, and illegal casinos. More recently, the President's Crime Commission estimated the annual gross revenue to organized crime from gambling in the United States at from \$7 to \$50 billion.³⁵¹ The Commission indicated that an analysis of organized crime betting operations showed the profit to be as high as one-third of gross revenue and concluded that while it was difficult to judge the accuracy of these figures, even the most conservative estimates put a substantial amount of capital in the hands of organized crime leaders.

It is from these huge gambling profits that organized crime is able to finance other illicit operations such as narcotics, loan sharking, prostitution, and bootlegging. This large source of illegally gained revenue also makes it possible for organized crime to infiltrate and pollute legitimate business.

The President, in his Message on Organized Crime in April of last year, characterized gambling income as the "lifeline of organized crime," and suggested that if we can cut or constrict it we will be striking close to its heart.³⁵² I need not emphasize too highly that it is in the field of gambling that the mob leader is most vulnerable to honest law enforcement. If we can remove the syndicate gambler from circulation, we will have at the same time largely eliminated the extortioner, the corruptor, the robber and the murderer — the gangster himself.

One of the inevitable by-products of illicit gambling, moreover, is corruption — of the police, the prosecutor, the courts — indeed, the whole system of criminal justice. Gamblers and bookmakers, in order to be free to operate, must pay off someone. The President in his message on organized crime put it this way:

It is gambling which provides the bulk of the revenues that eventually go into usurious loans, bribes of police and local officials, "campaign

349 *ABA Testimony* (endorsing title VII, with recommended amendment requiring written request by prosecutor for *in camera* screening).

350 S. REP. No. 1310, 87th Cong., 2d Sess. 2 (1962).

351 CHALLENGE OF CRIME at 189.

352 H.R. Doc. No. 91-105, 91st Cong., 1st Sess. 6 (1969). See also 115 CONG. REC. S12355 (daily ed. Oct. 13, 1969), (publication of presidential message urging, *inter alia*, immediate enactment of gambling legislation).

contributions" to politicians . . . and to pay for the large stables of lawyers and accountants and assorted professional men who are in the hire of organized crime.³⁵³

The report of the Permanent Subcommittee on Investigations on Gambling and Organized Crime described the problem as follows:

It must be conceded that for various reasons, mostly justifiable and understandable, local law enforcement agencies cannot adequately cope with the grave internal threat posed by organized crime. Jurisdictional limitations and lack of sufficient funds to provide adequate manpower or modern equipment are among the most frequently cited obstacles to the attainment of this objective. While most local law enforcement officials and prosecutors are honest and dedicated in their efforts to stamp out organized crime, too often local criminal statutes are not vigorously enforced or prosecuted because a dishonest policeman or prosecutor is motivated solely by financial or political gain.³⁵⁴

Senator Jackson, in the course of those hearings, during an exchange with Jacob Grumet, a member of the Commission of Investigation of the State of New York, aptly expressed it this way: "You and I know what the problem is. They buy off the judge, they buy off the prosecutor, they buy off the sheriff, and they buy off the law enforcement officers locally, directly or indirectly."³⁵⁵

Today's corruption is less visible, more subtle and therefore more difficult to detect and assess than the corruption of the prohibition era. But organized crime flourishes only where it has corrupted local officials. And as the scope and variety of organized crime's activities have expanded, its need to involve public officials at every level of local government has grown.

Something must be done to stop this flow of money to organized crime from gambling enterprises, and we must stop the corruption of local officials and law enforcement officers by organized crime. To do this we need new weapons. Title VIII would give the federal government two new means to aid the states in combating large-scale gambling. Part A contains special findings on the character of syndicated gambling. Part B of title VIII would make it a felony for large-scale gamblers and law enforcement officers or public officials to conspire to obstruct enforcement of state and local laws against gambling through bribery of government officials. Part C of this title would make it a federal offense to engage in a large-scale business enterprise of gambling.

At this point, I want to make one thing very clear. No part of this title will, or is intended to, preempt local efforts in this area, but it will add to such local efforts the expertise, the manpower, and the full resources of the Federal Bureau of Investigation, and other appropriate agencies of the federal government.

There is one other important point which I have not mentioned, and it is a point on which the Congress cannot legislate. I refer to public apathy about

³⁵³ *Id.*

³⁵⁴ S. REP. NO. 1310, 87th Cong., 2d Sess. 1 (1962).

³⁵⁵ *Hearings on Gambling and Organized Crime Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, 87th Cong., 1st Sess., pt. 1 at 31 (1961).*

gambling — indeed, about organized crime in general. The public must be informed of the dangers of organized crime, and must be cognizant of the fact that each bet with the local bookie, no matter how small, is not a harmless diversion but part of a large-scale process leading to the eventual decay of his community, for the effects of apathy poison our whole well-being. The late Robert F. Kennedy, commenting on the relation between organized crime and street crime, put it well:

Crime in the streets is directly related . . . to public apathy about organized crime. The young man in the ghetto who decides to steal rather than make that extra effort to find work is unquestionably influenced by the success which the numbers runner down the block has had. The bookmaker or the narcotics pusher is all too often the only conspicuous figure of success in the ghetto, the one who has demonstrated how to beat the system and gain wealth and prominence. Similarly, the worker who belongs to a corrupt union, or the businessman who must pay protection to keep his business or his life, are taught every day — as are their children — that our legal system has nothing to offer them. As long as the public cares too little about the racketeers who control the gambling and the narcotics and the prostitution that feed upon the poor and the weak, there will be youngsters who see the gangster's way as the model, the path to follow.³⁵⁶

It is in this context, particularly, that the Senate must assess Part D, which would set up, two years after the enactment of the bill, a Commission To Review National Policy Toward Gambling. Federal concern over gambling has a long history. Nevertheless, it is time to take stock of where our nation is and what direction it should take in the future. We know too little about the full scope of the impact of syndicated gambling and attendant police corruption on our society, or about the most realistic way to respond to them. There is a need here for careful study and public enlightenment after the formulation of prudent action plans.

Nevertheless, the ACLU characterizes title VIII as making it “a Federal offense to engage in ‘an illegal gambling business’ or to participate in a ‘scheme to obstruct’ state criminal laws with the intent to facilitate such business, without regard to any connection with interstate commerce.”³⁵⁷ In fact, however, title VIII does not make the proscribed conduct criminal “without regard to any connection with interstate commerce.” Instead, it limits its definition of the prohibited “illegal gambling business” to gambling operations so large or permanent that they necessarily depend upon and affect interstate commerce, and thereby eliminates the need of adducing evidence in each case linking the illegal business to the facilities of interstate commerce.

As the special findings in title VIII point out:

The Congress finds that (1) illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof; (2) illegal gambling is dependent upon facilities of interstate commerce

356 Address by Robert F. Kennedy, Columbia Law School Forum, Jan. 19, 1967 (reprinted at 113 CONG. REC. 1243-44 (1967)).

357 ACLU January 1970 letter at 9.

for such purposes as obtaining odds, making and accepting bets, and laying off bets; (3) money derived from or used in illegal gambling moves in interstate commerce or is handled through the facilities thereof; (4) paraphernalia for use in illegal gambling moves in interstate commerce; and (5) illegal gambling enterprises are facilitated by the corruption and bribery of State and local officials or employees responsible for the execution or enforcement of criminal laws.

During hearings before the Senate subcommittee on S. 2022, which has been incorporated into S. 30 as title VIII, Assistant Attorney General Will Wilson, who is in charge of the criminal division of the Department of Justice, stated: "Testimony already given before this Committee . . . establishes conclusively that without interstate commerce organized gambling cannot exist."³⁵⁸ Mr. Wilson further testified that "[t]here can be little question that illegal gambling has a substantial effect on interstate commerce. It uses the facilities of interstate commerce, its profits are distributed in interstate commerce, and its paraphernalia is shipped in interstate commerce."³⁵⁹

The committee report is explicit regarding the authority of Congress to enact legislation under the commerce clause to prevent criminal activities which affect interstate commerce. The pertinent section of the report states as follows:

It is well established that Congress is empowered under the commerce clause to prevent criminal activities which take place in or affect interstate commerce. As Mr. Justice Day stated for the Supreme Court in *Caminetti v. United States*, 242 U.S. 470, 491 (1917):

[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

It is equally well established that once Congress concludes that some general activity affects interstate commerce, and enacts a statute regulating participants in that activity, an individual participant will not be heard to claim that his particular segment of the activity does not affect interstate commerce. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); cf. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).³⁶⁰

The need for Congress to take action such as that proposed in title VIII was illustrated recently, when the Justice Department disclosed³⁶¹ a conspiracy through which the chief of intelligence of the Columbus, Ohio, Police Department, received \$40,000 over a three-year period, and certain patrolmen received some \$250 per month, for failing to close a known numbers operation. A federal prosecution was brought, but ended with an acquittal by a jury apparently convinced of the defendants' substantial guilt, but not of the federal authorities' jurisdiction under existing law. According to Assistant Attorney General Will Wilson, "the daily intake of one operator was believed to exceed \$15,000."

³⁵⁸ *Hearings* at 382.

³⁵⁹ *Id.* at 381.

³⁶⁰ REPORT at 73-74.

³⁶¹ See 116 CONG. REC. S6029 (daily ed. Apr. 20, 1970) (remarks of author inserting Justice Department letter).

Illegal gambling businesses of that size, especially where local law enforcement is crippled by corruption, are most appropriate subjects of federal jurisdiction, and title VIII would strengthen the ability of our laws to deal with them.

The specific objections to title VIII raised by the city bar committee and by the Civil Liberties Union are not persuasive. Once again, the city bar committee's statement mirrored that of the Civil Liberties Union; both claim that title VIII's use of the word "scheme" in the provision making it unlawful "for two or more persons to participate in a scheme to obstruct the enforcement of the criminal laws of a State or a political subdivision thereof" is so vague as to be unconstitutional. They join in contrasting the term "scheme" with the term "conspiracy," which they both quote Mr. Justice Jackson as criticizing for its elasticity.³⁶² Neither group points out that an individual can commit the offense of conspiracy simply by making an informal verbal agreement with one other man to commit a crime which actually never occurs, while the "overt act" which the law requires can be committed by the other member of the conspiracy and can be, in itself, an innocent act. Title VIII, on the other hand, requires that a defendant "participate in a scheme," and thus requires that each individual defendant take an active part, whether by financing, supervising, operating, or profiting from the scheme. The additional element of "participation," not required in conspiracy cases, makes the prohibition in title VIII more specific in one respect than the laws prohibiting conspiracy, which, although they have been criticized by Mr. Justice Jackson and some others, are today of unquestioned validity and great utility.

There are, in addition, strong affirmative reasons for using the term "scheme" in title VIII. Some of the reasons were presented in testimony before the Senate subcommittee by the Assistant Attorney General Will Wilson:

Senator McCLELLAN. What is the difference under your proposed section 1511, title I, between "devising or participating in a scheme," and "conspiring"?

Mr. WILSON. Well, the purpose of that language is to broaden the word "conspire" to include a situation, for instance, where you could trace some of the profits of a scheme of a gambling enterprise into a given individual, but couldn't ever put him in the room where conversations or other acts of conspiracy occurred.

Senator McCLELLAN. What you are doing is saying that if you accept the fruits or benefits of that conspiracy you would be guilty?

Mr. WILSON. Yes, sir. As you probably know, in the biggest gambling rackets it is relatively easy to make cases against the street sellers, and clear up through the bookkeeping department, but through the use of carriers and banking connections it is sometimes very difficult to develop proof against the person who is the most guilty, that is the top proprietor, because he isolates himself from it rather effectively. This would provide broader language which would permit us to go after the big ones with a lesser [*sic*] degree of proof than in conspiracy.

Senator McCLELLAN. In other words, if they get a take out of it, whether or not they participated in the actual activity, it would make no difference; they would be guilty?

³⁶² ABCNY at 36; ACLU January 1970 letter at 9. See *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring).

Mr. WILSON. That is the intent of the language.

Senator McCLELLAN. Someone might start something down here, and get it going, but then outsiders step in and say, "Well, we are going to take a part of it." They should be included, too.

Mr. WILSON. And conceivably might not either have been a party to it or known about it in the sense of knowing the mechanics of it — at least to the extent that you could prove it.

Senator McCLELLAN. But if they step in and get the benefits or the fruits from it, then they are guilty?

Mr. WILSON. That is the meaning of the language.³⁶³

It should be noted in addition, that the use of the word "scheme" in a substantive criminal prohibition is not novel. The mail fraud statute³⁶⁴ makes it criminal to "devise any scheme or artifice to defraud."

The substantive prohibitions in title VIII are criticized by the city bar committee and the Civil Liberties Union for overbreadth on another ground. They consider the prohibitions broad enough to reach very small gambling operators, and the city bar committee, for example, feels that title VIII would permit federal prosecution of a "mom and pop" bookmaking operation which pays a small bribe to the policeman on the beat.³⁶⁵ To support these contentions, both the union and the bar committee interpret title VIII's prohibitions as reaching not only the operators of a gambling business, but also the players. That interpretation is unwarranted. The statute itself states that it prohibits only "participation in an illegal gambling business" or "participation in a scheme to obstruct the enforcement of the criminal laws." Obviously, playing the horses does not make one a participant in the gambling business, any more than buying groceries at the A & P makes a person a participant in the grocery business. The committee report emphasizes the point by specifying that the prohibitions do not "include the player himself in an illegal game."³⁶⁶

When it is understood that title VIII does not prohibit the playing of an unlawful game, it becomes still more obvious that title VIII prohibits only relatively large gambling operations. Title VIII defines an "illegal gambling business" as involving five or more participants in the gambling business, and either remaining in operation over thirty days or grossing at least \$2,000 per day. A fair reading of those elements of the crime created by title VIII makes it clear that the two-person "mom and pop" bookmaking operation does not constitute an "illegal gambling business" under title VIII. One can only wonder how the Civil Liberties Union was able to state in its January 1970 letter that "the statute itself *easily* encompasses such petty crimes and criminals and by its terms could apply to *two* men who park illegally on their way to an *all-night* poker game."³⁶⁷

The union³⁶⁸ and bar committee³⁶⁹ join also in objecting to the provision of title VIII which reads:

363 *Hearings* at 397.

364 18 U.S.C. § 1341 (1964).

365 ABCNY at 37.

366 REPORT at 155.

367 AGLU January 1970 letter at 10.

368 *Id.*

369 ABCNY at 36.

For the purpose of this section, if it is found that a gambling business has five or more persons who participate in such business and such business operates for two or more successive days, the probability shall have been established that such business receives gross revenue in excess of \$2000 in any single day.

The union begins its criticism of that provision by misstating it. The union states that the provision creates a legislative conclusive presumption that the specified business "has" the necessary daily gross revenue.³⁷⁰ A reading of the provision itself makes clear that the presumption is not that the business "has" such gross revenue—a presumption which would be useful at trial—but only that it probably has such gross revenue — a presumption which has utility only in the sole situation where probability is an issue: a search or arrest.

It is strange, therefore, that both the union and the bar committee complain that the statute permits application of the presumption at trial. The Senate committee report³⁷¹ and the Senate hearings³⁷² make it explicit that the presumption applies only to the making of probable cause findings. It would seem, though, that such explicitness was not necessary, since whether or not an essential element of the offense has been shown probably to have occurred, is, as the union and bar committees surely know, utterly immaterial at trial. Even if this provision of title VIII attempted to create such a legislative presumption, the end result of the presumption could not be admitted in evidence or disclosed to the jury in the case, because of its immateriality.

The bar committee and the union criticized the provision concerning probability also on the ground, as expressed by the bar committee, that "we have grave doubt whether the constitutionally required nexus between the finding and the facts on which it is made to depend can be established. Cf. *Leary v. United States*, 395 U.S. 6, 36 (1969); *Tot v. United States*, 319 U.S. 463 (1943)."³⁷³ The *Leary* and *Tot* cases do not deserve even citation as analogous authorities. They dealt with legislative presumptions concerning the establishment of elements of offenses for use at trial when proof beyond a reasonable doubt was required. They involved a far tighter "nexus" than is necessary for the validity of the probability provision of title VIII.

The bar committee and Civil Liberties Union object also to the requirement of title VIII that a gambling business, in order to be subject to the prohibitions of title VIII, be conducted in violation of the law of a state or a political subdivision thereof.³⁷⁴ As soon as some thought is devoted to the question, it becomes apparent that the supposed difficulties with this type of reference to state law in a federal statute are actually nonexistent. Title VIII simply requires that the gambling business which is to be brought within its terms has been conducted in violation of the law of a state or a political subdivision having jurisdiction over the conduct violating its laws. If there are one or more states or

370 ACLU January 1970 letter at 10.

371 REPORT at 156.

372 Hearings at 401.

373 ABCNY at 38.

374 *Id.* at 38-39; ACLU January 1970 letter at 10.

political subdivisions as to which that is shown to be true, then that element of the offense under title VIII has been established. Title VIII, in this respect, follows the example of 18 U.S.C. § 1952, which punishes interstate travel with intent to promote any unlawful activity, and which defines "unlawful activity" as including "any business enterprise involving gambling in violation of the laws of the State in which they are committed."

As for the reference by the city bar committee to the provision of title VIII that "gambling" includes bookmaking and several other specified gambling activities, but does not provide that the list of activities is exclusive, and the committee's statement that "[w]e question whether such an important definition should be open-ended,"³⁷⁵ I simply call to mind the disastrous experience with legislation designed to curb the use of interstate commerce to promote slot machine gambling. One will recall, whether the city bar committee does or not, that the inventive genius of certain manufacturers of electromechanical devices in the Chicago area required the Congress, until it learned that undue specificity is no virtue in a gambling statute, to enact a series of laws designed to curb first the one-armed bandit, and then progressively more sophisticated machines for evading the latest federal prohibitions. I suggest that Congress decline the New York City Bar Committee's invitation to repeat that experience.³⁷⁶

On the contrary, I find the complaints and suggestions of the city bar committee and the Civil Liberties Union regarding title VIII to be, by and large, misguided and unconstructive. Although the New York City Bar Committee did not mention the fact, title VIII had been approved, in major part, by the House of Delegates of the American Bar Association,³⁷⁷ as well as by the U.S. Senate. It is strongly supported by the administration, which initiated the introduction of the bill. I think it is clear title VIII has withstood the criticism leveled at it by the bar committee and the union, and should be recognized as a valuable proposal against organized crime.

TITLE IX — RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Title IX of S. 30, when originally introduced as a piece of separate legislation, was supported by the Department of Justice in these terms:

The Department favors the objectives of S. 1861, and believes that with some possible revisions its combination of criminal penalties and civil remedies, which has been highly effective in removing and preventing harmful behavior in the field of trade and commerce, may be effectively utilized to remove the influence of organized crime from legitimate business.³⁷⁸

The subcommittee and committee agreed with the Department on their

375 ABCNY at 37 n.66.

376 See Gambling Device Act, 15 U.S.C. § 1171 (1964).

377 After the city bar and ACLU criticisms of title VIII were published, the A.B.A. expanded its support of the title to endorse it as passed by the Senate, without reservation. A.B.A. Board of Governors Resolution, July 15, 1970; *ABA Testimony*.

378 *Hearings* at 404-5.

suggested revisions and, along with other improving amendments, approved title IX, as did the Senate.

The infiltration of legitimate business by organized crime has been increasingly documented in the past year.³⁷⁹ Once it invades a legitimate field of endeavor, the mob quickly brings with it a full range of corrupt practices. It sometimes uses terror tactics to obtain a larger share of the market. Labor unions are infiltrated, and then labor peace is sold to businesses. This does not inure to the benefit of the workingman. To the contrary, for example, as documented in a grand jury report I inserted in the *Congressional Record* on December 5, 1969,³⁸⁰ in New Jersey members of the mob recently required payments from a contractor so that nonunion men could work at lower wages on a project. In business, the mob bleeds a firm of assets, then takes bankruptcy. It steals securities and then uses the stolen securities to fraudulently obtain funds from lending institutions. It evades taxes and thereby gains an unfair advantage. It monopolizes goods and services thereby raising prices. Through the violence used in its operations and its rigidly enforced code of silence, as well as exploitation of nonmembers in its schemes, the mob seeks to gain immunity from the rules of our society governing business and labor practices. We cannot afford to allow it to succeed in this endeavor.

Title IX is aimed at removing organized crime from our legitimate organizations. Experience has shown that it is insufficient merely to remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and, where possible, forfeiture of their ill-gotten gains.

Title IX uses three primary devices to achieve these ends — criminal forfeiture, civil remedies which have proven successful in the antitrust area, and a number of civil investigative procedures.³⁸¹

The concept of criminal forfeiture is an old one in our common law. It was extensively used in England and had some limited use in the colonies.³⁸² Title IX, drawing on this early history, would forfeit the ill-gotten gains of criminals where they enter or operate an organization through a pattern of racketeering activity. To bring this special criminal remedy into play, the offender must be chargeable as a principal in the commission of at least two racketeering acts, each of which is chargeable as a crime apart from title IX.

Since enactment of the Sherman Antitrust Act in 1890, the courts have used several equitable remedies, and developed new ones to implement the language of 15 U.S.C. §§ 1-2. I believe, and numerous others have expressed

379 See, e.g., 116 CONG. REC. H1459 (daily ed. Mar. 3, 1970) (remarks of Congressman Poff inserting speech by U.S. Attorney General to Bond Club); *id.* at H3679 (daily ed. April 29, 1970) (remarks of Congressman Poff inserting article by C. Grutzner); *id.* at H4476 (daily ed. May 18, 1970) (remarks of Congressman Poff inserting W. Schulz article on Meyer Lansky); *id.* at H4854 (daily ed. May 27, 1970) (remarks of Congressman Poff inserting M. Ottenberg article); *id.* at S8906 (daily ed. June 11, 1970) (remarks of author inserting article with U.S. Attorney General's views on organized crime infiltration of business).

380 115 CONG. REC. S15751 (daily ed. Dec. 5, 1969).

381 Civil approaches to organized crime control other than those proposed in title IX are suggested at 116 CONG. REC. H3714 (daily ed. Apr. 29, 1970) (remarks of Congressman Fascell inserting article by H. Levine and J. Jorgenson and FLA. STAT. §§ 932.58-60).

382 See REPORT at 79-80.

a similar belief,³⁸³ that these equitable devices can prove effective in cleaning up organizations corrupted by the forces of organized crime. The first step in cleaning up an organization will be to require the mob to divest itself of its holdings in legitimate endeavors, where its members have abused that right by the condemned practices. In some cases, the organization will no doubt be so corrupt that it will have to be dissolved. Once the mob is removed, an injunction against it ever again entering that particular type of organization should prove effective to prevent its return to corrupt anew.

