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# Repeat Offenders: The Constitutionality of the Dangerous Special Offender Act

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**REPEAT OFFENDERS:** THE CONSTITUTIONALITY OF THE DANGEROUS SPECIAL OFFENDER ACT—*United States v. Stewart*, 531 F.2d 326 (6th Cir.), *cert. denied*, 96 S.Ct. 2629 (1976).

In 1970, under heavy nationwide pressure to take action against the escalating crime problem, Congress passed the Organized Crime Control Act.[1] Undoubtedly the most controversial new provision of this Act is Title X of the Dangerous Special Offender Act, which provides increased penalties for habitual or professional criminals convicted of a triggering felony.[2] It had generally been recognized that a federal recidivist statute of this kind was long overdue. According to the National Commission on the Causes and Prevention of Violence, the greatest proportion of all serious violence is committed by repeat offenders, accounting not only for a higher rate, but also a greater degree of violence.[3] In drafting the Act, Congress made use of the conclusions of many prestigious legal organizations,[4] whose studies had demonstrated that some form of increased sentencing for dangerous offenders was necessary not only to protect the community, but also, to begin the process of reduction of prison use as to non-dangerous offenders.

In contrast with these approving reports, the proposed Act met with serious opposition in Congress by the American Civil Liberties Union,[5] by the Association of the Bar of the City of New York,[6] and

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1. 84 Stat. 922 (1970).

2. 18 U.S.C. § 3575(a) (1970):

> Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties.

3. 115 CONG. REC. 35, 546 (1969).

4. Title X is largely modeled on ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, § 3.1, § 3.3 (Approved Draft, 1968). It is also based on the MODEL SENTENCING ACT OF 1963, § 5-9 drafted by the Advisory Council of Judges of the Nat'l Council on Crime and Delinquency, and on the MODEL SENTENCING ACT § 3202, of the Nat'l Commission for Reform of Federal Criminal Laws. These model acts were quoted in appendices attached to the court's opinion in United States v. Stewart, 531 F.2d 326, 339-42 (6th Cir. 1976), *cert. denied*, 96 S.Ct. 2629 (1976).

5. Remarks of Lawrence Speiser for the A.C.L.U., *Hearings on S. 30 Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, United States Senate*, 91st Cong., 1st Sess., 454 (1969).

by a number of concerned congressmen.[7] These groups raised difficult constitutional questions dealing with due process, vagueness, double jeopardy, cruel and unusual punishment, and equal protection, as well as many evidentiary and policy problems. While the bill appears to be a laudable attempt to remove a very dangerous element in our society, a more careful examination reveals potential pitfalls in its definitions and sentencing provisions.

The bill was passed in 1970 over many constitutional objections, but since that time Title X has rarely been invoked by the Justice Department, perhaps because of uneasiness or lack of confidence in its acceptance by the courts. The result has been that the issue of its constitutionality was not resolved in any United States Circuit Court of Appeals until the Act was upheld by the Sixth Circuit in *United States v. Stewart*.[8] Thus the *Stewart* case is of significant legal interest, since it marks the government's first definitive court victory at the appeals court level, and may signal more extensive use of the law by the Justice Department.

## I. FACTS OF THE CASE

On January 13, 1975, James Howard Stewart was charged in the Eastern District Court of Kentucky with aiding and assisting the escape of a co-defendant from the Bell County Jail in Pineville, Kentucky. Six days before trial, the United States filed notice[9] of its intention to proceed against Stewart pursuant to the dangerous special offender sentencing provisions of 18 U.S.C. § 3575(e)(1),[10]

6. McClellan, *The Organized Crime Act (S.30) or its Critics: Which Threatens Civil Liberties?*, 46 N.D. LAW. 55 (1970), *citing* ASS'N OF THE BAR OF THE CITY OF NEW YORK, THE PROPOSED ORGANIZED CRIME CONTROL ACT OF 1969 (S.30) (1970).

7. 2 U.S. CODE CONG. & ADM. NEWS 4007, 4070-91 (1970). An extensive counterattack to these objections was made by one of the bill's leading proponents, Sen. John D. McClelland, *The Organized Crime Act*, *supra* note 6.