As the criminal process has a grand jury for investigations, the civil process will need an investigative arm to determine whether there have been violations. To accomplish this end, the Attorney General is authorized to use either a civil investigative demand or investigative powers now existing in other agencies.

I am sure that there are some who are not aware of the extent of infiltration of our legitimate organizations by the mob. The facts, however, are truly disturbing.

According to Internal Revenue sources, of this country's 113 major organized crime figures, 98 are involved in 159 businesses. In like manner, the President's Crime Commission in 1967 reported that racketeers control nationwide manufacturing and service industries with known and respected brand names. It has also been reported that the mob controls one of the largest hotel chains in the country, dominates a bank with assets from \$70 to \$90 million, operates a \$20 million yearly gross laundry, and so on. In an eastern state the mob burned several stores and killed employees of a large grocery chain — the venerable A. & P.³⁸⁴ Nevertheless, violence is not the mob's only technique. Approximately 200 syndicate-inspired bankruptcy schemes are perpetuated annually, each involving up to 250 or more creditors and upwards of \$200,000 in merchandise or material. Organized criminals, too, have flooded the market with cheap reproductions of hit records and affixed counterfeit popular labels. They are heavily engaged in the illicit prescription drug industry.

This is just a sampling. I could go on at length in this fashion, but I think the necessary point has been made.

Nevertheless, the city bar committee attacks title IX and the statement in the Senate report³⁸⁵ that the list of crimes the commission of which constitutes one element of the prohibitions in title IX is a list of "specific State and Federal criminal statutes now characteristically violated by members of organized crime."³⁸⁶ The bar committee complains that the list is too inclusive, since it includes offenses which often are committed by persons not engaged in organized crime. The Senate report does not claim, however, that the listed offenses are committed *primarily* by members of organized crime, only that those offenses are characteristic of organized crime. The listed offenses lend themselves to organized commercial exploitation, unlike some other offenses such as rape, and experience has shown they are commonly committed by participants in

383 See, e.g., *id.* at 214 (additional views of Senator Scott).

384 See 115 CONG. REC. S7225 (daily ed. June 26, 1969) (replication and discussion of New York Times article); 116 CONG. REC. H6375 (daily ed. July 6, 1970) (remarks of Congressman Ford inserting E. Methvin article).

385 REPORT at 34.

386 ABCNY at 41.

organized crime. That is all the title IX list of offenses purports to be, that is all the Senate report claims it to be, and that is all it should be.

Members of La Cosa Nostra and smaller organized crime groups are sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit. It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well. A few illustrations should make that point. J. Edgar Hoover, for example, in testimony before the House Appropriations Subcommittee considering Justice Department appropriations for 1970, cited a variety of offenses committed by organized crime leaders, including assault on a federal officer, bank robbery, and conspiring to transport stolen television sets in interstate commerce.³⁸⁷ At another point in the testimony before that subcommittee, Mr. Hoover, for example, testified: "We have over 30 pending cases (March 1, 1969) involving thefts of securities from brokerage houses. Close associates and relatives of La Cosa Nostra figures are known to be involved in at least 11 of these cases."³⁸⁸

In his most recent testimony for 1970, he cited these offenses: armed robbery, pornography, stolen securities, Federal Reserve Act, theft, perjury, burglary.³⁸⁹ At one point in his testimony, for example, he indicated:

In New York City, the late La Cosa Nostra "Commission" member Vito Genovese has not been replaced yet and his organization is being run by an "acting boss" and a crew of "captains." Two of these "captains" have been convicted in recent months as the result of FBI investigations, and two others are currently awaiting trial. On July 23 and 24, 1969, Sam Mavarite, a captain, and 10 of his associates were arrested in five States, breaking up one of the country's largest interstate operations in pornography and obscene literature.³⁹⁰

Indeed, one of the statutes which the city bar committee cites as an example of a federal law which should not be included in the title IX list of offenses is the statute prohibiting use of a stolen telephone credit card.³⁹¹ Credit card offenses illustrate my point extremely well, because while they are commonly committed by persons having no organized crime connections, organized crime has made a big business out of dealing in stolen and counterfeit credit cards, sometimes selling \$250 kits, each with a credit card and proof of identity. Credit cards have, therefore, played a role in organized crime activities. For example, Salvatore "Bill" Bonanno, son of former Mafia boss Joseph "Joe Bananas" Bonanno and a Cosa Nostra member, was recently convicted of mail fraud and conspiracy for using a Diners Club credit card extorted from a New York

³⁸⁷ *Hearings on Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1970 Before a Subcomm. of the House Comm. on Appropriations*, 91st Cong., 1st Sess., pt. 1, at 557 (1969).

³⁸⁸ *Id.* at 559.

³⁸⁹ *Hearings on Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1970 Before a Subcomm. of the House Comm. on Appropriations*, 91st Cong., 2d Sess., pt. 1, at 770-76 (1970).

³⁹⁰ *Id.* at 772.

³⁹¹ 18 U.S.C. § 1343 (1964).

travel agent. These examples, of course, were only federal crimes. When one examines state offenses as well, still greater variety appears.

It is self-defeating to attempt to exclude from any list of offenses such as that found in title IX all offenses which commonly are committed by persons not involved in organized crime. Title IX's list does all that can be expected, as does the list found in the electronic surveillance provisions of title III of the 1968 Safe Streets Act — it lists offenses committed by organized crime with substantial frequency, as part of its commercial operations. The danger that commission of such offenses by other individuals would subject them to proceedings under title IX is even smaller than any such danger under title III of the 1968 act, since commission of a crime listed under title IX provides only one element of title IX's prohibitions. Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX.

The union offers an inaccurate and prejudicial criticism of title IX when it states that "pattern of 'racketeering activity' is defined as two or more acts of 'racketeering activity,'" and worries that a person could be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses, one of which related to an interstate business. Again, a careful reading of title IX would have informed the union that commission of two or more acts of racketeering activity is made a necessary, but not a sufficient, element of a pattern under title IX. As the Senate committee report points out:

The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.³⁹²

The term "pattern" itself requires the showing of a relationship and the committee report thus reinforces that interpretation. So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern and the ACLU's fears are unwarranted.

Once again, the city bar committee complains that a reference to state law, this time found in title IX, creates choice of law problems.³⁹³ Once again the objection is groundless, for reasons I have explained in reference to title VIII. An individual who engages, for example, in a lending transaction which violates the law of any state having jurisdiction over the transaction, has broken a state law. Thus, he satisfies that element of the prohibitions of title IX.

Neither is the city bar committee correct when it describes the difficulties of tracing tainted funds as nearly "insuperable."³⁹⁴ Such tracing is difficult, of course, but it has been done in the past. The FBI, for example, has traced money skimmed from Las Vegas casinos into Swiss bank accounts. That tracing was done, it is true, through unlawful surveillance, but the enactment in 1968 of authority for court-supervised electronic surveillance holds the promise of similar

392 REPORT at 158.

393 ABCNY at 42.

394 *Id.* at 8, 41.

tracing by legal means in the future. Other titles of S. 30, in addition, contain new investigative techniques, such as grants of use-restriction immunity to witnesses, which will make the tracing of tainted funds more practicable, though still difficult. It should be remembered, too, that only one of the three prohibitions in title IX requires tracing of funds and that violations of the other two — which essentially proscribe acquisition or operation of a business through racketeering activity — will be far easier to prove.

Although the Civil Liberties Union objects to the procedure used for issuing and executing a civil investigative demand under title IX, on grounds such as the alleged burden on a witness of bringing before the court a proceeding to resist allegedly unreasonable or improper investigative demands, those procedures are substantially the same as those presently used by grand juries, Internal Revenue Service investigators, and investigators using the civil investigative demand authorized for antitrust investigations.

Nor is the union on firmer ground in objecting to civil investigative demands on constitutional grounds. The union was so bold as to state, in January, 1970, that:

If material acquired in connection with a civil investigation can be used in a subsequent criminal case, any Fifth Amendment privilege would thereby be destroyed. Unless this privilege covers all prosecutions which result from the gathering of this information, broad civil investigative powers in an area involving criminal activity would clearly be unconstitutional.³⁹⁵

A person reading the Civil Liberties Union objections on constitutional grounds to titles I, II, VII, X, and other titles of S. 30, would do well to keep in mind the comparison between this language concerning title IX, in which the union made flat and absolute assertions of clear unconstitutionality, with the decision of the Supreme Court when it spoke on the subject shortly after the union filed its statement. In that case, *United States v. Kordel*³⁹⁶ the Supreme Court rejected the criticisms leveled by the ACLU against title IX, in the context of the Federal Drug Administration's enforcement of its governing statute by civil and criminal means.³⁹⁷

The concept of title IX has been generally approved by the House of Delegates of the American Bar Association³⁹⁸ and, with two minor reservations, by

395 ACLU January 1970 letter at 12.

396 6 CRIM. L. REP. 3059 (1970).

397 The *Kordel* decision is set out and its significance is discussed by the author at 116 CONG. REC. S4185 (daily ed. Mar. 23, 1970).

398 Title IX is derived from S. 1861, which was originally introduced by myself and Senators Ervin and Hruska on April 18, 1969. 115 CONG. REC. S3856 (daily ed. Apr. 18, 1969). A companion bill, H.R. 10312, was introduced in the House by Congressman Poff on April 21, 1969. 115 CONG. REC. H2879 (daily ed. Apr. 21, 1969); *id.* H2927 (daily ed. Apr. 22, 1969). In turn, S. 1861 and H.R. 10312 were the product of the subcommittee's hearings on S. 1623, which was introduced by Senator Hruska on March 20, 1969. 115 CONG. REC. S2991 (daily ed. Mar. 20, 1969). S. 1623, in turn was based on S. 2048 and S. 2049, 90th Cong., 1st Sess. (1968), sponsored at that time by Senator Hruska. It was these two bills "and all similar legislation having the purpose of adopting the machinery of the antitrust laws to the prosecution of organized crime," that were "endorsed" by the American Bar Association in 1968. *See Hearings* at 536-58. More specific approval of title IX by the A.B.A. occurred on July 15, 1970, when the Board of Governors endorsed title IX with recommended amendments to grant discretion to close proceedings to the public, and to authorize private damage actions. *See ABA Testimony*.

the Judicial Conference of the United States.³⁹⁹ It offers the first major hope of beginning to eradicate the growing organized criminal influence in legitimate commerce, while posing no real threat to civil liberties. It should be supported by all those who wish to turn the tide of lawlessness.⁴⁰⁰

TITLE X — DANGEROUS SPECIAL OFFENDER SENTENCING

Title X would authorize extended prison sentences for carefully defined categories of particularly dangerous special offenders.

Title X authorizes a federal prosecuting attorney to notify an adult felony defendant and the court before trial on any grounds for finding the defendant to be a dangerous special offender. The concept of dangerousness is defined, as are the types of special offender: recidivist, professional offender, and organized crime offender. The court⁴⁰¹ determines the accuracy of the allegations upon a full hearing with substantial presentence report disclosure and rights to notice, counsel, compulsory process, and cross-examination, imposes sentence up to a special maximum of thirty years, and records its findings and reasons for the sentence. The title authorizes appellate review of the sentence⁴⁰² at the instance of the defendant or the Government, preserves the right of a federal court to consider the fullest information possible in determining an appropriate sentence, and establishes within the FBI a central repository for admissible copies of conviction records.

Title X would be a dramatic improvement of our law in the one area, sentencing, which is most important to the great majority of defendants and yet has received the least legal development by the Congress and the courts. The basic difficulties in our sentencing law have been that, for a given crime, every offender has been exposed to the single maximum authorized punishment set by the Congress, and that a trial court's selection of a particular penalty at or under that maximum has not been subject to appellate review. Those two factors have led the Congress, as it has fixed maximum sentences for individual offenses over the years, to set the maximums at compromise levels which curb somewhat the danger of excessive sentences for ordinary offenders, but are of insufficient length to protect society by incapacitating recidivists, professionals, and Mafia members or others engaged in organized crime.

The inadequacy of sentences imposed upon organized crime leaders has been well known to racket prosecutors for years. The people, too, are aware of the facts. A Gallup Poll early last year found that seventy-five percent of those interviewed thought that our courts did not deal harshly enough with criminals.⁴⁰³ A recent staff study by the Senate Criminal Laws Subcommittee based on FBI

399 Letter from William E. Foley, Acting Director of the Judicial Conference of the United States, to John L. McClellan, Apr. 20, 1970 (disapproval of § 1966 relating to expedition of action and § 1967 relating to public taking of depositions).

400 A bill largely modeled on title IX passed the Pennsylvania House of Representatives on June 29, 1970, by a vote of 192 to 0. (House Bill 2297).

401 A brief discussion of special offender sentencing by judge rather than jury appears at 116 CONG. REC. S698 (daily ed. Jan. 27, 1970).

402 Review of the correction or reduction, as well as of the original imposition, of a sentence is contemplated. *See id.*

403 New York Times, Feb. 16, 1969, § 1, at 47, col. 1.

sentencing data, moreover, confirms that experience and the judgment of the people.⁴⁰⁴ Two-thirds of La Cosa Nostra members included in the study and indicted by the federal government since 1960 have faced maximum jail terms of only five years or less. Nevertheless, fewer than one-fourth have received the maximum sentences, twelve percent have received no jail terms, and the sentences of the remainder have averaged only forty to fifty percent of the maximums.

Statistics, however, outline only the bare bones of the situation. An example should flesh out the deplorable situation. One of the worst gangsters uncovered in the labor racketeering investigation of the Select Committee was Anthony "Tony Ducks" Corallo, then a captain in the Lucchese family of La Cosa Nostra. It was Corallo who helped James Hoffa gain control of New York City's 140,000 teamsters. Our hearing record showed how this gangster brought in forty hoodlums with records of 178 arrests and seventy-seven convictions for crimes ranging from theft, robbery, burglary, and stinkbombing to extortion and murder. One New York employer told how he hired Corallo simply to walk into his plant and "glance at the employees to keep them in line." The late Robert F. Kennedy, our committee counsel, commented, "This seemed to me rather funny at the time . . . But when Tony Ducks appeared on the witness stand and turned his glare on us, I changed my mind."⁴⁰⁵

It was just such experiences as this that led Kennedy, when he became Attorney General, to mount the first truly effective, concentrated federal attack in our nation's history on organized crime, and by 1962 Corallo had been convicted under the Federal Anti-Racketeering Act,⁴⁰⁶ for conspiracy to pay a \$35,000 bribe to a New York judge and an assistant U.S. attorney to fix a cohort's sentence in a \$100,000 bankruptcy fraud case. Despite Corallo's shocking public record as a vicious racketeer, he was sentenced to but two years out of a possible five. He was actually released to the street within eighteen months, and there is every indication that he and his associates control at least seven of the fifty-six Teamster locals in the New York area, piratically forcing millions of consumers to pay hidden tribute.

Nevertheless, this is only half of the deplorable story. In June of 1968, Corallo once again stood before the same judge, incredibly once again convicted under the same federal statute. This time, by loansharking a financially pressed city water commission, he had been able to arrange and share a \$40,000 kick-back on a city contract. In sentencing Corallo, the judge observed:

What the court noted then about him still remains true. His entire life reflects a pattern of anti-social conduct from early youth. It is doubtful that his money over any substantial period of his adult life came from honest toil. It is fairly clear that his means derived from illicit activities — book-making, gambling, shylocking and questionable union activities.

Nonetheless, the court this time — incomprehensibly — gave Corallo only three years out of a possible five.

As convicted organized crime offenders like Corallo walked out free to re-

404 That study appears at 115 CONG. REC. S14429 (daily ed. Nov. 17, 1969).

405 R. KENNEDY, *THE ENEMY WITHIN* 81 (1960).

406 18 U.S.C. § 1952 (1964).

sume their criminal careers, they are scoffing examples that for big-time mobsters, crime in America too often does pay — and richly.⁴⁰⁷

Title X will begin to correct that situation by implementing the principle, approved by the Department of Justice,⁴⁰⁸ the ABA,⁴⁰⁹ the National Council on Crime and Delinquency,⁴¹⁰ the American Law Institute,⁴¹¹ and the President's Crime Commission,⁴¹² that the Congress should authorize one maximum sentence for ordinary offenders and a greater maximum for more dangerous offenders.

All three of title X's definitions of special offenders will apply in some cases to hard-core members of large criminal syndicates. For example, the staff sentencing study referred to previously indicated that almost sixty percent of La Cosa Nostra members included in the study would, upon conviction of another federal felony, qualify under title X as recidivists. More importantly, the three definitions have been so drawn as to accurately define the three types of offenders who should be singled out for special sentencing treatment, regardless of their relationship to La Cosa Nostra. Again, recidivists are an obvious example. The National Commission on the Causes and Prevention of Violence recently reported that:

[b]y far the greatest proportion of all serious violence is committed by repeaters.

While the number of hard-core repeaters is small compared to the number of one-time offenders, the former group has a much higher rate of violence and inflicts considerably more serious injury.⁴¹³

The staff sentencing study revealed that sixty-eight percent of all persons arrested on federal charges during the period of the study who would have qualified as recidivists under title X accumulated an average of 4.3 charges per offender following those federal arrests.

In view of modern knowledge of the role recidivism plays in our exploding crime problem, we have gone too long without a federal general recidivist statute, and it would be intolerable if now we should reject this opportunity to enact a law making the distinction between aggravated offenders and ordinary ones for the vital purpose of sentencing.

The provision of appellate review of sentences is of great importance for offenders who are shown under title X to be unusually dangerous to society and are exposed to unusually long sentences. They implement a recommendation of the President's Crime Commission that

There must be some kind of supervision over those trial judges who, because of corruption, political considerations, or lack of knowledge, tend to mete out light sentences in cases involving organized crime management

407 Further examples of inadequate sentences, and a discussion of the problem, appear in an article of the author in *READER'S DIGEST*, placed in the Congressional Record by Congressman Poff with his analysis of the issues. 116 CONG. REC. H1394 (daily ed. Mar. 2, 1970).

408 See, e.g., *Justice Department Comments in Hearings* at 375-77.

409 A.B.A. STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES §§ 3.1, 3.3 (Approved Draft, 1968) [hereinafter cited as ABA STANDARDS ON SENTENCING].

410 See MODEL SENTENCING ACT § 5 (1963).

411 See MODEL PENAL CODE § 7.03 (Proposed Official Draft, 1962).

412 See CHALLENGE OF CRIME at 143, 203.

413 115 CONG. REC. H11314-15 (daily ed. Nov. 24, 1969).

personnel. Consideration should therefore be given to allowing the prosecution the right of appeal regarding sentences of persons in management positions in an organized crime activity or group. Constitutional requirements for such an appellate procedure must first be carefully explored.⁴¹⁴

The appellate review provisions of title X have been drawn with great care so as to avoid infringing individual rights under the due process and double jeopardy clauses. Supreme Court decisions rendered in the last two terms, and lengthy and detailed hearings into the legal and constitutional aspects of appellate review of sentences, have indicated that the concept can be implemented as title X does within constitutional bounds. Appellate review under title X will not only permit correction of unjust sentences in particular cases, it will also promote the evolution of sentencing principles and enhance respect for our system of justice. It promises a major improvement in the administration of criminal justice at a stage where that improvement long has been needed.

Nevertheless, the ACLU and bar committee are critical of title X and in particular its definitions of "dangerous special offenders," who are made subject to extended prison terms. The phrase "special offender" is defined in title X to include three types of criminals found by the Senate to pose special threats to society. Essentially, they are recidivists, professional criminals and organized crime offenders, but each type is defined in detail. Title X makes the special prison term depend in addition on a separate court finding that the defendant is especially "dangerous," and defines that term. The ACLU, however, finds each of those four definitions vague or overbroad.

The ACLU summarizes the definition of a recidivist by saying it covers — "a person previously convicted two or more times in any court — and imprisoned one or more times — of offenses punishable by imprisonment for more than one year" — regardless of how long ago the convictions occurred or for what crimes, or whether the person was over or under juvenile court age.⁴¹⁵ This summary is inaccurate and misleads the reader in two respects.

First, it states that the extended sentence can be imposed for any crime, while actually title X provides that the extended sentence can be imposed only if the defendant's latest crime, for which he is to be sentenced, is a felony. The ACLU must have been alert to this limitation on the scope of title X. It was the recommendation of the ACLU which led the Senate Judiciary Committee to amend the details of title X's definition of a prior felony conviction,⁴¹⁶ although the ACLU's recent statement draws no attention to the Judiciary Committee's acceptance of this earlier suggestion.

Second, the ACLU's statement that the recidivist definition covers a prior conviction "whether the person was over or under juvenile court age" is a half-truth. It omits to mention that under the definition, as the committee report makes perfectly clear, juvenile proceedings are not included.

On the other hand, the city bar committee is correct in its statement that a defendant's previous convictions and sentencing as a so-called "youth of-

414 CHALLENGE OF CRIME at 203.

415 ACLU January 1970 letter at 14-15.

416 See *Hearings* at 468 (statement of Lawrence Speiser, director of the ACLU's Washington office).

fender" can be considered as previous convictions exposing the sentencing as a recidivist.⁴¹⁷ Such convictions should be considered, since unlike juvenile proceedings they reflect, as much as do ordinary criminal convictions, the results of full criminal trials of defendants, and findings after jury trial or waiver of jury trial that the defendants committed the felonies involved. Once such a defendant's commission of a subsequent felony has demonstrated that the defendant failed to respond to his youth offender sentence, there is no reason to require the court to close its eyes to the significance of the defendant's prior felonious conduct. After all, convictions for which a defendant receives youth offender sentences are not, as the city bar committee asserts,⁴¹⁸ "offenses . . . received" by the defendant — they are felonies committed by him, and are quite relevant in determining the sentence which the defendant should receive for a subsequent felony.

The evaluation of the recidivist definition by the union and bar committee is no more valid than the union's summary of it. The union implies⁴¹⁹ that convictions occurring long before the defendant's latest felony should not be considered a basis for sentencing him as a repeater.⁴²⁰ The city bar committee similarly raises fears that title X may be applied to impose the maximum sentence authorized by title X, a thirty-year term of imprisonment, to the least aggravated offender who comes within the terms of the title X definitions. For example, the bar committee states that "under Section 3575(e)(1), a judge could give the same thirty-year sentence to an offender guilty of a minor felony, for which the maximum punishment was only two years, as to a person convicted of bank robbery, who could otherwise receive twenty-five years — all based upon a subjective evaluation of prior convictions."⁴²¹ This is so, the city bar committee asserts, because under title X — "the severity of the sentence [is] unrelated to the defendant's most recent crime."⁴²²

Of course, it is true that not every individual who barely satisfies the title X recidivist criteria will at the time of his sentencing require thirty years of incarceration — and the same would be true of any other definition of repeaters, however restricted its terms. A defendant's most recent felony, for example, may not have been discovered or prosecuted until several years after its commission, and he may have completely reformed in the meantime, or there may be other extenuating circumstances.

However, such a defendant is protected from severe sentencing as a recidivist by several provisions of title X other than the definition of a recidivist. For example, the title requires that the court find at the time of sentencing that the defendant is especially "dangerous," in the sense that a period of confinement longer than that ordinarily provided is required for the protection of the public from further criminal conduct by the defendant.⁴²³ The title also authorizes the district court in its discretion to impose a sentence less than either the special

417 ABCNY at 48 n.81.

418 *Id.*

419 AGLU January 1970 letter at 13.

420 *Accord, ABA Testimony.*

421 ABCNY at 44-45.

422 *Id.* at 47.

423 Proposed § 3575(f).

maximum or even the ordinary maximum, even though the defendant meets the statutory criteria. Furthermore, title X permits the court of appeals to review both the finding of dangerousness and the district court's exercise of discretion.

The vital point to keep in mind is that, though not every defendant barely meeting the definition of a recidivist in title X will deserve or receive a maximum thirty-year sentence, every defendant who meets that definition is found to be dangerous, and meets every other requirement of the title does merit some increase in punishment, large or small. Title X merely gives courts discretion to increase the punishment to the degree appropriate in each case.

In addition, many recidivists deserve and require very long sentences despite the fact that their most recent convictions prior to the felonies for which they are being sentenced occurred a number of years earlier. Indeed, the subcommittee staff study of FBI sentencing experience showed that the average La Cosa Nostra member in the study had a criminal career of over 20 years. Racket prosecutors have found this pattern to be typical: a Mafia member is convicted of several minor or moderately serious offenses in early adulthood, rises in the criminal organization and is immune for many years, and then is convicted of a felony in late middle age when his prominence in the syndicate has led to a concerted effort to obtain evidence of his activities. Title X's recidivist definition covers such a criminal career. The staff study previously referred to indicated that almost sixty percent of La Cosa Nostra members upon conviction of another federal felony would qualify under title X as recidivists. To impose a time limitation on the definition would reward syndicate members for avoiding detection of their crimes, and for corrupting law enforcement officials and witnesses. It also would prevent effective sentencing of many recidivists who are not members of organized crime but who present special dangers to society nevertheless. The complaint that prior convictions are stale overlooks the fact that each defendant covered by title X's recidivist definition has committed a new crime recently, a felony at that. We must not fetter the right of a sentencing judge to evaluate the case of every repeater in the light of all its circumstances, by imposing a mechanical, mathematical time limitation. That conclusion is the one reached by the American Law Institute in its Model Penal Code,⁴²⁴ and by states, such as Missouri, having general recidivist laws.⁴²⁵ Indeed, title X's recidivist definition was drawn largely from the Model Penal Code and existing state recidivist laws,⁴²⁶ and then was refined in view of testimony received by the subcommittee.

Numerous precedents from states having general recidivist statutes undercut the complaint that a recidivist sentence much more severe than that ordinarily authorized for the defendant's most recent felony is improper. Such statutes have been held constitutional as employed by the states, despite the fact that they commonly permit or require imposition of a prison sentence for life or for an extremely long term regardless of the seriousness of the defendant's most recent

424 MODEL PENAL CODE § 7.03 (Proposed Official Draft, 1962).

425 VERNON'S ANN. MO. STAT. § 556.280 (Supp. 1969) *State v. Humphries*, 350 Mo. 938, 169 S.W.2d 350 (1943).

426 The statutes are collected in Note, *The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions*, 33 N.Y.U.L. REV. 210 (1958); Note, *Recidivist Procedures*, 40 N.Y.U. L. REV. 332 (1965).

felony. The U.S. Supreme Court has held, for example, that the imposition of a life sentence for a third conviction is not "cruel and unusual punishment," although the defendant's latest offense merely is larceny.⁴²⁷

It is the existing recidivist statutes — at least such of them as do not impose mandatory prison sentences — which permit sentencing based upon the "subjective evaluation of prior convictions" of which the city bar committee complains. Title X, on the contrary, will make recidivist sentencing objective, both by articulating on the face of the statute the criteria for finding a defendant to be a recidivist, to a greater degree than is common in the state general recidivist laws, and by authorizing appellate review of recidivist sentences, which is designed to produce a body of decisional precedent developing and refining objective standards for discretionary sentencing of recidivists. For those reasons, the sentences under title X will be, to a far greater degree than sentences held to be valid under existing state recidivist statutes, related in severity both to the seriousness of the defendant's most recent felony and to the character of his previous convictions.

The language of title X itself quite properly declines to place mechanical limitations on the relationship which sentencing and reviewing courts must find to exist between the appropriate sentence for a recidivist in a given case and the maximum authorized sentence for his most recent felony. The committee report in the Senate does, however, make it clear that both the trial court and the court of appeals must measure the "appropriateness" of any sentence to be imposed, and the provisions for discretionary rather than mandatory sentencing and appellate review provide effective means by which this principle will be applied.⁴²⁸ So far as any constitutional undercurrents in the concept of relationship between a recidivist's sentence and his most recent felony are concerned, any constitutional question would be resolved, not upon a reading of the face of the recidivist statute, but upon evaluation of each application of the statute through the imposition of a specific sentence in a specific case.⁴²⁹

Title X's definition of a professional offender also is rejected by the ACLU,⁴³⁰ which asserts that

[e]ven the Justice Department opposed a similar proposal in the original bill as being so vague as to create due process problems and, being unable to suggest constitutionally acceptable language, called for its deletion. *See, e.g., Lanzetta v. New Jersey*, 306 U.S. 451 (1939).⁴³¹

It is odd that the ACLU says "even the Justice Department." The Department was nearly as critical as the ACLU, and much more thorough and constructive, when it submitted its comments on the original version of S. 30. The Department proposed a great many changes in the bill, some of them major, and nearly all were accepted by the Judiciary Committee.

In fact, the committee adopted all the Department's criticisms of the pro-

427 *Graham v. West Virginia*, 224 U.S. 616 (1912).

428 *REPORT* at 91, 166.

429 *Hearings* at 204.

430 *See also ABA Testimony* (finding the definition of a professional offender to be vague).

431 ACLU January 1970 letter at 14.

fessional offender definition.⁴³² Far from being unable to suggest constitutionally acceptable language, as the ACLU claims, the Department made these constructive suggestions:

In order to withstand a constitutional attack on grounds of vagueness . . . it is felt that the definition of professional offender must be made more specific and must emphasize a pattern of specific past criminal activity and conduct in opposition to the legal structure of society as a whole, rather than emphasis on his income from a source other than legal. This could perhaps best be approached by adopting the approach taken in the Model Sentencing Act. . . .⁴³³

Comparison of S. 30 as originally introduced, with the Model Sentencing Act and S. 30 as passed by the Senate, demonstrates that the Judiciary Committee made the suggested changes. Therefore, the ACLU's reliance on the Justice Department's criticism is inexplicable and irrelevant, and the union's statement that S. 30's present definition of a professional offender is "similar" to the one criticized by the Department is inaccurate.⁴³⁴

Nor is the "professional offender" definition invalid under the case of *Lanzetta v. New Jersey*,⁴³⁵ though the ACLU implies that such is the case by citing that decision. *Lanzetta* involved a substantive statute defining a crime, while title X merely applies sentencing criteria. Substantive law must be relatively clear and precise, so that citizens may know in advance whether their acts will be crimes. Remedial law such as title X, on the other hand, may be less precise, and those who violate clear substantive prohibitions have always been required to accept a risk of relatively flexible, less predictable consequences at the stage of sentencing. In any case, neither the "professional offender" definition nor the others in title X are at all comparable to the vague, undefined terms held impermissible in *Lanzetta*, such as "gang" and "known to be a member," and similar statutory language has been sustained by the Supreme Court.⁴³⁶

The city bar committee complains that title X's definition of a professional offender, which requires, in part, that "the defendant committed such felony as part of a pattern" of criminal conduct, "nowhere defines what is a sufficient pattern of conduct."⁴³⁷ The city bar committee goes on to state that:

The section-by-section analysis, Senate Report 164, explains that this requirement "precludes the application of the provision to an isolated offense." But all that is apparently necessary to trigger the possibility of a thirty-year sentence are two isolated offenses, no matter how widely separated in time.⁴³⁸

The bar committee's conclusion that two isolated offenses are sufficient is inaccurate and unwarranted. The committee reached that conclusion, and makes the conclusion appear to the reader to be tenable, only by failing to note

432 The criticisms are stated in the *Hearings* at 376.

433 *REPORT* at 116.

434 ACLU January 1970 letter at 14.

435 306 U.S. 451 (1939).

436 *Minnesota v. Probate Court*, 309 U.S. 270 (1940).

437 *ABCNY* at 48.

438 *Id.*

that the Senate report, on the page immediately following the page from which the city bar committee took its short quotation, states:

The phrase "pattern of conduct" covers continuing, repetitive, intermittent, sporadic, or other conduct in which two or more similar or different criminal acts bear relationships to one another which are relevant to the purposes of sentencing, regardless of the nature of the relationships. The variety of such relationships precludes more detailed specification of them in the bill.⁴³⁹

Clearly, just as in title IX, where the concept of "pattern" is employed, the intent of S. 30 is clear, on its face and in the Senate committee report, that the term "pattern" itself conveys the requirement of a relationship between various criminal acts. In addition, the establishment of a pattern is only one of a number of elements which must be satisfied before the possibility of a thirty-year sentence is triggered, such as the requirement that the defendant be "dangerous," that he have been convicted of a subsequent felony, that he have been over twenty-one at the time his most recent felony was committed, and so forth. The bar committee's statement that a thirty-year term can be triggered by two isolated offenses and nothing more is plainly incorrect and inflammatory.

The ACLU's objections to the "professional offender" definition also include the complaint that "it is unclear whether a 'criminal' pattern of conduct includes misdemeanors as well as felonies."⁴⁴⁰ On the contrary, it is perfectly clear. In referring to the defendant's most recent offense, title X invariably uses the narrow word "felony," so that offense plainly must be a felony; and, in referring to the previous offenses to be considered in ruling whether the defendant is a professional or organized crime offender, it invariably uses the broad word "criminal"—so those offenses may be any crimes, whether felonies or not.

The meaning of title X in this respect is not only clear, it is sound. It follows the example of the Model Penal Code,⁴⁴¹ promulgated by the American Law Institute. Indeed, title X goes further than the Model Penal Code to insure that the defendant's prior criminal activity was sufficiently serious and relevant so that it should be considered in sentencing. Both the professional and the organized crime offender definitions in title X require that the prior criminal conduct be so related to the latest offense, which must be a felony, as to form a "pattern" with it.

The ACLU also asserts that it violates the privilege against self-incrimination to permit an inference against a defendant alleged to be a professional offender to be drawn from his income or property, where it is not explained as derived from a source other than crime.⁴⁴² The city bar committee goes still further, stating that it disagrees "that failure to explain income or property in the defendant's possession supports an inference that it was derived from a pattern of criminal conduct. The right to refrain from explaining one's sources of income

439 REPORT at 165.

440 ACLU January 1970 letter at 14.

441 MODEL PENAL CODE § 7.03 (Proposed Official Draft, 1962).

442 ACLU January 1970 letter at 14.

in public is one that deserves recognition and protection."⁴⁴³ Those assertions are incorrect for several reasons.

First, title X does not require that a defendant desiring to explain his wealth testify in person. The defendant instead can offer other witnesses or documentary evidence, and doing so is not considered self-incrimination.

Second, this provision of title X does not compel a finding that a defendant with unexplained wealth is a professional offender, it does not create an irrebuttable or even a rebuttable presumption to that effect, and it does not even require the court to draw any inference from the unexplained wealth. It is clear, from a careful reading of the face of the provision, that its sole effects are to declare unexplained wealth to be relevant, and to permit the drawing from it of any inference of fact which is logical and persuasive in the circumstances. In this connection, it is like the similar permissible inference that follows from the recent possession of stolen property, which has been long upheld.⁴⁴⁴ The inference under title X may be very strong in some cases and nonexistent or very weak in others, depending upon the type of wealth, the circumstances of its acquisition, the facts concerning the felony for which the defendant is to be sentenced, and the other circumstances of aggravation. If the sentencing judge draws any such inference, title X requires him to say so on the record, and the court of appeals reviews the issue. It is stretching the fifth amendment beyond reason to suggest that it is violated by a statute which merely permits the drawing of any inference which is persuasive and does not require the drawing of an inference which the facts do not justify. Indeed, it is surprising that the ACLU presses this objection in its statement, and does not mention that the provision was amended by the Senate Judiciary Committee, to read as it now does, in response to the ACLU's complaint that when S. 30 was introduced the provision, which then declared that every person with unexplained wealth automatically was a "professional offender," tended "to draw a conclusive presumption of guilt."⁴⁴⁵ Obviously, the provision no longer does that, and it no longer threatens the constitutional privilege.

Third, the *Marchetti*⁴⁴⁶ and *Grosso*⁴⁴⁷ cases, relied upon by the union, shed no light on title X, since the law they invalidated made one's failure to incriminate himself a crime in itself. The ACLU seems to recognize the irrelevance of those cases, since its citation suggests only that the reader "see generally" those decisions. The precedents which are relevant to this provision of title X support its constitutionality, since they permit the use of a defendant's net worth in a tax prosecution⁴⁴⁸ and an inference of guilt from unexplained possession of stolen property in cases of larceny and receiving stolen goods.⁴⁴⁹ Title X's provision, which applies such a principle to sentencing criteria, is virtually identical to one in the Model Sentencing Act⁴⁵⁰ approved by the National Council of

443 ABCNY at 48 n.82.

444 *Wilson v. United States*, 162 U.S. 613, 619 (1896).

445 *Hearings* at 472.

446 390 U.S. 39 (1968).

447 390 U.S. 62 (1968).

448 *See Holland v. United States* 348 U.S. 121 (1954).

449 *See Wilson v. United States* 162 U.S. 613 (1896).

450 MODEL SENTENCING ACT § 6 (1963).

Crime and Delinquency's Advisory Council of Judges, while the American Law Institute's Model Penal Code goes still further and permits the inference that a defendant is a professional criminal from the single fact of substantial unexplained wealth.⁴⁵¹

The ACLU's criticism of title X's "organized crime offender" definition is less detailed, more emotional, and equally unsound. It attempts to provoke a fear that that definition is overbroad and applies to "civil rights activists or political demonstrators,"⁴⁵² or to Dr. Spock or the "Chicago Seven." A person can be sentenced under title X as an "organized crime offender," however, only if he was convicted of a felony—not a minor offense—and only if all the following facts are true: first, he was a member of a conspiracy to commit not just a single crime, but a pattern of crimes; second, the conspiracy was closely related to the defendant's felony and therefore was intrinsically an especially serious conspiracy; third, the conspiracy had at least four members, not just the usual legal minimum of two; fourth, the defendant, as a part of the conspiracy, either gave or received a bribe, or used force, or was a leader of the conspiracy.

The city bar committee's assertion that "it is hard to imagine any conspiracy"⁴⁵³ in which it will not be true that every participant in the conspiracy managed or directed part of the conspiracy is incorrect. While certain small conspiracies, such as gangs which rob stores or burglarize warehouses for a living, often delegate some aspects of their plan to individual members and involve most members of the conspiracy, many of the most common and most profitable conspiracies engaged in by organized crime, such as large gambling businesses and schemes for distribution of narcotics, involve more conspirators at the lowest level, having no management or supervisory responsibilities, than at all the upper levels combined.

Not one of the title X criteria for finding one to be an organized crime offender is a requirement for conviction of the defendant's felony itself. Not one of those facts needs be shown in order to impose the maximum sentence which is provided for that felony in ordinary cases. Yet title X requires every one of them to be established before a sentence exceeding the ordinary maximum, however slightly, can be imposed. Those who suggest that so-called civil rights leaders engage in felonious conspiracies to commit patterns of crime must have a very low opinion of the nation's civil rights movement. The essential point, however, is that any defendant who actually meets every one of those extra criteria of culpability and dangerousness deserves and requires a sentence longer, to some degree, than that of a defendant who meets none of them. Thus, the scope of the "organized crime offender" definition is not only permissible, it is also necessary. The nation must not let a hysterical fear that some "political activists" will commit crimes of special gravity deter it from setting up sentencing standards which distinguish more grave from less grave offenses.

The definition title X adopts for identifying organized crime offenders is

451 MODEL PENAL CODE § 7.03 (Proposed Official Draft, 1962), and Comment No. 5, Tent. Draft No. 2, 1954.

452 ACLU January 1970 letter at 14.

453 ABCNY at 49.

much narrower than that approved by the Model Sentencing Act.⁴⁵⁴ Indeed, the Director of the National Council on Crime and Delinquency, testifying before the Senate subcommittee on S. 30, went so far as to state that S. 30

defines an "organized crime offender" in terms that are rather similar to those in the Model Sentencing Act. [S. 30's definition] is more detailed, and perhaps in that respect superior to the corresponding provision in the Model Sentencing Act. This section we think is fine, and desirable, a useful addition in the fight against organized crime.⁴⁵⁵

The changes made in that definition after the National Council's testimony was given have clarified it, and the Council still "fully endorses" it.⁴⁵⁶

The ACLU also criticizes the provision of title X that a defendant is "dangerous" if a prison term longer than that ordinarily provided for his felony is required for protection of the public from further criminal conduct by him, claiming that it contains no standards for determining what sentence is "required," and that "[s]uch breadth and discretion create grave risks of abuse."⁴⁵⁷

Once again the ACLU's only attempt to support an objection to title X is a citation of an inapposite Supreme Court decision, which this time is *Minnesota v. Probate Court*.⁴⁵⁸ This case actually supports the adequacy of title X's criteria, as noted above. The Court sustained the statute challenged there, as elaborated by judicial interpretation, against a charge of vagueness, since it required evidence of "past conduct pointing to probable consequences" as a condition of restraining a person due to his "psychopathic personality."⁴⁵⁹ Title X clearly requires proof of a defendant's "past conduct" when it defines recidivists and professional and organized crime offenders, and of the "probable consequences" when it defines the word "dangerous." The title thus satisfies the constitutional requirements laid down by the Supreme Court in that decision.

The ACLU's statement does not mention this fact, but title X's definition of the term "dangerous" was framed in its present language largely in response to prior suggestions by the ACLU. When S. 30 was introduced, it made one prerequisite of an extended prison sentence a finding "because of the dangerousness of such person that a period of confined convictional treatment or custody longer than that provided for the offense for which he is charged is required for the protection of the public."⁴⁶⁰ The ACLU informed the subcommittee that it found that language "vague, confusing and lacking in standards" and gave three specific reasons.⁴⁶¹

First, the ACLU noted that the bill seemed to require showings of both "dangerousness," which was not defined, and of the need for extended imprisonment.⁴⁶² The Judiciary Committee agreed that use of the word "dangerousness" as an operative term was redundant and vague, and cured the defect by elimi-

454 MODEL SENTENCING ACT § 5 (1963).

455 *Hearings* at 251.

456 Statement submitted to House Judiciary Subcommittee No. 5 at 1; but see *ABA Testimony* (organized crime offender definition held vague).

457 ACLU January 1970 letter at 14.

458 309 U.S. 270, 276-77 (1940).

459 *Id.* at 274.

460 *Hearings* at 21-22, 25.

461 *Id.* at 468.

nating the operative use of the term "dangerous." The bill approved by the Judiciary Committee and passed by the Senate does not, however, as the city bar committee's report implies that it does,⁴⁶³ eliminate "dangerousness" as a separate element, in addition to the element that a defendant be a "special offender," which is required to be shown before special sentencing is authorized. The Senate report's statement that "[d]angerous' may be inferred, although not necessarily, from the establishment of the requirements of subsection (c)"⁴⁶⁴ is simply a recognition of the possibility that the same facts the establishment of which shows the defendant to fall within one or more of the definitions of "special offender" may, in a given case, also demonstrate that the defendant is "dangerous." It is more apparent that the statement in the committee report means only that, and does not eliminate dangerousness as an independent requirement, when the statement is quoted in full, rather than quoted out of context as the city bar committee did when it omitted the statement in the report that dangerousness is "not necessarily" to be inferred from establishment that a defendant is a "special offender."

Second, the ACLU criticized S. 30's failure to say from what the public must need protection, and pointed out the provision of the ABA sentencing standards for a finding that extended custody is necessary to protect "the public from further criminal conduct by the defendant."⁴⁶⁵ The Judiciary Committee again agreed, and added the ABA's language verbatim.

Third, and last, the ACLU said it had difficulty seeing how a judge could determine when a longer term is "required" in a given case, and noted that the Model Sentencing Act, which has a "protection of the public" clause like that found in S. 30 when it was introduced, is amplified by relatively detailed definitions of special offenders.⁴⁶⁶ The corresponding definitions in title X have been so amended that they now are, as a group, more specific and narrow than those in the Model Sentencing Act, so the union's third suggestion on the subject of "dangerousness" has been accepted as well.

Perhaps the fact that the Senate so completely cured the specific defects on which the ACLU's vagueness objection originally was based accounts for the lack of specificity in its new charge that the dangerousness definition is vague. Actually, that definition now closely follows, or even exceeds in specificity, not only the Model Sentencing Act and ABA standards, but also the Model Penal Code⁴⁶⁷ and the Minnesota recidivist law.⁴⁶⁸ Although the bar committee thinks that title X's definition of "dangerousness" provides "no meaningful standards,"⁴⁶⁹ such standards apparently have meaning to the ABA, NCCD, ALI, and Minnesota Legislature.

The definitions used in title X as a group are unusually specific and clear for sentencing standards. It must be recalled that the definitions in title X are not substantive criminal prohibitions, defining crimes, and do not establish the

463 ABCNY at 49.

464 REPORT at 166.

465 ACLU January 1970 letter at 14.

466 *Id.*

467 MODEL PENAL CODE § 7.03 (Proposed Official Draft, 1962).

468 MINN. STAT. ANN. §§ 609.155, 609.16 (1964).

469 ABCNY at 49.

question of guilt or innocence. They are legislatively specified criteria for sentencing only. They are not only a great improvement over a situation where sentencing is, at the present, guided by no standards at all — they conform to similar standards developed by professional bodies which have studied the problem of special sentencing most thoroughly, and seem to provide excellent guidance and control over the discretion of a sentencing court.