8. 531 F.2d 326 (6th Cir.), *cert. denied*, 96 S.Ct. 2629 (1976). Section 3575 had been tested at the district court level only four times before *Stewart*, but these cases were decided on procedural deficiencies. *See* United States v. Holt, 397 F. Supp. 1397 (N.D. Texas 1975); United States v. Edwards, 379 F. Supp. 617 (M.D. Fla. 1974); United States v. Kelly, 384 F. Supp. 1394 (W.D. Mo. 1974), *aff'd*, 519 F.2d 251 (8th Cir. 1975); United States v. Duardi, 384 F. Supp. 874 (W.D. Mo. 1974), *appeal dismissed*, 514 F.2d 545 (8th Cir. 1975), *aff'd*, 529 F.2d 123 (8th Cir. 1975). In *Duardi* and *Holt*, the courts were able to decide the cases before them on grounds other than constitutionality. However, the *Duardi* court, *supra* at 885, gave as an alternate holding, the unconstitutionality of the Act because of vagueness, after a lengthy discussion of this point. On the other hand, the *Holt* court, *supra* at 1399, maintained the Act's constitutionality.

9. 531 F.2d at 337-39, Appendix A.

10. 18 U.S.C. § 3575 (e)(1) (1970):

A defendant is a special offender for purposes of this section if—(1) the defendant has previously been convicted in courts of the United States . . . for two or more offenses committed on occasions different from one another and from such felony and punisha-

the habitual offender section. The notice set out the required three prior felony convictions. As proof that he was dangerous within the meaning of 18 U.S.C. § 3575(f)[11] and that additional imprisonment was necessary to protect the community, the prosecution offered evidence of additional pending felonies, poor institutional adjustment, and a history of violence both in and out of prison.

After an initial mistrial, Stewart pleaded guilty to count III of the indictment in lieu of a retrial, and moved to dismiss the government's dangerous special offender notice. He alleged that the term "dangerous," as used and defined in § 3575(f), and the provision for an enhanced sentence "not disproportionate" to the instant felony in § 3575(b), were unconstitutionally vague. The District Court ruled that the Dangerous Special Offender Act is unconstitutionally vague both in its application and sentencing provisions.[12] The Sixth Circuit Court of Appeals reversed.[13]

## II. The Sixth Circuit Decision

The primary issue of concern to the Sixth Circuit was whether the statutory provisions for an increased sentence for dangerous special offenders are so unduly vague, overbroad, and uncertain that the courts could not properly make the necessary finding of dangerousness[14] or increase the defendant's sentence in an amount "not disproportionate in severity to the maximum term"[15] for the triggering felony, without a denial of due process as guaranteed by the fifth amendment. In upholding the constitutionality of the statute, the court cited the legislative history of the Act to demonstrate the care with which it was drafted, the particularity of its provisions and definitions, and the many safeguards it allows the defendant.[16] The court ruled that the term "dangerous" is not unduly vague or uncertain, and in fact, is a common finding of the courts in the field of

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ble in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment . . . .

11. 18 U.S.C. § 3575(f) (1970):

A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

12. In an unpublished order, filed May 9, 1975, by the United States District Court for the Eastern District of Kentucky (Criminal 75-5), *cited in* United States v. Stewart, 531 F.2d at 328, n.1.

13. United States v. Stewart, 531 F.2d 326 (6th Cir. 1976).

14. 18 U.S.C. § 3575(f) (1970).

15. 18 U.S.C. § 3575(b) (1970).

16. 531 F.2d at 335-36.

criminal law.[17] The court noted that the statute is more moderate, and provides the defendant greater safeguards than state recidivist statutes. The Sixth Circuit emphasized the fact that the statutory notice does not involve a new and distinct criminal charge, but is merely a procedure for increased sentencing which aggravates the penalty for the most recent offense. To support its position, the court then reverted to the general rule that an Act of Congress is presumed constitutional.[18] In examining the facts of *Stewart*, the court found that the statute could be applied in a manner which was not violative of the defendant's constitutional right to due process. Thus, it concluded, the statute was not void for vagueness.[19]

## III. Analysis

Title X is an attempt to deal with an urgent problem. The need to protect the public from chronic criminal offenders cannot be doubted, but urgency alone does not justify abandonment of constitutional principles or common sense. Much of the language in the statute seems to threaten constitutional rights, if not to abridge them directly. In the words of Representative John Conyers Jr., "Title X is, in blunt language, an end run around due process."[20] Thus, the defendant based his argument on two contentions: (1) that the statutory term "dangerous" is not sufficiently defined so as to afford adequate guidelines to the sentencing judge, and (2) that the section providing that the increased sentence may not be disproportionate in severity to the triggering felony sentence is also unduly vague and uncertain.[21] The *Stewart* court spoke to the issue of due process, but did not adequately answer these objections.