The ACLU's complaints that title X is vague not only are found on study to be groundless — they are made in such a way as to call into question the ACLU's credibility as a commentator on S. 30. Not once in its current attack on S. 30's definitions does the ACLU suggest new phrases which should be used, amendments which should be offered, to improve rather than defeat the bill. Since the ACLU's new statement does not merely emphasize, but actually concentrates exclusively upon, a destructive rather than constructive approach to the legislation, its arguments seem to be based less upon specific objections than upon hostility to the entire concept of special offender sentencing. That is unfortunate, since it reduces the value of the ACLU's comments to a legislative body which recognizes the validity of that concept — as have the President's Crime Commission, the American Bar Association, the American Law Institute, and the National Council on Crime and Delinquency.

It would be a grave mistake to restrict dangerous special offender sentencing under title X to sentencing for any list of specified offenses supposedly typical of organized crime. As the title is now written, it will, of course, have its main impact on those engaged in organized crime. As mentioned above, a subcommittee staff study analyzing FBI data on La Cosa Nostra revealed that almost sixty percent of its members, upon new convictions for Federal felonies, would qualify under the provisions of title X as "recidivists." Even higher proportions of organized crime participants would fit the definitions of "organized crime" and "professional" offenders contained in title X.

Of course, it is true that title X will have some application to individuals who are not members of La Cosa Nostra or otherwise engaged in organized crime. However, that is not a reason to cut back its scope, but a natural and proper consequence of the congressional study of the subject. It was the organized crime problem which first prompted us to consider the wisdom of authorizing special sentences, but our study of the measure revealed the broad principle which underlies it: the establishment of special criteria and procedures for sentencing aggravated offenders improves the protection of ordinary offenders, special offenders and society — and that principle applies to recidivists and professional offenders as well as organized criminals. Courts have to decide only one case at a time, of course, but the Congress must remember it is a legislature and should not close its eyes to the inherent scope of a valid proposal.

The scope of title X has been carefully confined by a number of definitions and provisions assuring that it will apply only to defendants who deserve punishment exceeding that normally provided for their offenses, since the offenses were committed under aggravating circumstances. Title X, in short, will not cover any defendant, a member of La Cosa Nostra or otherwise, unless he is guilty of committing a federal felony, he is found to be "dangerous," and either he

has two prior felony convictions with one imprisonment or he is shown to be a "professional" or "organized crime" offender. Every individual who falls within these definitions deserves to be exposed to some aggravation of the penalty for his latest felony, regardless of whether or not that felony is one commonly committed by participants in organized crime, and society deserves special protection from the special threat he poses.

The crime crisis is nationwide, and stems from organized criminals, professionals and recidivists alike. As the President's Crime Commission reported in 1967 on the subject of recidivism:

The most striking fact about offenders who have been convicted of the common serious crimes of violence and theft is how often how many of them continue committing crimes. Arrest, court, and prison records furnish insistent testimony to the fact that these repeated offenders constitute the hard core of the crime problem.⁴⁷⁰

The Commission based that conclusion in part upon its review of studies of recidivism, which it said lead "to the conclusion that despite considerable variation among jurisdictions, roughly a third of the offenders released from prison will be reimprisoned, usually for committing new offenses, within a 5-year period."⁴⁷¹ Further, the Commission pointed out that "[t]hese findings are based on the crimes of released offenders that officials learn about. Undoubtedly many new offenses are not discovered."⁴⁷²

Of course, defendants who are not Mafia leaders often will not require the maximum sentence authorized by title X, so the bill confers upon the sentencing court discretion as to the degree of aggravation of offense and sentence, and subjects the exercise of that discretion to appellate review. Thus, title X will affect each defendant only to the extent warranted by his individual conduct. In this day of lawlessness and violence, there can be no objection on grounds of principle to the scope of title X.

Further, it would be unrealistic and impractical to confine the operation of title X entirely to a pat list of so-called "organized crime" offenses. One of the most striking aspects of the logs of FBI electronic surveillance of Simone De Cavalcante and Angelo De Carlo, disclosed by New Jersey federal judges last year, was the readiness which the logs showed on the part of La Cosa Nostra members to violate any law, any time, any place, as long as there is money in it.⁴⁷³ If Congress limits special sentencing to a list of offenses, it will create a loophole that will dwarf the law — a loophole best taken advantage of by the very criminal it is most important to imprison, the Mafia leader who can stress one or another illicit activity to reduce his risk.

The many bodies that have recommended, adopted or used special offender sentencing statutes have not found it wise to restrict them to lists of offenses. The first American special offender sentencing statutes, of course, were the state

⁴⁷⁰ CHALLENGE OF CRIME at 45.

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 46.

⁴⁷³ See, e.g., J. VOLZ and P. BRIDGE, THE MAFIA TALKS (1969) (DeCavalcante surveillance transcripts).

general recidivist laws. At the present time, such laws are found in some forty-five states.⁴⁷⁴ Defects have been identified in their operation, but there has been no general movement away from the principle embodied and approved in those statutes; and they are not confined in their operation to lists of specified crimes.

In addition, it now has become generally accepted that the concept of special sentencing should be extended beyond recidivists to professional and organized crime. A number of thoughtful bodies have strongly recommended it. First, in 1962, it was recommended by the Model Penal Code, promulgated by the American Law Institute, whose council of some forty-two leading lawyers and jurists was chaired by Harrison Tweed and included Judge Henry J. Friendly and Professor Samuel Williston. In 1963, such a proposal was made in the Model Sentencing Act adopted by the Council of Judges of the National Council on Crime and Delinquency. Among the members of the council of judges were Justice William J. Brennan, Jr., Judge Irving R. Kaufman, Chief Justice Paul C. Reardon, and Justice Joe W. Sanders. The President's Crime Commission, which of course was chaired by Attorney General Katzenbach and included Judge Charles Breitler, William P. Rogers, and Herbert Wechsler, reached the same conclusion in 1967. And the same year, the American Bar Association approved such a proposal on the recommendation of committees chaired by Judges J. Edward Lumbard and Simon E. Sobeloff.

What is most significant at this point is that not one of the proposals made by those distinguished bodies recommended that special sentencing be limited to a list of offenses — on the contrary, each proposal was made to cover all felonies. After thorough subcommittee hearings and study, the Judiciary Committee and the Senate agreed, for good reasons. The inadequacies and defects which title X will correct in our existing law and procedures for sentencing in aggravated cases are common to all federal felonies. To correct them only for certain crimes would distort the basic concept of special sentencing. It would permit inconsistent, unequal and unfair treatment of defendants who are similarly situated, and it would not get the job done of protecting honest citizens from all unusually dangerous felons.

It is fallacious, moreover, to say that title X should be restricted to sentencing for a list of specified offenses, just because there is a list of offenses in one section of title IX, on corrupt commercial organizations. That list was placed in title IX for reasons which have no application in the context of sentencing.

The basic provisions of title IX are substantive: they define conduct as prohibited. These provisions implement economic policy by authorizing the removal of corrupt influences from legitimate commercial organizations, and the commission of an offense listed in title IX subjects one to the remedies of the title only if the offense bears a specified relationship to interstate commercial activity. Since the purpose of title IX is economic, it would be pointless surplusage for it to cover crimes which are not adapted to commercial exploita-

⁴⁷⁴ The statutes are evaluated in Tappan, *Habitual Offender Laws and Sentencing Practices in Relation to Organized Crime*, in II A.B.A.: ORGANIZED CRIME AND LAW ENFORCEMENT 139 (1952).

tion.⁴⁷⁵ This is why the particular offenses which are well-suited for use to infiltrate a legitimate organization were listed in a section defining one of the substantive elements of title IX.

Title X, in contrast, is not substantive: it deals solely with the penal disposition of individuals already convicted of substantive crimes. Its purpose is not confined to one sphere, such as economic policy, which can be treated separately from other problems. The activities of organized criminals extend beyond commercial exploitation, such as that treated by title IX, and bring them in violation of every felony in the books. The problem which title X solves is the problem of distinguishing the aggravated offender from the ordinary offender, and that problem is the same whatever felony was committed. It is the definitions of "dangerous special offenders" which appropriately limit the scope of title X, just as it is a list of offenses which limits that of title IX.

For these reasons, title X on sentencing, like title IX on racketeer infiltration, already is so drawn as to apply only in those situations necessarily covered in a consistent application of the purposes of the measure, and title X should not be restricted to a list of specified felonies. The Senate, of course, rejected a motion which would have restricted sentencing under title X to sentencing for the offenses listed in title IX by a vote of 11 to 62.⁴⁷⁶ This resolution of the issue was in line not only with the state practice, but also with the recommendations of the expert bodies which have proposed special sentencing.

The bar committee also objects that the filing of the notice commencing special sentencing "might well lead to widespread pre-trial publicity adverse to the defendant."⁴⁷⁷ The bar committee, in making that statement, makes no attempt to analyze the countervailing interests requiring the filing of such a notice, ignores the existing law and practice permitting the filing of comparable allegations, and displays its hostility to the purposes of title X by declining to offer suggestions as to how any difficulty as to publicity can be avoided.

Actually, of course, there is nothing to prevent a court in which such a notice is filed from immediately sealing the notice from public inspection.⁴⁷⁸

On the other hand, the exposure of judicial proceedings to reasonable public scrutiny often serves the interests of defendants by protecting them from arbitrary official action. Even where a dangerous special offender notice is made public, though, its filing as a matter of public record simply does not raise the extreme dilemma suggested by the city bar committee. Neither the case of *Sheppard v. Maxwell*,⁴⁷⁹ nor the "spirit" of court rules such as the Southern District of New York criminal rule cited by the bar committee,⁴⁸⁰ requires that all publicity concerning criminal court proceedings be avoided. The city bar committee actually misuses the *Sheppard* case, by citing it as teaching that the sort of

475 See, e.g., 18 U.S.C. § 2032, which deals with carnal knowledge of female under the age of sixteen.

476 116 CONG. REG. S415-19 (daily ed. Jan. 22, 1970).

477 ABCNY at 49-50.

478 See, e.g., NEV. REV. STAT. § 200.670 (1967) [search and seizure application and supporting documents to be confidential except on court order]; *United States v. Michael*, 180 F.2d 55, 56-57 (3d Cir. 1949), cert. denied, 339 U.S. 978 (1950) [secrecy in records unobjectionable absent prejudice].

479 384 U.S. 333 (1966).

480 ABCNY at 50 n.84.

information to be included in notices filed under title X should not be publicized.⁴⁸¹ The decisions and rules dealing with this subject actually prohibit only gratuitous publications, leaving the question whether papers necessarily filed as part of judicial proceedings should be filed publicly or sealed in the discretion of the court.

Of course, the exercise of that discretion sometimes will lead to public filing resulting in some publicity. This often occurs at present with the publication of indictments, search warrants, the affidavits upon which warrants are based, and returns by officers executing search warrants, and with publicity given to a first trial where a reversal results in the necessity of a second trial. For such a case, techniques have been developed for protecting defendants from prejudice, such as voir dire examination of prospective jurors and sequestration of jurors during trial.

Since the dangerous special offender notice can be sealed, or, if publicized, can be isolated from the jurors who try the case, it presents no problems of publicity not presented by the filing of search papers and other necessary legal documents. There is no sound objection to title X so far as publicity is concerned.

Neither is it correct to argue, as the city bar committee does,⁴⁸² that the filing of a dangerous special offender notice is "highly prejudicial" since the allegations contained in the notice can be read by the trial judge before trial. The city bar committee, in raising this objection, relies upon the case of *Gregg v. United States*,⁴⁸³ and rule 32(c) of the Federal Rules of Criminal Procedures. Rule 32(c) merely prohibits the submission of the presentence report to the court, and disclosure of its content to anyone, until the defendant has been found guilty. This is a perfectly sound rule, since there is no legitimate reason for the court to examine the presentence report before the defendant's guilt is determined.

The dictum in the *Gregg* case on which the city bar committee relies was based more upon the impropriety of the conduct by the officer involved, than upon any supposed prejudice in the decision of the judge. The Supreme Court affirmed the conviction in the *Gregg* case, moreover, since the record did not establish a clear violation of rule 32(c) and since the Court was unable to conclude "that the handling of the presentence report raised any possibility of prejudice to petitioner's rights under Rule 32."⁴⁸⁴ In addition, the Court based its dictum that delivery of the presentence report to the judge prior to the finding of guilt was error on the fact that, as the court stated, "there is no reason for him (the judge) to see the document until the occasion to sentence arises."⁴⁸⁵

There is a reason for filing the dangerous special offender notice before the trial of the defendant begins, though the Constitution does not require such early filing, so that the defendant may be on notice before entering his plea that a finding of guilt may subject him to an extended sentence. Thus, the provision to title X which permits the filing of a dangerous special offender notice does not, as the trial court's examination of the presentence report in the *Gregg* case

481 *Id.*

482 *Id.* at 50; see also *ABA Testimony*.

483 394 U.S. 489, 492 (1969).

484 *Id.* at 494.

485 *Id.* at 492.

did, go beyond the necessities of the administration of justice, and is not subject to the objections voiced in the *Gregg* dictum. Again, there are analogies in existing practice: the judge examines the indictment before trial, and a judge may be aware of a previous guilty verdict while he begins to preside in the re-trial of a case after reversal on appeal. In addition, it is common for a judge in a case charging, for example, possession of burglar tools, first to hear virtually all of the Government's evidence when he hears a motion to suppress the burglar tools seized during a search, and then, if he rules that the search and seizure were lawful, to preside at the trial on the merits. His ability to do so is not deemed to have been prejudiced by his having heard the motion to suppress evidence before trial.

The ACLU and bar committee also disapprove of the provision of title X which prevents the placing of limitations upon the information concerning a defendant's background, character and conduct that a federal court can consider in choosing an appropriate sentence.

Insofar as it permits the use of hearsay in dangerous special offender proceedings, the procedure adopted by title X is not inconsistent with the Supreme Court's decision in *Specht v. Patterson*.⁴⁸⁶ The *Specht* case required that a person committed under a state Sex Offenders Act in a postconviction proceeding "be confronted with witnesses against him . . . [and] have the right to cross-examine."⁴⁸⁷

Specht is inapplicable to title X, since the post-conviction allegations in the *Specht* case were held to be a new charge, separate and distinct from the criminal conviction which triggered the sex offender proceedings. In title X, on the other hand, the dangerous special offender criteria are facts which merely aggravate the penalty for an offense.

The Supreme Court has explicitly recognized as lawful and sustained the application of the principle, for example, that recidivist allegations, comparable to those authorized by title X, are not separate criminal charges, as the ACLU and bar committee assert,⁴⁸⁸ but merely aggravate penalties for defendants' most recent offenses.⁴⁸⁹ The offender is being neither tried nor punished for past offenses; his latest offense is merely considered aggravated by special circumstances.⁴⁹⁰

The same principle applies to title X's provisions for special sentencing of organized or professional criminals. As the Director of the National Council on Crime and Delinquency, whose Model Sentencing Act was one basis for title X, testified before the Senate subcommittee:

A sentencing statute certainly does not take the place of new definitions of racketeering crimes, appropriate and specific to the methods of operation in organized crime. The Model Sentencing Act does not define crimes. But if a defendant is convicted of an offense such as tax evasion, assault, criminal

486 386 U.S. 605 (1967).

487 *Id.* at 610.

488 *E.g.*, ABCNY at 44-52.

489 *See* *Gryger v. Burke*, 334 U.S. 728, 732 (1948); *Graham v. West Virginia*, 224 U.S. 616 (1912).

490 *Moore v. Missouri*, 159 U.S. 673, 677 (1895).

coercion, it makes a great deal of difference whether his crime was an individual act, or was part of a racketeering operation. If the latter, the sentence should be a severe one, and we so recommend in our act.⁴⁹¹

In addition, Title X's definitions require that the conduct making one an organized or professional offender must be factually related to the felony for which sentence is imposed. Indeed, as the Senate Report on S. 30 explains:

The conduct making the defendant a "professional" or "organized crime" offender under title X is closely related to the felony for which he is to be sentenced. Title X thus treats such conduct not as separate offenses, but as a circumstance of aggravation in the commission of the felony for which the defendant is to be sentenced. Because of this relationship, the "special offender" conduct may be necessarily or incidentally proven in the course of the full and formal trial on the merits of the felony. Since rules of evidence permit or require the Government, for example, to prove the history and circumstances of a conspiracy with which a defendant is charged, or the existence of which is a predicate for admissibility of evidence, the trial of a conspirator whose conduct makes him a "special offender" under title X often will establish that he is such a "special offender." In other cases, the formal trial on the merits may establish some but not all of the required elements, and the less formal sentencing proceeding will be necessary to embellish the circumstances of the crime already established, adding information about the defendant, his crime, and the context in which it was committed. Sentencing judges traditionally have relied both upon circumstances proven in the trial and upon information acquired during the sentencing process. See Model Penal Code § 7.03, comment at 43 (Tent. Draft No. 2, May 3, 1954). The starting point for measuring the appropriateness of a particular sentence and the sentencing procedure used for its imposition, therefore, is not confined to the bare essential elements of the offense, but includes all facts established through the full procedure of the trial on the merits. In addition, the sentencing procedures established by title X include guarantees of most rights enjoyed in the trial itself. For these reasons, relatively long sentences under title X can be expected to satisfy constitutional standards.⁴⁹²

The Report's statement that ". . . relatively long sentences under title X can be expected to satisfy constitutional standards" points up one of the reasons why title X's procedural provisions are constitutional: it is not the provisions themselves, on their face, which can receive constitutional challenge, but their *applications*—the specific sentences given in individual cases. Associate Dean Peter Low of the University of Virginia Law School, who was Reporter for the A.B.A. Standards on this subject, acknowledged that fact in his Senate testimony.⁴⁹³

Title X contains specific provisions designed to prevent the imposition of unconscionable or disproportionate prison terms.⁴⁹⁴ For example, the trial judge

491 *Hearings* at 251.

492 *REPORT* at 91-92.

493 *Id.* at 92.

494 The ACLU finds title X's provision for unrestricted use of sentencing information especially threatening to "dangerous special offenders," since the ACLU believes that sentencing judges are "able" to give them sentences "5 or 10 times as long as would follow a conviction for the underlying felony alone." The ACLU's statement of that belief is unfair and misleading, since it compares sentencing authority under title X with sentencing practices under existing laws—while maximum sentences are, and should be, exceptional in both instances.

is given discretion to impose a term of any length, even one shorter than the maximum sentence authorized for the defendant's offense in ordinary cases. Trial judges thus are authorized to consider the nature of the defendant's offense, and the maximum sentence authorized for it in ordinary cases, in selecting an appropriate sentence. In the unlikely event that a disproportionate sentence is originally imposed, title X gives the court of appeals the broadest scope of appellate review, and lets it reduce the sentence to any level.

Since such protections against excessive sentences are included, it is unlikely that any sentences so long that they offend sound policy will be imposed, and virtually impossible that there will be any of unconstitutional severity. After all, the Supreme Court has held that it is not cruel and unusual punishment to give a defendant convicted of mere larceny a sentence of life imprisonment on his third conviction.⁴⁹⁵ There is no reason under these circumstances, and given the protections written into title X, to expect that it will be used to impose disproportionate or unconstitutional sentences.

In case still more assurance on that point were desired, however, it would be possible to accept the suggestion in the A.B.A.'s testimony before Subcommittee Number Five of the House Judiciary Committee that language be added to title X making more explicit the requirement that each sentence be appropriately proportionate to the ordinary term. Such an amendment would do no harm, and might emphasize the duty of the sentencing and appellate courts to fix special sentences at appropriate levels.

The A.B.A. indicated in its *Standards* that appropriately enhanced sentences for special offenders are consistent with *Specht*, and promulgated a scholarly, careful, and generally excellent special sentencing proposal permitting the use of hearsay in special sentencing. Since then, they have specifically endorsed title X, suggesting the amendment which I just mentioned on this issue.⁴⁹⁶ In doing so, they followed the lead of the N.C.C.D.'s Model Sentencing Act, the A.L.I.'s Model Penal Code, and the President's Crime Commission, whose proposals also permit such hearsay use. Each of those four bodies is recognized as a distinguished group of experts and scholars. Each devoted years to a thorough study of the matter. Each concluded that special sentencing, using hearsay, is constitutional. The Justice Department raised the same question when S. 30 was introduced, worked with the Senate on improving the bill's procedures, and concluded that the revised bill does not violate the *Specht* case. A year of Senate study led to the same conclusion, in committee and on the floor. And at least one provision⁴⁹⁷ included in the recently published Study Draft of a New Federal Criminal Code, developed by the National Commission on Reform of Federal Criminal Laws, likewise permits use of hearsay in special sentencing.

The *Specht* case is not only inapplicable to title X. Even in statutes to which *Specht* might apply, it is not clear that *Specht* would require confrontation as broad as that afforded at trial. As Professor Henry Ruth of the University of

495 *Graham v. West Virginia*, 224 U.S. 616 (1912).

496 *ABA Testimony*.

497 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 3203 (1970) [hereinafter cited as STUDY DRAFT OF A CRIMINAL CODE].

Pennsylvania Law School testified before the Senate Subcommittee, Justice Douglas's opinion for the Court in *Specht* used the word "confrontation" but "did not equate 'confrontation' the same in the sentence hearing with confrontation at a trial."⁴⁹⁸ Even if the principles of *Specht* control title X, they could be considered satisfied by the measures title X employs to protect the same interests of the offender protected by the confrontation clause. Though the ACLU fails to mention these facts,⁴⁹⁹ title X permits the sentencing court to give hearsay appropriately reduced weight, and it authorizes cross-examination of those witnesses who do appear at the hearing. Judges, of course, are accustomed to weighing the value of hearsay information used for sentencing in other cases. In addition, title X permits a court of appeals to reduce a sentence on the ground that it rests too heavily upon unreliable hearsay.

It should be noted, also, that the *Specht* opinion reaffirmed and quoted at length from the Court's earlier decision in *Williams v. New York*⁵⁰⁰ that confrontation, cross-examination, and other rules of evidence cannot be extended to sentencing proceedings. The following are excerpts from the Supreme Court's statement in the *Williams* case of the policies that underlie that decision:

Highly relevant—if not essential—to his [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

. . . .

Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.⁵⁰¹

The A.B.A.'s *Standards* and Commentary have demonstrated that the *Williams* case cannot be distinguished and treated as irrelevant to special, as op-

⁴⁹⁸ *Hearings* at 345.

⁴⁹⁹ The Senate committee report was careful to point out that hearsay information can be "appropriately evaluated" and assigned little or no weight if found unreliable. REPORT at 167. In view of the report's clarity on this point, it is inexplicable that the ACLU's January, 1970, statement persists in referring to "ranked hearsay" and "coerced confession," two obvious examples of information which should be discounted or, depending on the circumstances, even discarded, as unreliable.

⁵⁰⁰ 337 U.S. 241 (1949).

⁵⁰¹ *Id.* at 247-50.

posed to ordinary, sentencing. In the *Williams* case, of course, a sentencing judge had discretion to impose life imprisonment or the death penalty—and after reviewing hearsay information, free of any requirement that his decision be based upon a preponderance of anything, the sentencing judge imposed the death penalty and was upheld by the U.S. Supreme Court. Further, the hearsay that led to the death sentence in that case consisted of allegations that Williams had committed a number of other crimes—and not necessarily crimes related to his most recent one, as title X requires.

In view of that analysis of the right of confrontation declared in *Specht* as it relates to special sentencing, and the well-considered view reached by the authoritative bodies that have fairly studied the subject, it does not appear that the *Specht* case precludes enactment of title X. As the A.B.A. Committee itself noted in its *Sentencing Alternatives and Procedures*:

[T]he Advisory Committee fails to see why the method of the criminal law as employed at trial must be carried over into the sentencing phase, or if it must, why the procedure for sentencing repeat or dangerous offenders is the only case where this must be so. No constitutional questions are raised in the normal sentencing case where the trial judge considers the contents of a presentence report without providing the defendant with direct confrontation of all who contributed background information. See *Williams v. New York*, 337 U.S. 241 (1949). And factual disputes which arise in the imposition of a normal term are resolved daily by the judge without the creation of any such difficulty.

If it can be assumed that there is no constitutional difficulty with the basic structure of a sentencing procedure which uses the presentence report and which proceeds less formally than does the hearing on the question of guilt, the issue can be considerably narrowed. Presently the judge is left completely at large in making the sentencing decision, although he is expected to act in a manner that is responsive to a factual picture of the defendant which is conveyed to him by this less formal procedure. The issue thus comes down to whether providing standards by way of findings to precede the imposition of a particularly serious sentence necessarily invokes a change in the required procedure. The Advisory Committee would agree with the conclusion of the revisers of the Minnesota laws that the method of the criminal trial need not be invoked for that reason. See MINN. STAT. ANN. § 609.155 (1964) (Comments, at 148-49). It would indeed be ironic if procedural due process *required* the absence of legislative guidance in order for the sentencing proceeding to be informal. The Advisory Committee is confident that such a result need not follow.⁵⁰²

The ACLU's attack on title X's provision for unlimited information in sentencing is broader, however, than special offender sentencing. The ACLU opposes all the provision's applications, in ordinary as well as special sentencing cases, and urges that sentencing courts be required completely to disregard hearsay, evidence obtained in violation of any law, and information otherwise inadmissible at a trial of guilt or innocence.⁵⁰³

Title X, however, preserves the traditional principle, approved by the Su-

⁵⁰² ABA STANDARDS ON SENTENCING at 263-64.

⁵⁰³ ACLU January 1970 letter at 14-15.

preme Court in *Williams v. New York*,⁵⁰⁴ that sentencing proceedings are exempt from the rules of evidence constitutionally required at trial.

In view of that specific holding of the Supreme Court, relied upon by the Judiciary Committee in its report on this provision of S. 30,⁵⁰⁵ the ACLU's treatment of the issue is shallow and unpersuasive. Its original statement on S. 30 branded the provision "clearly unconstitutional,"⁵⁰⁶ and its more recent statement specifically mentions "hearsay" as objectionable in sentencing, despite the Supreme Court's explicit approval of hearsay in the *Williams* case. Further, the ACLU's discussions of this provision in both statements neither cite a single authority in their support nor advert to the *Williams* decision on use of trial rules of evidence in ordinary sentencing cases and the Model Penal Code, Model Sentencing Act, and ABA Sentencing Standards applying the *Williams* principle to increased sentencing of special offenders, as well as to ordinary sentencing.

The principles requiring use of hearsay for sentencing also prevent application, in a sentencing proceeding, of other exclusionary rules designed for use at trial.

Despite this consensus of scholarly opinion, enactment of this provision of title X is necessary to prevent federal courts from making the ACLU's error, as at least one court of appeals has done,⁵⁰⁷ and refusing to consider information of unquestioned reliability on the ground that it was obtained in violation of law. Such refusal would be inconsistent with the policies expressed in the *Williams* case, and with its very holding that a constitutional rule for exclusion of evidence at trial, even one—the right of confrontation—designed to guarantee reliability of evidence, does not apply in a sentencing proceeding. Title X would forestall such a refusal and protect the sentencing judge's access to what *Williams* described as "the fullest information possible."⁵⁰⁸ In addition, it would prevent sentencing from becoming encumbered by motions, evidentiary hearings on admissibility, interlocutory rulings, and other complexities which are appropriate at trial, but inimical to effective sentencing.

Where reliable evidence obtained illegally is concerned, the rule requiring its suppression even at trial is not absolute, as explained earlier in connection with title VII, on suppression litigation. The exclusionary rule is only an imperfect means to certain ends, as the Supreme Court recently acknowledged when it said:

The exclusionary rule has its limitations . . . as a tool of judicial control. . . . [I]n some contexts the rule is ineffective as a deterrent.

. . . .
Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. . . . [A] rigid and unthinking application of the exclusionary rule, in futile protest against

504 337 U.S. 241 (1949).

505 *Hearings* at 187.

506 *Id.* at 474.

507 *Verdugo v. United States*, 402 F.2d 599, 608-13 (9th Cir. 1968). In contrast, one district court has recently held that it may legitimately consider illegally obtained evidence in giving a higher sentence to an organized crime figure. *See* 116 CONG. REC. H 7551 (daily ed. July 31, 1970) (remarks of Congressman Poff inserting text of *United States v. Schipani*).

508 *Williams v. New York*, 337 U.S. 241, 247 (1949).

practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.⁵⁰⁹

For those reasons, the rules excluding evidence at trial are not extended to other situations unless the additional deterrence of unlawful official conduct would be so great, in the words of the Supreme Court, as to "justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."⁵¹⁰

Under that test, the suppression rule does not apply to a sentencing proceeding.⁵¹¹ Since police officers know that suppression of vital evidence at trial prevents a guilty verdict—and that it is futile to prepare a persuasive sentencing presentation against a defendant who cannot be convicted—no substantial increase in deterrence of police would result from a rule of suppression of evidence for sentencing. The same would be true if the suppression rule were extended into proceedings to revoke parole, and, as noted above, the Supreme Court of California and the Court of Appeals for the Second Circuit have concluded that such an extension of the suppression rule is not warranted. The Constitution permits, and sound policy requires, Congress to preserve time-tested and efficient procedures for imposing sentences based upon "the fullest information possible." It is for those reasons, among others, that the Senate defeated an amendment to impose rules of evidence on sentencing proceedings by a vote of 63 to 11.⁵¹²

One other facet of the ACLU's attack on the provision for unlimited sentencing information bears examination, since it is symptomatic of the ACLU's emotional, irresponsible approach to the sentencing title. The ACLU states that the provision would let a sentencing court hear information "without regard to relevance."⁵¹³ The contrary is true. The provision, on its face, applies only to "information concerning the background, character and conduct" of the defendant—considerations held by the Supreme Court to be relevant to imposition of an appropriate sentence.⁵¹⁴

The ACLU and bar committee criticize title X not only for the kind of information on which it permits sentencing, but for its amount as well. The bar committee objected that under title X

[t]he trial court is directed to base its findings on a "preponderance of the information," yet the sentencing decision may be far more critical than the initial determination of guilt or innocence which must be made on the basis of admissible evidence and beyond a reasonable doubt.⁵¹⁵

However, it has never been supposed that sentencing in ordinary cases required that facts relevant to the sentence be established "beyond a reasonable doubt." Indeed, the lack of explicit standards for sentencing, and the lack of

509 *Terry v. Ohio*, 392 U.S. 1, 13-15 (1968).

510 *Alderman v. United States*, 394 U.S. 165, 175 (1969).

511 *See United States v. Schipani*, 7 CRIM. L. RPTER. (E.D. N.Y. June 4, 1970), 116 CONG. REC. H7551 (daily ed. July 31, 1970) (remarks of Congressman Poff on the *Schipani* case).

512 116 CONG. REC. S472-74 (daily ed. Jan. 23, 1970).

513 ACLU January 1970 letter at 15.

514 *Williams v. New York*, 337 U.S. 241 (1949).

515 ABCNY at 46.

appellate review of sentences in the federal system, means that at the present time the sentencing court need not base its sentence on even a preponderance of the sentencing information brought to its attention. Title X follows the well-documented and supported example of the American Bar Association Standards⁵¹⁶ when it requires that facts used for dangerous special offender sentencing be established "by a preponderance" rather than "beyond a reasonable doubt."

The second point made by the bar committee, that the sentencing decision may be more critical under title X than the determination of guilt, also is true under existing statutes, such as the Hobbs Act,⁵¹⁷ prohibiting robbery or extortion in interstate commerce. The Hobbs Act can be applied to a wide variety of offenses, from minor crimes by first offenders to very aggravated felonies, yet every offender is exposed to a single possible maximum of twenty years. The *Williams* case itself illustrates the relative importance of the sentencing decision under existing law, which regulates that decision and the factual basis on which it can be made little or not at all. In the *Williams* case, of course, a sentencing judge had discretion to impose life imprisonment or the death penalty—and after reviewing hearsay information, free of any requirement that his decision be based upon a preponderance of anything, the sentencing judge imposed the death penalty and was upheld by the Supreme Court.

The New York City Bar Committee complains also of what it calls "the limited access" which title X grants a defendant to the presentence report upon which his special sentence may, in part, be based.⁵¹⁸ Actually, title X requires that a defendant alleged to be a dangerous special offender

shall be informed of the substance of such parts of the presentence report as the court intends to rely upon, except where there are placed in the record compelling reasons for withholding particular information. . . .⁵¹⁹

Those standards are more favorable to defendants than existing federal law, which grants a trial court unfettered discretion to disclose all, part, or none of the presentence report to the defendant,⁵²⁰ and conform generally to standards for presentence report disclosure developed by the Model Penal Code⁵²¹ and the American Bar Association.⁵²² Limitations on presentence report disclosure such as those found in title X, the Model Penal Code, and the ABA Standards are essential for informed sentencing, since identification of the sources of information in those reports would inhibit vital communication from family members, neighbors, social agencies, and others. In addition, portions of some presentence reports contain evaluations and professional opinions regarding the defendant's weaknesses, disclosure of which would interfere with the possibility of their rehabilitation.

In the city bar committee's imagination, the exceptions to presentence report disclosure swallow the rule, so the committee threatens that sentencing judges will

516 ABA STANDARDS ON SENTENCING § 5.5(b)(iv).

517 18 U.S.C. § 1951 (1964).

518 ABCNY at 46-47.

519 Proposed § 3575 (b).

520 FED. R. CRIM. P. 32(c)(2).

521 § 7.07 (Proposed Official Draft, 1962).

522 ABA STANDARDS ON SENTENCING §§ 4.3-4.5.

impose maximum sentences based upon minimum showings, all supported by facts revealed only in portions of a presentence report withheld from a defendant. While such a result may be possible under present law where there are no statutory standards to control disclosure and no appellate review of sentences to correct sentences imposed upon insufficient and undisclosed factual data, title X protects against such action both at the trial court level and on appeal.

Read as a whole, the ACLU's attack on title X's provisions for the procedure to be used in sentencing dangerous special offenders is unremittingly hostile and one-sided. This posture is remarkable in view of the changes already made in that procedure at the suggestion of the ACLU, liberalizing and complicating it in an effort to protect defendants. The notice provided to a defendant accused as a dangerous special offender was changed to add the grounds for considering him "dangerous."⁵²³ Commencement of special sentencing proceedings was made discretionary with the prosecutor, rather than mandatory.⁵²⁴ Language which arguably might have coerced defendants to waive the right of grand jury indictment or to plead guilty was amended.⁵²⁵

Defendants convicted of misdemeanors but acquitted of related felonies were barred from sentencing as special offenders.⁵²⁶ The period of notice to the parties of the time for the sentencing hearing was expanded from three to ten days.⁵²⁷ The issue of "dangerous" was added to those on which the defendant is given a hearing.⁵²⁸ Explicit grants to the defendant of rights to submit evidence, cross-examine witnesses, and examine the presentence report were added.⁵²⁹

It was specified that convictions reversed on appeal, or found invalid in the sentencing proceeding or any other proceeding, are not sufficient for recidivist sentencing.⁵³⁰ The requirement that a dangerous special offender serve at least two-thirds of his sentence was deleted.⁵³¹ And review of a conviction and the sentence imposed on it were made concurrent.⁵³² Since acceptance of so many of the ACLU's criticisms of title X leaves it nevertheless unqualifiedly opposed to the title, doubt is cast upon the ACLU's openness to any legislative proposal for effective sentencing of special offenders.

The bar committee, on the other hand, affirms its devotion to the basic concept of special sentencing by stating it would support a "rational and consistent sentencing code" including special sentencing provisions and expressing concern that adoption of title X "might delay or defuse a more widespread sentencing reform."⁵³³

The latter concern, however, is not warranted. The National Commission on Reform of Federal Criminal Laws is developing such a general reform at the present time.⁵³⁴ Some of the leading advocates of enactment of title X, Senators

523 *Hearings* at 468.

524 *Id.*

525 *Id.* at 469.

526 *Id.*

527 *Id.*

528 *Id.* at 469-70.

529 *Id.*

530 *Id.*

531 *Id.* at 471.

532 *Id.* at 474.

533 ABCNY at 44-45.

534 *See* STUDY DRAFT OF A CRIMINAL CODE.

Ervin and Hruska, Congressman Poff and myself, also serve as members of that Commission, and we are not against general reform.

In addition, the bar committee misleads the reader concerning the views of the Department of Justice on the adequacy of the procedures now required by title X.⁵³⁵ The bar committee quotes statements made by the Justice Department concerning the initial draft of title X indicating that it was "virtually impossible to predict whether these procedures would survive constitutional challenge" and that "it is not clear what the procedural requirements for extended sentencing are."⁵³⁶ The bar committee fails to point out, however, that the Department examined the revised version of title X, concluded that it was fully constitutional, and decided fully to support it, although the Department still recognizes that there remains no explicit judicial authority indicating the required procedures for extended sentences.⁵³⁷

Whatever the reason for the bar committee's unwarranted and incorrect assumption that the Justice Department considers objections to the first draft of title X's procedures "equally applicable" to the present version,⁵³⁸ the nature of the bar committee's objections to title X calls into doubt whether it really accepts the basic special sentencing concept. The bar committee emphatically rejects the special sentencing procedures in title X,⁵³⁹ and expressly declines to suggest "what constitutional protections are required in a proceeding such as this. . . ."⁵⁴⁰

It compares the title's definition of an organized crime offender with the substantive crime of conspiracy, and rejects the use of a sentencing hearing to establish the defendant's conduct, considering it a circumvention of the requirement that conspiracy allegations be proved at the trial of guilt.⁵⁴¹ The bar committee also objects to the power which the dangerous special offender provisions place in the hands of prosecutors to bring pressure to bear upon defendants, to induce guilty pleas.⁵⁴² Obviously, though, those objections, if they are valid, could be made to any dangerous special offenders law. It always will be possible to argue, for example, that the criteria aggravating an offense and making one a special offender could have been embodied in a substantive prohibition defining a crime.

The bar committee's view of special sentencing as an evasion of constitutional trial procedures, and its refusal to subordinate the minor risk of abuse contributed by special sentencing to plea bargaining to the benefits to be derived from special sentencing, are not, fortunately, typical of professional authorities. The concept implemented by title X has been endorsed, as noted above, by the President's Crime Commission, the American Law Institute, the National Council on Crime and Delinquency, the American Bar Association, and other august associations.⁵⁴³ By establishing impossibly high—even unspecified—standards for

535 ABCNY at 45-46, n.78.

536 *Id.*

537 *Justice Department Comments.*

538 ABCNY at 46.

539 *Id.* at 8, 45-46.

540 *Id.* at 45.

541 *Id.* at 49.

542 *Id.* at 45 n.74.

543 *See also* STUDY DRAFT OF A CRIMINAL CODE § 3203.

procedure which a special offender statute must meet in order to obtain the approval of the city bar committee, the committee, in effect, disapproves the concept of special sentencing, and states an implied preference for the existing lack of standards and still more informal procedures. As the commentary to the American Bar Association's standards on sentencing notes, "It would indeed be ironic if procedural due process *required* the absence of legislative guidance in order for the sentencing proceeding to be informal. The Advisory Committee is confident that such a result need not follow."⁵⁴⁴

The ACLU approves the concept of appellate review of sentences, but opposes the appellate review provision of title X in the belief that it "raises serious Constitutional problems under both the due process clause and the double jeopardy clause of the Fifth Amendment."⁵⁴⁵

So far as the double jeopardy clause is concerned, it is true that the question of its consistency with title X was raised in the Senate hearings,⁵⁴⁶ and that the objection that sentence review on motion of the Government constitutes double jeopardy has superficial appeal until it is examined thoroughly. When the double jeopardy theories, policies and precedents are fully explored, however, they are found to be entirely consistent with title X.

The constitutionality of appellate increases in sentences has been the subject of much discussion but little litigation.⁵⁴⁷ Commenting on the provisions of Title X, the Department of Justice said:

As to the [double jeopardy issue], while recent authorities appear to cast some doubt on the constitutionality of this provision, cf. *Patton v. North Carolina*, 381 F. 2d 636, 645-46 (C.A. 4, 1967), *cert. denied*, 390 U.S. 905 (1968) and *Whaley v. North Carolina*, 379 F. 2d 221 (C.A. 4, 1967), the Supreme Court has upheld an increase in sentence following an appeal by the defendant in at least three cases: *Flemister v. United States*, 207 U.S. 372 (1911); *Ocampo v. United States*, 234 U.S. 91 (1914); *Stroud v. United States*, 251 U.S. 15 (1919). Consequently, it would seem that if these cases are still good law today then the Government should be able to seek an increase in sentence on appeal without violating either due process or the Fifth Amendment ban on double jeopardy.⁵⁴⁸

Since title X permits sentence increase only when the Government acts affirmatively to take a review, it is necessary to discuss the double jeopardy issue only in reference to Government appeal to increase a sentence, not in reference to sentence increase on review taken by a defendant.

In *North Caroline v. Pearce*,⁵⁴⁹ the Supreme Court observed that the double jeopardy guarantee

⁵⁴⁴ ABA STANDARDS ON SENTENCING at 264.

⁵⁴⁵ ACLU January 1970 letter at 15.

⁵⁴⁶ See, e.g., *Hearings* at 474.

⁵⁴⁷ On the state level, the highest courts of Connecticut and Massachusetts have sustained increases on defendants' sentence appeals, against double jeopardy objections, *Kohlfuss v. Warden*, 149 Conn. 692, 183 A. 2d 626 (1962), *cert. denied*, 371 U.S. 928 (1962); *Hicks v. Commonwealth*, 345 Mass. 89, 185 N.E.2d 739 (1962), while the highest courts of Maine and Maryland have not ruled upon the constitutionality of their statutes permitting increase on appeal.

⁵⁴⁸ *Hearings* at 377.

⁵⁴⁹ 395 U.S. 711 (1969).

has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.⁵⁵⁰

And in *Green v. United States*⁵⁵¹ the Court observed:

The underlying idea [of the fifth amendment double jeopardy provision] . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.⁵⁵²

Nevertheless, no U.S. Supreme Court decision has held Government appeal from sentences to be double jeopardy. The analogous precedents in the area, moreover, are consistent with a decision that it is not double jeopardy, and the policies underlying the clause would seem to justify such a decision.

A defendant whose sentence is increased on sentence review taken by the Government is not, in the language of the fifth amendment, "twice put in jeopardy." Instead, concerning his sentence, the defendant is once in jeopardy continuing until termination of an orderly process of sentence review and revision. Failure of the Government to take sentence review terminates the sentencing proceeding and jeopardy as to sentence, but when sentence review is taken it continues both jeopardy as to sentence and the sentencing process from which jeopardy arises.

The chief case which might be thought to be analogous authority against this line of analysis is *Kepner v. United States*,⁵⁵³ which held Government appeal from an acquittal to be double jeopardy and apparently rejected application of the concept of continuing jeopardy appeal from an acquittal. The Supreme Court in the past, however, has refused to apply the *Kepner* doctrine in situations where logic and consistency would seem to require its application.⁵⁵⁴

⁵⁵⁰ *Id.* at 717.

⁵⁵¹ 355 U.S. 184 (1957).

⁵⁵² *Id.* at 187-88. The decisions interpreting and applying the clause have relied upon a variety of "conceptual abstractions." *United States v. Tateo*, 377 U.S. 463, 466 (1964), while the reasons for them have been "variously verbalized," *North Carolina v. Pearce*, 395 U.S. 711, 720-21 (1969). Legal scholars and a few Supreme Court decisions have articulated principles governing the applicability of the clause on the basis of their, "implications . . . for the sound administration of justice" in view of "defendants' rights as well as society's interest," *id.* at 721-22 n.18. *E.g.*, *United States v. Tateo*, 377 U.S. 463 (1964); *Wade v. Hunter*, 336 U.S. 684 (1949); *Bozza v. United States*, 330 U.S. 160 (1947). The interests of Government and defendant underlying various applications of the double jeopardy rule, the principles for application of the rule, and the consistency of this approach with the history and policy of the fifth amendment, are analyzed and supported in *Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960); *Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965); Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272 (1964); Comment, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

⁵⁵³ 195 U.S. 100 (1904).

⁵⁵⁴ See *Bryan v. United States*, 338 U.S. 552, 560 (1950) (retrial, after reversal of conviction on guilty verdict following erroneous denial of motion for directed verdict, is not double jeopardy); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824) (Government can retry defendant on whose guilt or innocence first jury could not agree).

Consequently, it may be expected that the Court will not extend *Kepner* to strike down Government sentence appeals. Its failure so far to carry *Kepner* to its logical conclusions may be attributed to a frank recognition by the Court that there is ample ground for a contention that permitting Government appeal even from an acquittal would be more consonant with the double jeopardy clause than the contrary rule announced in *Kepner*.⁵⁵⁵

Nevertheless, whether or not *Kepner* remains the law for Government appeal from an acquittal, there is no justification for extending it to Government sentence appeal. Any limitation of "continuing jeopardy" as a justification for Government appeal from an acquittal, or reversal of an acquittal on a defendant's appeal,⁵⁵⁶ is absent when that concept is used to support Government sentence appeal, since sentencing proceedings are relatively brief and simple, and since any further evidence and arguments after appeal would be complementary rather than repetitive. Sentence appeal by the Government, therefore, does not conflict with the double jeopardy policy of preventing harassment of a defendant through expense, delay, embarrassment, anxiety and ordeal. Nor does sentence appeal by the Government involve double punishment, prohibited by the double jeopardy clause, since the maximum sentence authorized by law for a crime sets a ceiling on increases.