### A. *Dangerousness*

It was made clear in *United States v. Duardi*[22] and in *United States v. Kelly*[23] that dangerousness is a separate element in defining a dangerous special offender. In the notice filed by the prosecutor to invoke the statute, it must be set out independently and with particularity. It is certainly true, as the *Stewart* court pointed out, that the concept of dangerousness is not a new one in the criminal

17. *E.g.*, one of the findings a judge must make when denying bail pursuant to 18 U.S.C. § 3148 (1970) is that "the defendant will pose a danger to any other person or the community."

18. Flemming v. Nestor, 363 U.S. 603, 617 (1960).

19. 531 F.2d at 337.

20. U.S. Code Cong. & Adm. News, *supra* note 7 at 4085.

21. 531 F.2d at 330..

22. 384 F. Supp. 874, 875 (W.D. Mo. 1974).

23. 384 F. Supp. 1394, 1398 (W.D. Mo. 1974).

justice system.[24] It is the essence of the inchoate crimes (possession, solicitation, conspiracy), and the *raison d'etre* of status crimes (juvenile delinquency, vagrancy, sexual psychopathy, habitual criminalism, insanity, communism). It is the backbone of critical steps in the criminal justice process (stop and frisk, preventive detention, bail, and parole), and has constituted the crux of censorship under the "clear and present danger" test.[25] In all these instances, the defendant is penalized not for the harm he has already done, but on the basis of a legislative, administrative, or magisterial prediction of what he might do in the future; *i.e.*, because of his status as dangerous.

However, in order for statutes defining these crimes to withstand constitutional scrutiny, it is the duty of the courts ". . . to define the criteria of our prediction. To make them precise. To make them testable. Not to leave it as a freewheeling discretion."[26] At least two interacting questions are involved in the determination of dangerousness: "What kinds of behavior are sufficiently threatening to be called 'dangerous' and . . .with what degree of certainty must the prognosis establish the likelihood of the kind or kinds of behavior designated 'dangerous' occuring over what period of time?"[27] It is here that the Dangerous Special Offender Act falls, and the *Stewart* court failed to supply the missing guidelines. In order to increase a defendant's sentence by possibly twenty-five years, the prosecution should have to produce compelling evidence of the magnitude of the danger; *i.e.*, the probability of its occurence and the seriousness of the impending harm.[28]

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24. 531 F.2d at 336. The *Stewart* court cites as an example the Federal Bail Reform Act of 1966, 18 U.S.C. § 3148 (1970), upheld as constitutional in Russell v. United States, 402 F.2d 185 (D.C. Cir. 1968). However, this Act is clearly distinguishable from the Dangerous Special Offender Act. The Bail Act involves a purely discretionary court function, in which a finding of "dangerousness" merely denies an alleged offender his freedom on bail for a short time. In the Act involved in the *Stewart* case, on the other hand, a finding of "dangerousness" will confine the offender for as much as twenty-five years. It would seem that such a change would require a much higher degree of statutory definition, but, in fact, the definitions in both statutes are remarkably similar.

25. The phrase was first used by Justice Holmes in Schenck v. United States, 249 U.S. 47, 52 (1919).

26. Seney, *"A Pond as Deep as Hell" Harm, Danger and Dangerousness in Our Criminal Law*, 17 WAYNE L. REV. 1095, 1129 n.99 (1971), *quoting* Address by Norval R. Morris, *Conference on Preventative Detention*, Chicago, Oct. 1968, in PREVENTIVE DETENTION 55-56 (Urban Research Corp. ed. 1971).