Federal court decisions of double jeopardy questions in two analogous areas provide affirmative support for the consistency of Government sentence appeals with the double jeopardy clause. The Supreme Court itself recently held that, except for requiring credit for punishment served to be given upon resentencing, ". . . the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction"⁵⁵⁷ following reversal on a defendant's appeal. In reaching that decision the Court relied upon past precedents,⁵⁵⁸ but distinguished *Green* saying:

The Court's decision in *Green v. United States*, 355 U.S. 184, is of no applicability to the present problem [of the application of the double jeopardy clause to a longer sentence on reconviction]. The *Green* decision was based upon the double jeopardy provision's guarantee against retrial for an offense of which the defendant was acquitted.⁵⁵⁹

The *Pearce* decision has significance here because it rejected the commonly held broad view that under the double jeopardy clause any sentence pronounced in a case sets a ceiling which cannot be exceeded except by traditional trial court revision during the term of court.⁵⁶⁰

The Court did observe, moreover, that to hold that the double jeopardy clause restricted the imposition of a single lawful punishment for an offense retried after reversal, higher than that first imposed, would be to cast doubt

555 See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 323 (1937); *Kepner v. United States*, 195 U.S. 100, 135 (1904) (dissenting opinion).

556 *Green v. United States*, 355 U.S. 184 (1957).

557 *North Carolina v. Pearce*, 395 U.S. 711, 719 (1969).

558 *United States v. Tateo*, 377 U.S. 463 (1964); *Bryan v. United States*, 338 U.S. 552 (1950); *Stroud v. United States*, 251 U.S. 15 (1919).

559 *North Carolina v. Pearce*, 395 U.S. 711, 720 n.16 (1969).

560 See *United States v. Benz*, 282 U.S. 304, 306-7 (1931) (dictum).

on the validity of the principle of *United States v. Ball*⁵⁶¹ that the double jeopardy clause does not limit retrial after reversal of a conviction.⁵⁶²

The second set of analogous precedents deal with trial court revision of sentences. Decisions in federal criminal cases generally have held that the double jeopardy clause permits a sentencing court to increase its sentence any time until, but not after, the defendant begins serving the sentence.⁵⁶³ To the extent

561 163 U.S. 662, 672 (1896).

562 This statement is particularly significant in view of the Court's exclusive reliance upon *Ball* rather than *Kepner* for its double jeopardy reversal in *Benton v. Maryland*, 395 U.S. 784 (1969), and its recent and sound disparagement of the "waiver" approach to double jeopardy problems. *E.g., id.* at 796-97; *Green v. United States*, 355 U.S. 184, 191-92 (1957). A "waiver" rationale would make Government sentence review, like the *Kepner* review of guilt, a violation of double jeopardy, since the defendant takes no action which could be called a waiver, and would treat *Pearce* and *Ball* as consistent with the double jeopardy clause, since those defendants' appeals constituted waivers. If, on the other hand, the result in *United States v. Ball*, 163 U.S. 662 (1896), is not justified by the theory of "waiver," it must be explained as a recognition that jeopardy can be unitary and continuous pending appellate review and disposition. Likewise, the fall of the "waiver" theory from favor indicates that the vital concepts in *Pearce* are not "at the defendant's behest" but are "wholly nullified and the slate wiped clean," "unexpired portion of the original sentence will never be served," and "an otherwise lawful single punishment." *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969). These concepts equally well serve to justify Government sentence appeal against double jeopardy attack, and more generally to implement an approach to double jeopardy issues based on a concept of "continuing jeopardy" until a reasonable process of writing on the "slate" has been completed. If "waiver" is not the principle, moreover, which *Pearce* and *Ball* share to the extent that a contrary decision in *Pearce* would have undercut *Ball*, and if that principle instead is continuing jeopardy, then the application of that principle would again treat *Ball* and *Pearce* as consistent with the double jeopardy clause, since the defendants' appeals continued the litigation and the jeopardy, and it would also uphold government sentence review. In addition, it might or might not actually result in *Kepner's* overruling, depending on the importance placed by the Court on the policy of limiting harassment, delay and expense, and therefore on the strictness of the limits on the Government's right to set procedures. There was error in the first *Kepner* trial prejudicial to the Government, while in *Ball* there was none. The reliance in *Benton* on *Ball* rather than *Kepner* must have been motivated by this distinction (and not, for example, by the fact that *Benton* involved appeal by a defendant), which is a significant distinction only on the view that jeopardy can continue in order to afford a reasonable opportunity to review rulings adverse to the Government. In sum, the Court's use and discussion of *Ball* in *Benton* and *Pearce* are consistent with a concept of "continuing jeopardy" not plainly foreclosed by *Kepner*, pursued in a manner designed to avoid reconsidering the validity of *Kepner* itself. This interpretation of *Benton* and *Pearce* may be supported by the Court's recent explicit approval of the "continuing jeopardy" concept in *Price v. Georgia*, 90 S. Ct. 1757 (1970).

563 *See, e.g., United States v. Benz*, 282 U.S. 304, 306-7 (1931) (dictum); *United States v. Sacco*, 367 F.2d 368 (2d Cir. 1966); *United States v. Adams*, 362 F.2d 210, 211 (6th Cir. 1966); *Vincent v. United States*, 337 F.2d 891 (8th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965); *cf. Ex parte Lange*, 85 (18 Wall.) 163 (1873).

Sometimes a defendant from whose sentence the Government takes a review under title X will be released under 18 U.S.C. § 3148 (Supp. IV, 1969), pending review; clearly, he has not begun to serve his sentence, so the double jeopardy clause is no bar to a sentence increase. *Cf. United States v. Byars*, 290 F.2d 515, 516 (6th Cir. 1961), *cert. denied*, 368 U.S. 905 (1961) (dictum) (double jeopardy clause permits trial court to increase sentence when defendant is free pending appeal from his conviction, since service of sentence has not begun); *United States v. Mandracchia*, 247 F. Supp. 1 (D. N.H. 1965).

When the defendant would be confined under 18 U.S.C. § 3148 pending title X sentence review taken by the Government, his confinement is not service of his sentence, within the meaning of the constitutional decisions or of 18 U.S.C. § 3568 (Supp. IV, 1969). *Compare with ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES* 3741 (Approved Draft 1968) [hereafter cited as *ABA STANDARDS ON APPELLATE REVIEW*]. His situation is like that of one detained under 18 U.S.C. § 3148 awaiting trial for a capital offense or sentence or pending appeal or *certiorari*, and analogous to that of one detained under 18 U.S.C. § 3146 awaiting trial:

(1) each of them is confined to assure his future presence and, in some cases, to protect society:

(2) each of them receives credit against any final sentence for time spent in custody. 18 U.S.C. § 3568; *see North Carolina v. Pearce*, 395 U.S. 711 (1969). *Compare Sawyer v.*

that those decisions are relevant to appellate review of sentences, they are consistent with the constitutionality under the double jeopardy clause of Government sentence appeal.

The decisions applying the dictum of *United States v. Benz*,⁵⁶⁴ must be understood as applying the double jeopardy clause in view of the absence of statutory or case law authorization for sentence increase by an appellate court. Since, according to statutory and common law, only the trial court can consider increasing the sentence, it was necessary to determine when the sentencing proceeding in the trial court had ended and the sentence had therefore become final. The beginning of service of sentence was a sensible point in time to select for various reasons, including the ability of the trial court to defer sentencing and the service of the sentence until the trial judge felt he had exhausted his need to consider the sentence. The time when the sole sentencing proceeding ended, once fixed, then marked the end of sentence jeopardy. Thus, those decisions did not consider whether statutory provision of appellate review of sentences would, by postponing sentence finality, also postpone the end of sentence jeopardy.

This view of those decisions, moreover, is supported by the analogous case of *Bozza v. United States*.⁵⁶⁵ There the Supreme Court found persuasive procedural reasons, where a trial court had imposed a sentence less than a mandatory minimum, for delaying the finality of trial court sentencing proceedings beyond the beginning of service of sentence.⁵⁶⁶ Once that special rule of sentence finality had been established, the Court had no difficulty holding that the double jeopardy clause was not violated by an increase of a sentence being served in such a case.

Other federal and state courts and commentators likewise have concluded that failure to impose a mandatory minimum penalty may be corrected by increasing the sentence after its service has begun, without violating the double jeopardy clause.⁵⁶⁷ In terms of the policies underlying the double jeopardy rule,

United States, 376 F.2d 615 (8th Cir. 1967) (fifth amendment not violated when defendant given maximum sentence is denied credit for time in custody from arrest to sentencing pursuant to denial of bail lawful due to joinder of capital charge) *with* *Dunn v. United States*, 376 F.2d 191 (4th Cir. 1967), and *Stapf v. United States*, 367 F.2d 326 (D.C. Cir. 1966) (interpreting 1960 amendment to 18 U.S.C. § 3568, requiring credit for time in custody pending proceedings, as applying to all sentences though it mentions only mandatory minimum sentences, so as to avoid fifth amendment arbitrariness), and *Short v. United States*, 344 F.2d 550, 554-56 (D.C. Cir. 1965) (opinion of Bazelon, C.J.) (constitutional or other law may require credit for time in custody due to denial of constitutional right to bail):

(3) the eventual result for each of them could be a determination that no sentence is to be imposed:

(4) the possibility of a maximum sentence remains open for each of them under the double jeopardy clause. *See* *North Carolina v. Pearce*, 395 U.S. 711 (1969).

⁵⁶⁴ 282 U.S. 304, 306-7 (1931) (double jeopardy sets limits of sentences save revision only during term by trial court).

⁵⁶⁵ 330 U.S. 160 (1947).

⁵⁶⁶ *Id.* at 165-67. *See* Act of June 29, 1932, ch. 310, 47 Stat. 381.

⁵⁶⁷ *E.g.*, *Hayes v. United States*, 249 F.2d 516 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 914 (1958); *McDowell v. Swope*, 183 F.2d 856 (9th Cir. 1950). The procedure for correction can be appeal by the Government. *State v. Stang Tank Line*, 264 Wis. 570, 59 N.W.2d 800 (1953). Statutory authority for such an appeal exists in Wisconsin under a law providing that "[a] writ of error or appeal may be taken by the state from any . . . [j]udgment and sentence or order of probation not authorized by law . . ." WIS. STAT. ANN. § 958.12(1) (1958). Similar authority is found in a Florida statute which provides that "[a]n appeal may be taken by the state from . . . [t]he sentence, on the ground that it is illegal. . ." FLA. STAT. ANN. § 924.07 (1944). Equally explicit provisions establishing the right of states to obtain appellate correction of illegal sentences are found in the statutes of such states as Hawaii and

Government appeal from failure to impose a mandatory minimum sentence cannot be persuasively distinguished from Government appeal from a sentence on the ground that in sentencing the court, for example, excluded admissible information or abused its discretion. Thus, the beginning of service of a sentence should not be considered per se the end of the first sentence jeopardy by force of the Constitution alone — jeopardy may or may not end then, depending upon the availability of review procedures.⁵⁶⁸

Professor Peter Low of the University of Virginia Law School, the reporter to the ABA study on sentencing, in his testimony before the subcommittee, carefully analyzed the double jeopardy arguments and precedents and then offered these observations:

. . . [T]here would seem to be ways of putting the increase power so that it would be very difficult to suggest constitutional infirmity. One would be to permit the sentencing court only to "recommend" a sentence to the

Louisiana. HAWAII REV. LAWS § 641-12(6) (1968); LA. CRIM. PRO. CODE ANN. art. 882 (West 1967).

Other states have laws granting general rights of appeal in criminal cases to the Government. Tennessee, for example, gives the state general appellate rights in criminal cases and forbids appeal by the state only when the defendant has obtained a "judgment of acquittal." See *State v. Malouf*, 199 Tenn. 496, 287 S.W.2d 79 (1956); TENN. CODE ANN. §§ 40-3401, 3402, 3403 (1955). Such statutes have been interpreted to include the right of the Government to obtain appellate increases of unlawful sentences. A New York statute, for example, provides that "[a]n appeal may be taken by the people as of right . . . [i]n all cases where an appeal may be taken by the defendant, except where a verdict or judgment of not guilty has been rendered." N.Y. CODE CR. PROC. § 518 (1958). That statute has received, in the case of *People v. Garland*, 20 App. Div. 2d 822, 248 N.Y.S.2d 700 (1964), an application similar to an aspect of title X's provisions for appellate review of recidivist sentences. In the *Garland* case, the Appellate Division held that the New York statute authorized the State of New York to appeal from the trial court's sentencing a defendant as a first offender rather than a second offender. On appeal, the trial court's determination was reversed, and the case was remitted for resentencing.

The types of improper sentences which can be corrected on appeal by the Government include failure to impose a mandatory term of imprisonment or fine, suspending of the imposition or execution of a sentence, and granting of probation. The California statute, for example, provides that "[a]n appeal may be taken by the people . . . [f]rom an order made after judgment, affecting the substantial rights of the people . . . [and from] an order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed. . . ." CAL. PENAL CODE § 1238 (1970). A California District Court of Appeals has interpreted the former phrase as authorizing Government appeal from the improper suspending of the execution of a sentence, and the second phrase as authorizing Government appeal from the suspending of the imposition of a sentence. *People v. Orrante*, 20 Cal. Rptr. 480 (Dist. Ct. App. 1962). The Louisiana statute noted above has likewise been held to authorize appeal by the Government from the unauthorized suspending of a prison sentence. *State v. Glantz*, 253 La. 883, 220 So. 2d 711 (1969). Indeed, even in the absence of a statute explicitly authorizing Government appeal from an unlawful sentence, the Court of Appeals of Maryland has sustained the right of the Government to appeal the suspending of a mandatory fine. *State v. Fisher*, 204 Md. 307, 104 A.2d 403 (1954).

It is true, of course, that the United States Supreme Court did not declare the federal constitutional prohibition against double jeopardy to be applicable to the states until its decision last year in *Benton v. Maryland*, 395 U.S. 784 (1969). On the other hand, most of the states which have authorized Government review of unlawful sentences have had double jeopardy prohibitions in their own constitutions, laws or common law. In Wisconsin, for example, the state supreme court has held the identical predecessor of its present statute authorizing Government appeals from unlawful sentences to be consistent with the Wisconsin Constitution's provision that ". . . no person for the same offense shall be put twice in jeopardy of punishment . . ." WIS. CONST. art. I § 8. This decision, *State v. Stang Tank Line*, 264 Wis. 570, 59 N.W.2d 800 (1953), was based upon the concept of "continuing jeopardy" recently approved by the U.S. Supreme Court in *Price v. Georgia*, 90 S. Ct. 1757 (1970).

⁵⁶⁸ See *North Carolina v. Pearce*, 395 U.S. 711, 713-21 and 718 n.12 (1969) (rejection of double jeopardy limit on sentence after retrial applies even where sentence first imposed has been partly served or fine paid, except that credit is required).

appellate court, the "recommendation" to become final if neither side appealed within so many days. If an appeal were taken by either side, the issue could then be resolved de novo by the appellate court. A second way would be to analogize the situation to 18 U.S.C. § 4208(b) (commitment for study) and have the trial court impose a sentence that would be "deemed" to be for the maximum, with a recommendation that the appellate court "reduce" the sentence to a certain level, a recommendation that would become the sentence if neither side appealed, but which would not bind the appellate court if an appeal was taken.

Both of these devices are clearly artificial, and in substance obviously involve no more than would be involved if a direct appeal of the sentence were allowed to the Government. But the fact that they can be suggested with some plausibility, and that it would be difficult to say that they offended any principles rooted in the double jeopardy clause, is suggestive of the fact that the proposal here may well be constitutional.⁵⁶⁹

No such artificial technique should be or need be employed. As Professor Low concluded before *Pearce* was decided, a reaffirmation of *Stroud* and a distinguishing of *Green* for sentence increase after conviction reversal, both accomplished in *Pearce*, would establish the consistency of Government sentence appeal with the double jeopardy clause. Thus Professor Low expressed the opinion, after the *Pearce* decision, that in view of *Pearce* ". . . the double jeopardy and equal protection arguments that could be made against an increased sentence on appeal are weakened if not completely destroyed."⁵⁷⁰ Since double jeopardy precedents and policies are consistent with Government sentence appeal, it should be enacted if it will improve public justice. Again in Professor Low's words: ". . . that is the consideration that ought to control that issue, is it wise, is it desirable, as a matter of your legislative judgment to do this. I think the constitutional door has not been closed. . . ."⁵⁷¹

These arguments and authorities were set out fully in the Senate Judiciary Committee report on S. 30. That report was, of course, available to the ACLU over a month before issuance of its January, 1970, statement charging that title X authorizes double jeopardy. If it considered the problem as "serious" as it asserts, it could have supported the assertion with a detailed analysis of the public policies underlying the double jeopardy clause and the respects in which they allegedly are violated by title X. It could have specified the alleged relevance of the two court decisions it cites against the title on this issue, and could have attempted to explain away the decisions and other authorities which the report argued support title X's consistency with the double jeopardy clause. Instead, the ACLU backs up its double jeopardy allegation with a paragraph and a half of superficial comment making only two points.

First, the ACLU mentions that "the Supreme Court has never upheld . . . an increase in sentence" on review taken by the Government.⁵⁷² That is correct, but it is equally true that the Court has never invalidated such an increase in sentence. The comment does not begin to rebut the persuasive case made for constitutionality.

569 *Hearings* at 196.

570 *Id.* at 544.

571 *Id.* at 211-12.

572 ACLU January 1970 letter at 15.

Second, the ACLU notes that the scope of title X review is not limited to the appropriateness of the sentence, but also allows correction of a sentencing judge's error in failing to find a defendant to be a "dangerous special offender." The ACLU claims that such a correction is "in effect" the reversal of an acquittal, and thus is unconstitutional.⁵⁷³ The bar committee is somewhat more tentative, but repeats the inflated claim that Government appeal of a trial judge finding that a defendant is not a dangerous special offender arguably constitutes double jeopardy.

The argument, according to the bar committee, would stress the disparity between the maximum sentence permitted for special offenders and the maximum permitted for most ordinary felonies, as well as what the city bar committee calls "the lack of correlation between the conduct creating the special offender status and the acts which occasioned the current felony conviction."⁵⁷⁴

It should be noted, of course, that such a correlation actually is required by the professional offender and organized crime offender provisions of title X, as was explained above. The bar committee goes on, however, to conclude that a finding by a sentencing judge at the trial level that the defendant is not a dangerous special offender so resembles an acquittal that Government appeal of the issue arguably constitutes double jeopardy.

This objection exemplifies the kind of one-way street, in favor of defendants and oblivious to society's needs which the ACLU and bar committee would make of a criminal proceeding. It was the ACLU which pointed out that S. 30, in the form in which it was introduced, was open to a construction preventing a court of appeals which was reviewing a sentence from including in its review a determination of whether the record supported the finding that the defendant was "dangerous." Now, in its January, 1970, statement criticizing title X's scope of sentence review, the ACLU fails to mention that the language on scope of review was broadened at its suggestion, and apparently seeks a broad scope of review for the defendant and a narrow one or none for the Government.

In support of its objection, the ACLU cites only *Kepner v. United States*⁵⁷⁵ and *Trono v. United States*.⁵⁷⁶ The *Trono* case actually affirmed a conviction and merely approved the *Kepner* case in dictum, so *Kepner* is the only judicial holding offered by the ACLU as support for its opinion.

The *Kepner* case, however, involved not review of a sentence but reversal of an acquittal — the Supreme Court merely held that the Government cannot appeal for conviction of a defendant whom the lower court found not to have committed a crime at all. The ACLU's attempt to equate the sentencing hearing with the trial of guilt fails here as it does when the ACLU tries to impose trial

573 *Id.* The degree of overstatement in the ACLU's position is indicated by consideration of the right of the Government, consistent with the double jeopardy clause, to apply to a court of appeals for revocation of bail which a trial court has granted to a defendant pending appeal. Under the Bail Reform Act, bail can be denied by the trial court or appellate court in such a case, on the ground that the defendant is dangerous. 18 U.S.C. § 3148 (Supp. IV, 1969). The Government, therefore can obtain an appellate court reversal of a finding that a defendant is not dangerous.

574 ABCNY at 52.

575 195 U.S. 100 (1904).

576 199 U.S. 521 (1905).

rules of evidence upon sentencing. The Supreme Court has shown in the *Williams* case, *supra*, and in the *Pearce* case,⁵⁷⁷ its full understanding that sentencing need not be equated with a trial simply because sentencing often involves determinations that defendants committed crimes.

Under the existing precedents, therefore, there no longer is serious doubt as to the consistency of permitting the Government to appeal and obtain appellate increases of sentences with the double jeopardy clause. Even the city bar committee agrees that Governmental appeal "from the length of a sentence given by a trial judge after finding the defendant to be a dangerous special offender, . . ." followed by the imposition of an increased sentence on appeal, yet does not constitute double jeopardy.⁵⁷⁸ The Civil Liberties Union persists in the broad assertion that appellate review of sentences at the instance of the Government always constitutes double jeopardy.⁵⁷⁹ The American Bar Association on the other hand, has recently endorsed title X's sentence review provisions, with sentence increase on review taken by the Government, exactly as passed by the Senate.⁵⁸⁰

⁵⁷⁷ 395 U.S. at 720 n.16 (distinguishing *Green v. United States*, 355 U.S. 184 (1957), by distinguishing the trial of guilt from sentencing).

⁵⁷⁸ ABCNY at 51.

⁵⁷⁹ ACLU January 1970 letter at 15.

⁵⁸⁰ A.B.A. Board of Governors Resolution, July 15, 1970; *ABA Testimony*. That endorsement is the culmination of a long and thorough study of sentence review by the A.B.A. In April, 1967, the Association published a Tentative Draft of Standards Relating to Appellate Review of Sentences in which the Advisory Committee on Sentencing and Review proposed that the A.B.A. take the position that "[n]o reviewing court should be empowered to impose, or direct the imposition of, a sentence which results in an increase over the sentence imposed at the trial level." ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES § 3.4(a) (Tent. Draft April 1967).

That provision was, however, disapproved by the Special Committee on Minimum Standards for the Administration of Criminal Justice, on the ground that it was unwise to authorize reductions and not increases in sentences on appellate review. For the same reason, the provision was eliminated from the Draft when the Standards were approved in February, 1968, by the A.B.A. House of Delegates, the policy-making body in the A.B.A. The changes were made after full consideration, and are set out in a supplement bound as the first five pages of the volume containing the Standards. As the Standards finally were approved, they support the concept that a defendant's sentence may be increased when he has taken sentence review, without violating the double jeopardy prohibition. *Id.* at §§ 3.2(i), 3.3(ii) (Supp., March, 1968).

On the distinct question whether the Government should be authorized to obtain review and increases of sentences, the A.B.A. Standards themselves are silent. The Reporter's Commentary on the Standards Relating to Appellate Review of Sentences (at 56, 64, and Supplement p. 3) discusses that issue, but was not included in the material approved by the House of Delegates, so does not constitute ABA policy. Even that Commentary, however, indicates that the ABA's Advisory Committee, which opposed sentence increase on a defendant's appeal, but was overruled on that issue by the Special Committee and the House of Delegates, neither supported nor opposed a provision allowing the Government to appeal the failure to impose a mandatory sentence. *Id.* at 64-65. As noted below, the Senate Judiciary Committee examined the reasons which can be offered to distinguish Government appeal of failure to impose a mandatory sentence from Government appeal of other sentences, and found them unpersuasive.

Nevertheless, the Commentary to the Standards stated the following:

While there appears to be no United States Supreme Court precedent directly in point, there is a trilogy of cases which can be read to indicate that an appeal by the state which resulted in an increase would violate the double jeopardy provision of the fifth amendment. See *Ocampo v. United States*, 234 U.S. 91 (1914); *Trono v. United States*, 199 U.S. 521 (1905); *Kepner v. United States*, 195 U.S. 100 (1904). *Id.* at 56.

The statement that the cases "can be read" in that manner was condensed and strengthened in the Commentary to the revisions to the Standards, published in the front of the volume, to the unqualified statement that ". . . the conflicting principle of double jeopardy undoubtedly

The ACLU's "due process" objection to title X is that "[t]he defendant would be deterred from appealing if he knew the Government could then appeal as well and have his sentence increased,"⁵⁸¹ and relies entirely upon the Supreme Court case of *North Carolina v. Pearce*, *supra*. The author of this criticism could hardly have read title X, which takes great pains to prevent exactly the type of deterrence of which the ACLU warns (i.e., deterrence through fear of prosecutive retaliation). Since a defendant might be deterred from appealing if the Government, in the ACLU's words, "could *then* appeal as well," [emphasis added] title X requires that the Government take any review it desires five days before the defendant must do so. By the time the defendant is about to make his decision, the Government already has appealed or lost its chance to do so, so the defendant cannot possibly fear such retaliation.

The city bar committee, however, questions the effectiveness of the five-day lag time, arguing that it would prevent the prosecution from penalizing a defendant for appealing "only if the Government did not appeal routinely, with the intention of proceeding with the appeal only if the defendant also appealed. Some further safeguard may be desirable in this regard."⁵⁸²

The bar committee overlooks the fact that title X already includes such further safeguards against abusive prosecutive action. The section of title X dealing with appellate review of sentence,⁵⁸³ provides expressly that when a sentence review is taken by the United States the court of appeals may increase *or reduce* the sentence, and that "any withdrawal of review taken by the United States shall foreclose change to the disadvantage but not change to the advantage of the defendant." These provisions prevent the taking of routine Government appeals in the manner described by the City Bar Committee's statement, since taking routine appeals would expose the Government to the possibility of sentence reductions, a possibility not foreclosed by Government withdrawal of review. In addition, the sentence review provisions include a provision that "any review taken by the United States may be dismissed on a showing of abuse

will prevent the state or the appellate court from initiating review of a sentence deemed too low." *Id.*, Supp. at 3. Thus, while the A.B.A. took no position for or against allowing the government to take review and obtain sentence increases, its endorsement of sentence increase on review taken by a defendant was based on a judgment that under existing precedents that was the method of authorizing sentence increases less subject to constitutional challenge.

After the Standards were published, however, the Supreme Court decided the case of *North Carolina v. Pearce*, 395 U.S. 711 (1969), which upsets the A.B.A.'s assumptions as to both methods of allowing sentence increases. In the first place, *Pearce* undermines the Commentary's reading of the *Ocampo*, *Trono*, and *Kepler* cases, and supports the consistency of sentence review by the Government with the double jeopardy clause. The reasons why the *Pearce* decision has those effects, and why the double jeopardy clause is no more violated by sentence review on the Government's motion than by sentence increase on review taken by a defendant, have been explained in large part by the Reporter and author of the A.B.A. Commentary, Associate Dean Peter Low of the University of Virginia Law School, and are summarized below. The *Pearce* decision was followed, furthermore, by another Supreme Court decision, *Price v. Georgia*, 90 S. Ct. 1757 (1970), which for reasons explained below strengthened the conceptual foundation for consistency of sentence increases on review taken by the government with the double jeopardy clause. In the second place, *Pearce* strongly indicates that authorizing sentences increases only on review taken by a defendant violates due process.

Since review taken by the Government as in title X appeared, then, to be constitutional and, indeed, the only constitutional way to achieve its aim of authorizing appellate increases in sentences, the A.B.A. fully endorsed title X.

581 *Id.*

582 *Id.*

583 § 3576.

of the right of the United States to take such review." These safeguards, coupled with the five-day lag itself, provide ample protection for a defendant against being penalized by the prosecutor for taking an appeal. This conclusion, too, is concurred in by Dean Low, who emphasized the due process problems concerning sentence increases on appeal in his prepared testimony before the Senate subcommittee. He then was asked, during the hearing:

Could part of your objection to the prosecutor having the right to appeal be obviated by giving him a short period of time to exercise his option, and then allowing the defendant to exercise his option at a later point, but not permitting increase on appeal where the prosecutor did not elect to exercise his option at the earlier point?⁵⁸⁴

Dean Low replied:

I believe that would be very good. I believe it would be a very good provision. I think the prosecutor could not then appeal in response to a defendant's appeal. I think that would be an excellent suggestion.⁵⁸⁵

Neither does title X create a danger of due process violations under the *Pearce* decision through court of appeals action in imposing abusive increases in sentences, or through the fear of such increases. *Pearce* held only that due process forbids exposing a defendant who appeals his conviction to the risk of a sentence increase, not justified by his misconduct after the initial sentencing, following reversal and his retrial, where a defendant who does not appeal runs no risk of a sentence increase. Even if one reads *Pearce* for all it may be worth, it stands only for the proposition that, under the due process clause, a defendant's exercise of a right cannot confer judicial power to increase his sentence for reasons other than subsequent misconduct.

Title X never does that. Under title X it is not possible to say that a defendant's taking of a sentence review, or of an appeal of his conviction, ever authorizes an increase in his sentence. Increase of sentence will always stem from action not attributable to the defendant.

The provisions of title X which bring about this result are found in §3576. If the government takes a review, that action alone, in effect, brings about a review and an appeal for the defendant, opening the possibility of a reversal of conviction or a reduction of sentence. Section 3576 explicitly provides that the court on government review to increase may either increase, affirm, or decrease. In addition, since the propriety of the sentence necessarily involves the propriety of the conviction, outright reversal of the conviction itself may result from the government's review. The defendant need not do anything to obtain all of whatever he might want. If the government takes a review and then withdraws it, moreover, it is explicitly provided that the withdrawal forecloses a sentence increase, but not a decrease; the review and appeal for the defendant opened by the government's action, therefore, remain open. Finally, if the government takes no review, and the defendant himself affirmatively

584 *Hearings* at 211.

585 *Id.*

takes a review, it is explicitly provided that the sentence cannot be increased.

Those provisions prevent the appellate court from increasing a sentence to punish the defendant for taking a review or appeal. No increase is possible where the presence of the case in the court of appeals may be attributed to the defendant. It will always be there because of what the government has done or no increase at all is authorized.

Taken together, these provisions may be said to operate in this way: whenever the defendant is exposed to a sentence increase, it is not because he took a review or appeal (since his review and appeal result from the government's action) so the defendant cannot be punished for doing anything. And whenever the defendant takes a review or appeal, no sentence increase is authorized, so the defendant cannot be punished for taking his review or appeal.

The Senate Judiciary Committee Report on S. 30 elaborates somewhat upon the ways in which the present language of title X achieves those results

. . . [Subsection (g) of proposed §3575] envisions that review of both sentence and conviction will be heard together. The scope of review encompasses all factual and legal questions, substantive and procedural, as well as the exercise of discretion.

. . . The five-day lag, the limitations on increasing sentences, and the authority for dismissal for abuse obviate any due process objections to Government appeal. *Cf. North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969).⁵⁸⁶

Still greater explicitness on the face of the Act could be provided, perhaps, by including in proposed section 3576 a sentence such as "The taking of a review by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant." Such language would foreclose any possible argument about the meaning of the bill on the scope of review and appeal as now drafted. With or without the addition of specific language, just so long as no action taken by the defendant may be said to confer power on a court to increase the sentence of the defendant, as *Pearce* indicated is improper, title X may be said to be consistent with *Pearce* and the requirements of due process.

The city bar committee asserts also that appellate review of sentences under title X would not be effective, for three reasons. First, the bar committee finds the criteria determining whether or not one is a "dangerous special offender" to be "so vague as to provide no clear standards for . . . the appellate court on review."⁵⁸⁷ Second, the committee considers that the provision permitting withholding of information found in the presentence report from the defendant in certain cases "makes it highly doubtful that an appeal could be very effective."⁵⁸⁸ The bar committee buttresses that point by asserting that "[a]nother obstacle to adequate review would be presented if all the sections upon which the trial court relied, but which were suppressed, were not transmitted to the

586 REPORT at 166-67.

587 ABCNY at 48.

588 *Id.* at 47.

appellate court for review. Section 3576 should be modified to make clear that this information is communicated to the court of appeals.⁵⁸⁹ Section 3576 is, of course, already clear on that point, since its provisions authorizing the court of appeals to review special sentences state that the court of appeals may take such action "after considering the record, including the presentence report." In addition, the provisions of section 3575 permitting the sentencing court to withhold portions of the presentence report from the defendant for "compelling reasons" require that those reasons be placed in the record, and that section further requires the trial court to "place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed." The committee's third ground for doubting the effectiveness of appellate review of sentences under title X is the supposed difficulty which a court of appeals will have in reviewing the adequacy of hearsay to support a sentence.⁵⁹⁰

Discussed in connection with title I above some of the many situations other than sentencing in which courts of appeals as well as trial courts already are accustomed to making and reviewing fact determinations based upon hearsay. In addition, it should be noted that already a number of states permit appellate review of sentences,⁵⁹¹ and that even in the federal system appellate courts are empowered to review sentences for criminal contempt.⁵⁹² The state experience, and the federal experience with appellate review of contempt sentences, demonstrates that all three points made by the city bar committee on this issue are invalid. Federal criminal contempt sentences, for instance, are reviewed despite the absence of any statutory standards to guide the sentencing court or the court of appeals, and such review is not considered to be impeded by the present rule making presentence report disclosure entirely discretionary. Similarly, the experience with review of federal contempt sentences and state criminal sentences, both of which can be based upon hearsay, demonstrates again the invalidity of the supposition that hearsay underlying a criminal sentence cannot be effectively reviewed.

The city bar committee complains that "Title X makes no effort to determine either the scope of review or the standards which an appellate court is to consider on review" of sentences.⁵⁹³

The scope of review is, on the contrary, made perfectly clear, both on the face of title X and in the Senate committee report. Title X's section 3576 provides:

The court of appeals . . . may affirm the sentence, impose or direct the imposition of any sentence that the sentencing court could have imposed, or remand for further sentencing proceedings and imposition of sentence.⁵⁹⁴

589 *Id.* at 47 n.79.

590 *Id.* at 51.

591 See ABA STANDARDS ON APPELLATE REVIEW 67 (Appendix A).

592 *Brown v. United States*, 359 U.S. 41, 52 (1959), *overruled on other grounds*, *Harris v. United States*, 382 U.S. 162 (1965) (Supreme Court can review discretion in federal criminal contempt sentence); *Yates v. United States*, 356 U.S. 363 (1958) (same).

593 ABCNY at 50-51.

594 REPORT at 166.

The Senate report goes on to specify: "The scope of review encompasses all factual and legal questions, substantive and procedural, as well as the exercise of discretion."⁵⁹⁵

It states further:

The Government may obtain review of the failure to impose any special sentence or the sentence imposed. Where the sentence is vacated and remanded for new proceedings subsequent review is contemplated. A defendant found to be a dangerous special offender, but given a sentence less than the maximum authorized for ordinary offenders, may take a sentence review.⁵⁹⁶

These passages make it explicit that every issue considered by a trial court imposing sentence — including the procedures followed, the findings made, and the exercise of discretion in selection of a particular sentence — are included in the scope of appellate review.

The standards for viewing each of the various questions open on appeal from title X sentence are not specified in title X, because of the voluminous existing authority on appellate review of analogous question in other contexts. The sentencing court's exercise of discretion in selecting a sentence will be reviewed under the same standard under which such exercises of discretion presently are reviewed in federal criminal contempt cases.⁵⁹⁷ Questions as to whether or not proper procedures were followed by the sentencing court will be reviewed, as they always are, with the appellate court examining the record of the proceedings below and making de novo determinations of questions of law. There is no reason for the city bar committee to suppose that the hearing in the court of appeals, which must be held prior to any increase in sentence, "is to be a de novo evidentiary hearing."⁵⁹⁸

The ACLU properly suggests that some of the affirmative reasons why appellate review of sentences is desirable, which are discussed at length in the committee report,⁵⁹⁹ apply to ordinary as well as special sentences. However, due to the past absence of general appellate power over sentences, and expressions in previous Congresses of concern over the possibility of unduly burdening appellate courts, it might be wise to test the operation of sentence review by first enacting such authority only for a limited class of cases.⁶⁰⁰ Later, the decision whether to extend appellate review to all sentences would be made in light of the volume of past sentence reviews taken, the time and money consumed by each review, and the court adjudication of the constitutionality of review by the Government. As the ACLU concedes, the importance of title X cases, the long sentences available under the title, and its unusual procedures make sentence review "particularly apt in that context,"⁶⁰¹ so if review should first be tried in a limited class of cases, title X describes an appropriate one.

595 *Id.*

596 *Id.*

597 *See* *Yates v. United States*, 356 U.S. 363 (1958).

598 ABCNY at 51 n.86.

599 REPORT at 92-93, 99.

600 *See* ABA STANDARDS ON APPELLATE REVIEW § 1.1(b) (suggesting limits on the length and kind of sentence that should be subject to review).

601 ACLU January 1970 letter at 14.

Title X should have received more careful consideration than it was given in the ACLU statement, but instead the uncritical acceptance of that statement by other commentators is compounding its inaccurate and unbalanced analysis of title X. Tom Wicker of the *New York Times*, for example, declared that S. 30 "threatens the eighth [amendment]," but failed to say what provisions did so, or how, or according to what authority,⁶⁰² while the ACLU apparently has dropped its objection to S. 30 on that ground. And the *Times*' editors charged that title X "substitutes police discretion for court adjudication."⁶⁰³ That irresponsible complaint is wrong on both counts. Title X never mentions any police authority, and gives no authority of any kind, much less any discretion, to any police agency. If the *Times* meant to say "prosecutorial," but did not, the editors might note that it was the ACLU which urged that the charging of a defendant as a "dangerous special offender" be made discretionary with the government attorney.⁶⁰⁴ Finally, court adjudication is not displaced — it is required as fully in title X as in ordinary sentencing cases.

D. The Method of Objection

I now have replied to many of the claims that specific provisions of S. 30 threaten fundamental civil liberties and constitutional protections. In addition, of course, many concepts implemented by the bill have been explained and supported by the Crime Commission, and by other bodies whose proposals formed much of the basis for the Organized Crime Control Act. By comparing the criticisms and defense of the provisions found in S. 30, therefore, a student, lawyer, judge or legislator can form his own opinion concerning the bill's propriety and constitutionality.

A person who studies these materials will find, however, a surprisingly sharp contrast between the views of S. 30's supporters, and the views of its detractors, concerning its civil liberties implications. I would like to assist anyone concerned about this legislation in assessing the reasons for that contrast, and in evaluating the validity of the civil liberties objections raised against the bill. For that purpose, I must go beyond my comments on specific complaints about individual provisions, for a time, to discuss the approach and methodology which underlie the objections to S. 30 voiced by the Civil Liberties Union and the city bar committee.

First, both the city bar committee and the Civil Liberties Union repeatedly make demonstrably inaccurate and misleading statements concerning S. 30. On some occasions, they mislead the reader merely through deceptively biased use and omission of precedents. The result is that their reports have the appearance of impartial analysis, but are in substance briefs against S. 30. Often, however, through carelessness or haste, and occasionally, it seems, through misguided zeal to discredit the bill, both the union and the bar committee actually misstate the plain meaning of S. 30's specific provisions and the state of existing law. It appears that on some of those occasions, the bar committee was led into error

602 *New York Times*, Feb. 1, 1970, § E, at 12, col. 3.

603 *Id.*, Feb. 3, 1970, at 42, col. 2.

604 *Hearings* at 468.

by the Civil Liberties Union's testimony and statement against the bill, which the bar committee obviously used as its guide to the bill and the issues raised by it. The remarkable congruency of organization and analysis between the Civil Liberties Union's January, 1970, letter and the city bar committee's statement on S. 30 becomes apparent again and again when the two statements are compared. I have drawn attention to a few of the similarities between the two statements at some earlier points in this article, but let me illustrate this point, and the others that I shall make in discussing the approach taken by these two organizations to S. 30, with a few examples.

The Civil Liberties Union falsely stated that title IV, on perjury, would eliminate the requirement that the perjury have been committed "knowingly" where the defendant was found to be guilty of having made two manifestly contradictory statements.⁶⁰⁵ As I explained in discussing title IV, careful examination of the precise terms of title IV makes it clear that the union simply misread the language of the provisions. The city bar committee, however, was led by the ACLU's mistake into making the same error themselves, and even expressly suggesting the insertion of the word "knowingly" in title IV.⁶⁰⁶ The city bar committee likewise repeated⁶⁰⁷ the union's error⁶⁰⁸ in supposing that the provision of title VIII that proof of operation of a gambling business in a particular way shall be deemed to establish the probability that the business receives gross revenue over \$2,000 in a single day was intended to have, or even could have, application in a trial of guilt where probability is not a material issue.

Less important than the sources of the incorrect and misleading statements found in the statements of the union and city bar committee, though, is the frequency with which they are found. I shall not attempt to identify every error and every misleading statement of which the two organizations are guilty, but I consider it worthwhile to mention several, to assist anyone interested in crime control in evaluating the reliability and persuasiveness of the bar committee and union statements as authorities on S. 30.

I described above, first, the way in which the Civil Liberties Union falsely stated that title V, on protected facilities for housing Government witnesses, left open the possibility that the Attorney General was being authorized to detain witnesses involuntarily;⁶⁰⁹ second, the union's direct misstatement of the holding of *Counselman v. Hitchcock* concerning immunity legislation and the fifth amendment; third, the union's misleading failure even to cite the recent Supreme Court case, *Murphy v. Waterfront Commission*, contradicting the union's misinterpretation of *Counselman*;⁶¹⁰ and fourth, the city bar committee's false statement that the National Association of Counties urged that title I be rejected in its present form.⁶¹¹

Another misstatement of the plain meaning of S. 30, which I have not

605 ACLU January 1970 letter at 6.

606 ABCNY at 23 n.37.

607 *Id.* at 38.

608 ACLU January 1970 letter at 10.

609 *Id.* at 6.

610 *Id.* at 4.

611 ABCNY at 9.

mentioned earlier in this article, is this statement by the Civil Liberties Union concerning title I, on grand juries:

though a criticized public employee is given an opportunity to answer before a report is made public, it is doubtful in the extreme that 20 days will be sufficient where the grand jury may have had over three years to investigate and need not reveal the basis for its allegations.⁶¹²

This statement clearly implies that a criticized public official has only twenty days in which to answer a report, and the union fails even to mention the provision of title I that "upon a showing of good cause, the court may grant such public officer or employee an extension of time within which to file such answer." The city bar committee, with somewhat more candor, notes that a public official can obtain an extension for "good cause," but contends:

the requirement that the public official named in a report show "good cause" to justify an extension of his time to file an answer beyond twenty days — also a refinement not found in the New York statute — seems unduly burdensome.⁶¹³

I consider title I's legislative specification that postponements are permissible, a provision not contained in the New York statute, to be an improvement over the New York law, beneficial to the subject of a report. In any case, the bar committee fails to point out that "good cause" or "cause" is an ordinary standard for granting postponements of proceedings and delays in filing pleadings and court papers,⁶¹⁴ and that the denial by a district court of the request for a postponement under title I could be reversed by a court of appeals.

The city bar committee makes a particularly egregious misstatement of the meaning of S. 30 when it discusses the definition of an organized crime offender subject to extended sentencing under title X.⁶¹⁵ In the course of its attempt to persuade the reader that the definition of an organized crime offender is satisfied even as to participants in small and unimportant conspiracies, the bar committee twice asserts that there need be only three members of the conspiracy in order to bring the conspiracy within the definition of title X. Actually, of course, that definition requires that the conspiracy have had four or more members. Similarly, when the bar committee makes a comparable effort to discredit the recidivist definition in title X by suggesting that title X provides the same sentencing treatment for defendants whose most recent felonies were minor as for defendants whose most recent felonies were the most grave offenses over which the federal courts have jurisdiction, the committee contrasts a conviction for possessing drugs with a conviction for "murder on the high seas" and asserts that recidivists convicted of those two crimes and sentenced under title X both would be exposed to thirty-year maxi-

612 ACLU January 1970 letter at 2.

613 ABCNY at 12 n.11.

614 See, e.g., FED. R. CRIM. P. 12(b)(2) ("cause" for relief from waiver of defenses and objections through failure to present them as required), 15(b) ("cause" to extend time for taking deposition), 16(f) ("cause" for delaying motion for discovery).

615 ABCNY at 49.

imum terms of imprisonment.⁶¹⁶ In fact, the maximum term of imprisonment for murder on the high seas is life imprisonment,⁶¹⁷ and would remain so under title X.

Discussing another aspect of the definition of a recidivist in title X, the city bar committee states:

The term "conviction" should also be more carefully defined to eliminate individual situations which title X should not reach. It should be made clear, for instance, that convictions overturned on collateral attack as well as direct appeal are discounted. The defendant should also be permitted to question the validity of any prior convictions at his sentencing hearing.⁶¹⁸

The fact is that title X already contains provisions which do everything requested in that statement by the city bar committee. The relevant language in title X is: "A conviction shown to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection."

Since the bill places no limitations on the time or forum where the conviction can be "shown to be invalid," that showing can have been made prior to the recidivist proceedings on collateral as well as direct attack, or can be made in the recidivist proceedings itself. This meaning of title X is reemphasized by the citation in the Senate committee report of the case of *Burgett v. Texas*.⁶¹⁹

These examples of misstatements and misleading language by the union and bar committee, coupled with the examples I mentioned in discussing each of the various titles of S. 30, should be sufficient to make the point: their statements of the meaning of S. 30, and of the state of existing law, have not provided a firm and reliable basis for their legal analysis of the provisions or their arguments regarding the policies involved in the statute.