27. Morris, *Psychiatry & the Dangerous Criminal*, 41 S.CAL. L. REV. 514, 529 (1968), *quoting* Katz & Goldstein, *Dangerousness & Mental Illness*, 131 J. NERVOUS & MENTAL DISEASE, 404, 409-10 (1960).

28. Seney, *"A Pond as Deep as Hell" Harm, Danger and Dangerousness in Our Criminal Law*, 18 WAYNE L. REV. 569, 635 (1971).

The *Stewart* court found that the statutory definition of dangerous is sufficiently precise;[29] yet it states only that a dangerous offender is one who is likely to engage in further criminal conduct from which the public needs protection for a longer period of time. In attempting to construe an uncertain statutory term, the courts have traditionally used one of the following standards: (1) the commonly accepted meaning;[30] (2) the technical or special meaning;[31] or (3) the common usage.[32] The application of any of these tests fails to remove the stigma of vagueness from this Act. There are a variety of common meanings for "dangerous." It usually connotes physical danger.[33] One court found the term to have a commonly understood meaning of "exposure or liability to injury, loss, pain or other evil."[34] When construing the "clear and present danger" test in *Dennis v. United States*,[35] the Supreme Court maintained that speech which advocated violent overthrow of the government may be restricted, even when the danger of such overthrow has little probability of success, or appears doomed from the outset. The vagaries of this "clear and present danger" test throughout Supreme Court history[36] show the limitations and weaknesses of such a broad and undefined term. It has often been employed far outside its original context—an ambiguous phrase which has been manipulated to suit the current purpose of its user.

Such a fate might well befall the term "dangerous" in Title X. Neither the text of the statute nor the subject with which it deals clarifies the definition. Certainly, dangerousness would involve physical danger to the public. Would danger to property be enough? To the social tranquility? The inclusion of the conspiratorial category of offender[37] in the statute would seem to reflect Congressional

29. 531 F.2d at 336-37.

30. *E.g.*, United States v. Harriss, 347 U.S. 612, 620 (1954), (the commonly accepted sense of "lobbyist").

31. *E.g.*, Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925), (the special, trade meaning of "kosher").

32. *E.g.*, Lanzetta v. N.J., 306 U.S. 451 (1939), (no one certain meaning for "gang").

33. *E.g.*, Millard v. Harris, 406 F.2d 964, 967 (D.C. Cir. 1968), (construed the term in the D.C. Sexual Psychopath Act of 1967, 22 D.C. CODE ANN. §§ 3503-11 (1973), to mean one "likely to attack or otherwise inflict injury, loss, pain or other evil on the object of the desire").

34. *Ex parte* Dubois, 331 Mass. 575, 580, 120 N.E.2d 920, 923 (1954).

35. 341 U.S. 494, 503-11 (1951).

36. *See generally* Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41.

37. 18 U.S.C. § 3575(e)(3) (1970) states, in pertinent part:

A defendant is a special offender for purposes of this section if —

. . . .

(3) such felony was, or the defendant committed such felony in furtherance of, a

intent to punish social disorders with which conspiracies are commonly associated, as well as crimes of violence. Yet, the *Stewart* decision failed to specify the boundaries of the term. The defendant must guess at its import, as must the sentencing judge, and this is clearly contrary to due process.[38] The *Duardi* decision, upon which defendant Stewart relied, emphasized this point by stating that the Act "does not establish any legally fixed standard and that the language of that section is not sufficiently definite and explicit to avoid application of the recognized constitutional rule against vagueness."[39]

*B. Sentencing Provisions*

The defendant also attacked as vague the provision that the enhanced sentence be "for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony."[40] This phrase was not in the original bill, but was added in response to the American Bar Association's concern that a twenty-five year sentence would be given for minor felonies, and would, in effect, be a penalty for a different crime than the one charged.[41] The Sixth Circuit did not give any criteria for determining at what point an increased sentence becomes disproportionate. If the new sentence is double or triple the amount thought sufficient by the legislature for the instant offense, would this not be disproportionate? In response, the court noted that Congress provided for appellate review of sentences for the first time in federal history.[42] This appeal process is intended to insure that the increased sentence will not be excessive. However, neither Congress nor the *Stewart* case set forth the criteria appellate courts should use to judge the appropriateness of the sentence.