In addition, they go beyond such misstatements, and beyond positive misuse of existing precedents. The bar committee and Civil Liberties Union have engaged more generally in biased and slanted citation and omission of analogous precedents, and of relevant pronouncements by respected authorities concerning the issues raised by S. 30. This method of treating legal authorities may be acceptable practice in an adversary brief. The most objectionable aspect of the use of that technique by the New York City Bar Committee, in particular, and to a lesser degree by the Civil Liberties Union—since the public generally recognizes that the union is an advocate for a particular point of view—is that their statements purport to be impartial reports of unbiased and representative professional and civic organizations.

The failure of the bar committee's statement to measure up to that standard is illustrated by the fact, which I discussed in the context of the constitutional issues raised by title VII, regulating litigation concerning sources of evidence, that it cites precedents, such as the *Mapp* and *Alderman* cases, and even lower court

616 *Id.* at 47.

617 18 U.S.C. § 1652 (1964).

618 ABCNY at 48 n.81.

619 389 U.S. 109, 115 (1967).

decisions such as the *Projanski* decision in the southern district of New York, which the bar committee considers authority against the validity of title VII, yet fails entirely to cite the many Supreme Court and other precedents which contradict the absolutist view of the suppression sanction taken by the bar committee.

Another flagrant example of the selective citation of persuasive authorities, or worse, is the city bar committee's citation⁶²⁰ of the decision by Judge Weinfeld in the *United Electrical Workers* case⁶²¹ for his disapproval of grand jury reports containing legislative recommendations or criticisms of specified individuals, and their omission to mention that in the same opinion Judge Weinfeld approved grand jury reports concerning general crime conditions.⁶²²

Where pronouncements by professional bodies and other authorities concerning concepts implemented in S. 30, or concerning aspects of the bill itself, are concerned, the bar committee was similarly one-sided. I discussed above, in the context of title I on grand juries, the bar committee's false statement that the National Association of Counties opposes the present version of title I, and its omission to note that title I is supported also by the Association of Federal Investigators and the International Association of Chiefs of Police. Similarly, the bar committee informed the reader that the Judicial Conference of the United States has recommended that the subject of depositions in criminal cases appropriately falls within the Supreme Court's rulemaking function and has referred title VI of S. 30 to the Federal Rules Advisory Committee for its consideration⁶²³ and used the Advisory Committee's treatment of the question as a reason to oppose title VI, but the bar committee did not go on to disclose other positions taken by the Judicial Conference concerning S. 30, such as its approval, with two minor reservations, of title IX, on racketeering infiltration of business.

After misstating the meaning of the various provisions of S. 30 and the state of existing law, and assembling almost exclusively the precedents considered adverse to S. 30's provisions, the city bar committee's and the Civil Liberties Union's next step is to raise specious claims that S. 30's provisions infringe upon personal interests, some of them of constitutional dimension, of individual citizens. The inaccuracies and unbalanced authorities, of course, help to make the claims concerning S. 30's impact upon individuals appear sound. In order to add further credibility to the assertion that individual interests are invaded, however, the bar committee and union strain the specific titles of S. 30 to find the most extreme applications of those provisions imaginable, in order to discredit the provisions. Let me, again, give some examples of how the bar committee's and union's reports employ the technique of discrediting proposed legislation by stressing extreme or fanciful applications of its provisions.

As I mentioned above in discussing title I, on grand jury reports, existing case law gives reasonably definite content to the phrase "non-criminal misconduct, malfeasance or misfeasance," upon which a title I special grand jury is permitted to report. The Civil Liberties Union, however, objecting to the failure of title I to define that term on the face of the bill, poses a hypothetical case in

620 ABCNY at 11.

621 111 F. Supp. 858 (S.D. N.Y. 1953).

622 *Id.* at 861.

623 ABCNY at 26.

which "a jury investigating alleged bribery of police officers could apparently report on whether particular policemen may have breached some non-criminal regulation, such as being improperly uniformed."⁶²⁴ I suppose it is conceivable that a grand jury which found a police department to be pervaded by unprofessional and inefficient conduct, such as drinking during working hours, sleeping while on duty, use of abusive language toward minority group members, and—among other things—sloppy and improper uniforms, might mention the improper attire in reporting on the entire intolerable situation, thereby conveying the whole picture of the demoralized state of the police department.

It is, in my view, exactly because it is impossible to predict how complicated and unforeseeable sets of circumstances will interact, that a general phrase such as "noncriminal misconduct, malfeasance or misfeasance" is needed in title I, in order to preserve the power of the grand jury to report upon situations of which the public needs knowledge. For the Civil Liberties Union to suggest, however, as it does, that title I should be defeated because of the supposed possibility that a grand jury would use a bribery investigation as a springboard to report simply on the failure of "particular policemen," in the words of the union, to be properly uniformed is ludicrous, and unworthy of the gravity of the subject on which S. 30 legislates.

In the same vein, the New York City Bar Committee attempts to discredit the special offender sentencing provisions of title X by suggesting that a prosecutor, a federal district judge, and a U.S. court of appeals all might be persuaded that a felony convict's prior history of "littering" established him to be "dangerous" in the sense that he required imprisonment for a term longer than the maximum authorized for his felony.⁶²⁵ The technique used against title X by the city bar committee in that hypothetical case, and others with which it attempts to frighten the reader, is to pair the bare minimum showing required to be made by the terms of title X—or less—with the maximum term of imprisonment authorized by title X for the most aggravated offense. This is an unrealistic and prejudicial way in which to assess the propriety of adding title X to the existing federal laws, which, as I pointed out above concerning the Hobbs Act, already permit the imposition of extremely long prison terms on first offenders who sometimes would be rehabilitated by immediate probation. It is not possible for any substantive criminal prohibition, or any sentencing statute, to avoid the possibility of such extreme applications. Title X does all that can be done in that direction, and a great deal more than is done by present law, by providing criteria for use by the sentencing court, a relatively full procedure for determining whether or not the criteria are satisfied before sentence is imposed, and, perhaps most importantly, an avenue of appellate review to correct individual abuses of discretion.

An almost identical rhetorical technique is used by the city bar committee in its assault upon title VIII, dealing with interstate gambling and related corruption. The bar committee stirs fears that title VIII could be used to prosecute small, unimportant "mom and pop" bookmaking setups—without informing the

624 ACLU January 1970 letter at 2.

625 ABCNY at 49.

reader that existing federal gambling statutes⁶²⁶ are much broader and more inclusive than title VIII, except that they require specific proof in each case of an interstate element of the gambling business. This interstate element can be a very minor one, provided that the Government can obtain evidence of it, such as accepting by telephone a single bet by a close personal friend just across the state line, or the use of numbers taken each day from a newspaper transported in interstate commerce.⁶²⁷ On balance, title VIII seems less susceptible of application to a "mom and pop" gambling business than existing federal statutes, since it is carefully restricted to major gambling businesses by its requirement that five or more persons participate and that the business operate over an extended period of time or enjoy a substantial and specified daily gross. Obviously, title VIII, like any criminal statute, could be applied to criminal cases which are so minor that they are better left to state law enforcement. The Justice Department and the other departments and agencies of the federal government are accustomed to enforcing such statutes, so they develop guidelines to prevent the waste of federal money and manpower, and the abuse of federal authority which would result from deep federal involvement in petty cases. The *Washington Post* recently reported, for example, that the Justice Department has just revised its guidelines governing the decision whether a stolen automobile case should be prosecuted under the Federal Dyer Act or by State authorities.⁶²⁸ Title VIII presents no special problems in this area.

It simply is an unavoidable fact of life that the Congress cannot anticipate every circumstance which will arise under a statute it considers enacting. We rely to some degree upon the good faith and judgment of prosecuting authorities and courts. The straining by the Civil Liberties Union and the city bar committee for extreme applications not only of title VIII but of all the titles of S. 30, and their demands that specific provisions be written into S. 30 to guard against imagined dangers of abuse, call to mind the observations made by Stephen, the English jurist and legal historian, on the Indian Penal Code:

The idea by which the whole Code is pervaded, and which was not unnaturally suggested by parts of the history of the English law, is that every one who has anything to do with the administration of the Code will do his utmost to misunderstand it and evade its provisions; this object the authors of the Code have done their utmost to defeat by anticipating all imaginable excuses for refusing to accept the real meaning of its provisions and providing against them beforehand specifically. The object is in itself undoubtedly a good one, and many of the provisions intended to affect it are valuable as they lay down doctrines which may be needed in order to clear up honest doubts or misunderstandings. . . .

I think, however, that to go beyond this, and to try to anticipate captious objections, is a mistake. Human language is not so constructed that it is possible to prevent people from misunderstanding it if they are determined to do so, and over-definition for that purpose is like the attempt to rid a house of dust by mere sweeping. You make more dust than you remove.

626 18 U.S.C. §§ 1952-53 (1964).

627 See, e.g., *United States v. Zambito*, 315 F.2d 266 (4th Cir. 1963), cert. denied, 373 U.S. 924 (1963).

628 *Washington Post*, May 27, 1970, § A, at 6, col. 3.

If too fine a point is put upon language you suggest a still greater refinement in quibbling.⁶²⁹

The city bar committee and the Civil Liberties Union, however, do not present their criticisms of S. 30 as quibbling. Relying on their misleading statements of the bill's meaning and of existing law, citing authorities for their position but not against it, placing the most extreme construction possible on each term of S. 30, and then imagining the most palpably unjust application to which Satan himself could put S. 30, the bar committee and union not surprisingly reach the conclusion that S. 30 is a grave threat to fundamental civil liberties.

They state the supposed danger in overblown, hysterical terms, such as the union's reference to the "withdrawal" of the exclusionary rule during its attack on title VII's five-year period of limitation and minimal criteria for in camera screening.⁶³⁰ Using colorful terms like "dragnet,"⁶³¹ warning of "masses of computer stored and processed information,"⁶³² and declaring modifications in existing pretrial procedure "totally inconsistent with our traditional presumption of innocence,"⁶³³ the bar committee and union paint a picture of repressive legislation deeply intruding upon settled constitutional rights.

Once they have made the argument that a provision invades individual interests, moreover, the bar committee and union often treat the validity and wisdom of the provision in question as settled. They do not proceed to the next step, which should be to measure the degree of the supposed invasion and balance it against the expected benefit to the effectiveness of the administration of justice and to other interests.

An example of this refusal to balance on the part of the Civil Liberties Union is found in its discussion of title VI, on depositions. The union states that title VI's standard for when depositions can be taken is vague, and that cross-examination of a witness at a deposition is not as effective as cross-examination at trial. Simply on the basis of those arguments, the union concludes that title VI is "objectionable," without weighing the relative practical advantages and disadvantages of greater specificity in the standards for taking depositions, and without evaluating the degree to which cross-examination at a deposition is inferior to cross-examination at trial or weighing that disadvantage of a defendant against the interest of society in not having the testimony of an unavailable witness entirely lost to the court.

The city bar committee's treatment of title VII, on litigation concerning sources of evidence, illustrates its refusal to balance society's interests against those of a defendant. In rejecting the title VII authorization of in camera screening of confidential government files under minimal threshold standards, the city bar committee state that "we agree with the Supreme Court's conclusion that disclosure and adversary proceedings will protect constitutional rights more effectively than *in camera* review."⁶³⁴

629 3 J. F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 305-6 (1883).

630 ACLU January 1970 letter at 9.

631 *Id.* at 12.

632 ABCNY at 27.

633 ACLU January 1970 letter at 9.

634 ABCNY at 32.

The bar committee omits to consider the next question: assuming for the sake of argument that full disclosure increases the protection of a defendant, does it increase the protection so greatly as to outweigh the harm done to other interests by indiscriminate disclosure? The bar committee makes its refusal to weigh competing interests even more explicit regarding the five-year limitation provision of the title VII, when it states:

More basically, however, even if there were an over-all saving of time and energy and the avoidance of dilatory tactics by criminal defendants, we do not believe that such objectives could possibly justify the proposed dilution of constitutional rights contained in Title VII.⁶³⁵

On occasion, the city bar committee does purport to weigh society's interests against individual interests in considering provisions of S. 30. It balances those interests unevenly, however, understating the affirmative reasons for enactment of S. 30 provisions and assigning slight value to the community interests protected by them.

For example, in summarizing its conclusions concerning title IX, on racketeering infiltration of legitimate business, the bar committee positively misstates the effect of title IX and the reasons for its enactment. According to the city bar committee:

Title IX . . . creates *penalties* for the investment in legitimate businesses of funds earned in criminal activity. The aim of *detering* organized crime from infiltrating legitimate businesses is one with which we agree. The draftsmen of this Bill, however, fail to consider . . . the problem that the proof of such investment requires proof that the funds were obtained by criminal activity. If the original crime can be proved, however, Title IX *does not add more than a higher penalty* to our present laws. (Emphasis added.)⁶³⁶

The words I have emphasized in that quotation from the bar committee's report pinpoint some of the ways in which the committee misstates the meaning and effect of title IX so as to belittle its value. The penalties of fine and imprisonment provided in title IX do, of course, have the "aim of deterring" the prohibited conduct, but deterrence is only one of the legitimate purposes of criminal prohibitions — and where organized crime is involved, most authorities⁶³⁷ agree that "incapacitation" is an equally or more important aim. Further, the committee ignores the fact that title IX adds to the existing criminal penalties of fine and imprisonment the further criminal penalty of forfeiture. Criminal forfeiture under title IX serves not only to punish, deter, incapacitate, and so on — it serves directly to remove the corrupting influence from the channels of commerce.

The committee further ignores the important civil remedies established in title IX. Even where the Government has sufficient evidence to prove beyond

⁶³⁵ *Id.* at 29.

⁶³⁶ *Id.* at 7-8.

⁶³⁷ See, e.g., CHALLENGE OF CRIME at 7; Rector, *Sentencing the Racketeer*, 8 CRIME AND DELINQUENCY 385, 389 (1962).

a reasonable doubt a criminal violation of title IX as well as violations of the specific offenses listed in title IX, the civil remedies provided are automatically available, through collateral estoppel as to the principal elements of the civil cause of action. The civil remedies grant still further power to the federal district court to make orders appropriate to remove the racketeering influence from the legitimate organization, and to prevent its return. It simply is false for the bar committee to state that title IX's "aim" is deterrence through the creation of "penalties," and that "title IX does not add more than a higher penalty to our present laws." In view of that understatement of the title's purpose and effect, it is hardly surprising that, when the bar committee turns to balance the benefits of title IX to society against the dangers which the bar committee imagines that its provisions pose to individual liberties, the committee concludes that title IX "will likely have very limited impact on organized crime," "could have the negative effect of encouraging complacency by giving the appearance of dealing with a very real problem while, in fact, failing to do so," and therefore "should not be enacted in its present form."⁶³⁸

The bar committee similarly gives short shrift to the affirmative reasons for authorization of appellate review of sentencing when it describes such review simply as "a means of insuring equity and consistency in sentencing patterns."⁶³⁹

In addition to that function of sentencing review, of course, such review serves other important purposes which have been well articulated by the American Bar Association study of appellate review of sentences, and which are summarized in the Senate Committee Report on S. 30:

Sentence review can, moreover, serve important purposes other than that of avoiding disparate and unsound sentences. In addition to correcting excessive or insufficient sentences, appellate review of sentences can contribute to rationality in sentencing by making sentencing decisions more public and promoting the evolution of sentencing principles, enhance respect for our system of justice, relieve pressure on appellate courts now lacking sentence review power to find grounds to reverse convictions on which unconscionable sentences were imposed, and aid rehabilitation of defendants by affording opportunities to object to sentences.⁶⁴⁰

The bar committee's grave misgivings about the constitutionality and wisdom of enacting S. 30's sentence review provisions are more understandable when one notices the degree to which the committee ignores important aspects of the social utility of sentence review.

In the same way, the bar committee states that "presumably" the purpose of title VI, authorizing the taking of depositions to preserve testimony, is "to safeguard that witness' testimony in the event of mob retaliation."⁶⁴¹ That obviously is not the sole purpose of expanding the deposition authority now found in rule 15, and I do not understand why the city bar committee found it necessary to "presume" what the purposes of title VI are, since the committee report spells out a number of eventualities against which a deposition can protect a prosecution:

638 ABCNY at 39.

639 *Id.* at 50.

640 REPORT at 92-93.

641 ABCNY at 7.

Whoever brings about the result, the mob's objective will have been realized if the witness dies before trial, or becomes too ill or is too injured to testify, changes his testimony in fear or from favor, or merely refuses to testify or produce evidence on grounds of privilege or "no" grounds at all. What is worse, particularly when the witness disappears or turns his coat at the last minute, the prosecution itself will usually be aborted and, under double jeopardy principles, the mob figure will attain permanent immunity from punishment.

Paralleling the attempt of title V to protect Government witnesses themselves from the mob by affording them physical protection and security, title VI seeks to protect the evidence the witnesses have to offer from corruption or other interference or harm by authorizing the taking of pretrial depositions in a form potentially admissible at trial to preserve this testimony. The primary purpose of title VI, therefore, is to remove the chief incentive the mob has in tampering with witnesses or their testimony and to prevent criminal prosecutions, especially in organized crime cases, from being defeated when Government witnesses are, in fact, prevented through murder, assault, intimidation, bribes or other factors, whatever their source, from testifying truthfully at trial. It may also be used, of course, by witnesses in protective custody to make their release feasible.⁶⁴²

Since the bar committee conceives title VI as having a purpose so much more limited than it has, the bar committee concludes that even existing law governing the use in evidence at trial of out-of-court statements, previously cross-examined, is too favorable to the Government, and that "absence of a Government witness from the jurisdiction should rarely, if ever, permit the Government to use his deposition at trial,"⁶⁴³ in spite of the injustice done in cases such as the *Bonnano* case, discussed above, where the disappearance of a witness deprived a trial jury of the right to hear relevant evidence.

By refusing to balance competing interests where procedural provisions are involved, and by balancing interests unevenly when it attempts to weigh them at all, the bar committee comes to the conclusion that virtually all of the key procedural provisions of S. 30, which are designed to improve the power of the federal government to gather and preserve evidence in criminal cases, should be rejected by the Congress. It is ironic, therefore, that the bar committee concludes that the section of title VIII, on gambling, dealing with corruption of local officials "could be extremely useful."⁶⁴⁴

The bar committee appears to assume that substantive criminal prohibitions like those found in title VIII are self-executing. The truth is that title VIII is a useful but limited extension of the already broad federal jurisdiction over illegal gambling. Enactment of title VIII will assist the federal government by permitting effective prosecutions in some gambling cases which are interstate in character but as to which it is not now possible to find specific evidence of interstate involvement. But the improvement in the effectiveness of the federal effort against organized crime which this provision of title VIII will cause will be relatively minor, compared to the improvement which would result from enactment of the procedural provisions of S. 30. As the President's Crime Com-

642 REPORT at 61.

643 ABCNY at 26.

644 *Id.* at 35.

mission found after a comprehensive examination of the defects in state and federal laws for dealing with organized crime:

on the Federal level, and in most State jurisdictions where organized crime exists, the major problem relates to matters of proof rather than inadequacy of substantive criminal laws. . . . From a legal standpoint, organized crime continues to grow because of defects in the evidence-gathering process.⁶⁴⁵

In view of that fact and the almost unremitting hostility of the bar committee to S. 30's provisions dealing with the gathering of evidence, the committee's endorsement of a portion of title VIII is a hollow victory indeed for law enforcement — or for society.

There is a final flaw in the approach of the bar committee and the union to the provisions of S. 30. After using misstatements of fact and law, biased precedents, nightmarish hypothetical applications, and a one-sided view of the relationship between society's interests and those of each individual, and concluding therefore that a provision of S. 30 creates excessive danger to individual liberty, the bar committee and union typically succumb to a classic fallacy by rejecting, rather than proposing to amend, the proposed legislation. The union applies that fallacy virtually without exception, which the bar committee makes a number of affirmative suggestions for changes in provisions of S. 30 — often, however, without suggesting that the proposed changes would make the provisions of the bill acceptable to the committee. The bar committee, too, however, often shows that it prefers defeat of a proposal to enactment of the proposal in a different form, as where the committee endorsed the concept of dangerous special offender sentencing,⁶⁴⁶ but found the sentencing procedure in title X unsatisfactory and expressly declined to consider how it could be made acceptable.⁶⁴⁷

E. Conclusion

I find the approach of the New York City Bar Committee and the ACLU to evaluating the civil liberties implications of S. 30, which I have described now at some length, to be unresponsive to the real need for effective crime legislation in America today, and unduly responsive to the imagined risks of marginal impingement upon interests reflected in the Bill of Rights. In preference to the approach taken by those bodies, we should try, I suggest, to implement the approach expressed so well by Dean Roscoe Pound when he wrote:

Civilized society presupposes peace and good order, security of social institutions, security of the general morals, and conservation and intelligent use of social resources. But it demands no less that free individual initiative which is the basis of economic progress, that freedom of criticism without which political progress is impossible, and that free mental activity which is a prerequisite of cultural progress. Above all it demands that the individual be able to live a moral and social life as a human being. These claims, which may be put broadly as a social interest in the individual life,

645 CHALLENGE OF CRIME at 200.

646 ABCNY at 44.

647 *Id.* at 45.

continually trench upon the interest in the security of social institutions, and often, in appearance at least, run counter to the paramount interest in the general security. Compromise of such claims for the purpose of securing as much as we may is peculiarly difficult. [Nevertheless,] . . . in criminal law, as everywhere in law, the problem is one of compromise; of balancing conflicting interests and of securing as much as may be with the least sacrifice of other interests.⁶⁴⁸

Burke put it this way:

For that which taken singly and by itself may appear to be wrong, when considered with relation to other things may be perfectly right — or at least such as ought to be patiently endorsed as the means of preventing something that is worse.⁶⁴⁹

In the long run, that approach to criminal legislation will prove more protective of our real civil liberties than a rigid, unthinking rejection of measures to strengthen law enforcement. We must seek that kind of balance now, and achieve a practical reconciliation of the need for effective administration of justice with the need to preserve our substantial rights. S. 30 has been written and amended with the intent to make such a reconciliation while there is time and will, on the part of the public, to do so. I hope that we can join in recognizing the Organized Crime Control Act as that kind of legislation, and that the Congress will move swiftly to enact it. We must reject the false cries of "wolf" by these self-appointed shepherds of civil liberties. Crime has a tyranny of its own. Those who love liberty should seek to overthrow this tyrant, too.

648 R. POUND, *CRIMINAL JUSTICE IN CLEVELAND* 18-19 (1922).

649 P. STANLIS, *EDMUND BURKE: SELECTED WRITINGS AND SPEECHES* 318 (1963).