The *Stewart* ruling took note of the fact that the discretion exercised by judges under the provisions of this Act is similar to that granted by federal as well as state law, which allow judges freedom

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conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

38. *E.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

39. 384 F. Supp. at 886. The case was decided on the basis of insufficiency of the notice, but the court found the Act unconstitutional for vagueness as an alternate holding.

40. 18 U.S.C. § 3575(b) (1970).

41. *See also* U.S. CODE CONG. & ADM. NEWS, *supra* note 7 at 4066.

42. 531 F.2d at 330-31.

to vary a sentence for certain offenses anywhere from probation to life.[43] Most states have recidivist statutes which authorize or mandate a life sentence for habitual offenders,[44] but Judge Phillips in *Stewart* pointed out that while Title X gives the court broader sentencing choices, it affords the defendant many more constitutional safeguards.[45] It was the court's position that Title X is merely a new sentencing procedure by which the maximum term prescribed for the triggering felony can be increased by the defendant's status as a dangerous special offender. As such, it is governed by *Williams v. New York*,[46] in which the Supreme Court exempted sentencing procedures from the rules of evidence constitutionally required at trial.

It is precisely here that Title X meets its most difficult constitutional challenge. The question, raised by opponents of the Act, is:

> Is this really merely a sentencing procedure or are we in view of the broad scope of the definition of "dangerous special offender" . . . really giving certain defendants a more severe punishment that others convicted of the same crime; this extra punishment being based on reports and repute as to a great many other alleged and unrelated acts for which they have never been tried and of which they have never been found guilty.[47]

In other words, the function of the judge, although disguised as a sentencing role, is to assess the defendant's guilt of being a dangerous special offender. Proponents of the Act point out that this offers greater flexibility, which is frequently lacking in the mandated sentences of the state recidivist laws. In using the state statutes, however, the trial judge need only identify the defendant, match him with his proven record of criminal convictions, and assess the given penalty. He does not have to determine, on an independent basis, whether the accused is dangerous for reasons beyond his instant conviction. There is no room for discretion in the state process.

Title X differs considerably from such a typical recidivist statute to which the *Stewart* court drew an analogy. Under the Act, the thrust of the proceeding shifts from proven offenses committed by the defendant to his status as a dangerous special offender, which

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43. 531 F.2d at 332-33.

44. Statutes collected in Note, *Recidivist Procedures*, 40 N.Y.U. L. REV. 332 (1965). Recidivist statutes were held constitutional in Graham v. West Virginia, 224 U.S. 616 (1912).

45. 18 U.S.C. § 3575(b) (1970):

> In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing.

46. 337 U.S. 241 (1949).

47. Views of David Dennis (Rep. Ind.), U.S. CODE CONG. & ADM. NEWS, *supra* note 7 at 4075.

may be demonstrated by hearsay and by only a preponderance of the evidence.[48] It is tempting to assume that the reason for the statute is that the prosecution could not *prove* the criminal activity in the normal way, and thus is attempting to reach the same result through the back door by proving the minor felony and "trying" the dangerous special offender issue by the more lenient due process standards applicable to sentencing.[49]

Congress included in the bill most of the safeguards[50] mandated by the United States Supreme Court in *Specht v. Patterson*[51] for such a situation. In that case, the Court held that where a first conviction is the basis for commencing another criminal proceeding, with a possible increase in sentence, to determine whether the defendant is a threat to the public, due process requires the defendant be accorded certain rights: the right to counsel, the right to be heard, the right to be confronted with witnesses against him, the right to cross-examine, and the right to present evidence of his own. While Congress included these rights in Title X,[52] it disallowed defendants two of the most important ones: the right to require the prosecution to prove its case beyond a reasonable doubt, and the right to a trial by jury.

One of the most fundamental protections of due process in criminal law is the reasonable doubt standard, which requires the prosecution to prove every fact necessary to constitute the crime charged beyond a reasonable doubt.[53] Yet, Title X allows the trial court to determine guilt by a preponderance of the evidence only.[54]

An even more basic constitutional question is whether the defendant's right to trial by jury can be denied simply by calling the judge's function "sentencing." If "due process embodies the differing rules of fair play . . . associated with differing types of proceedings,"[55] then the relative protections referred to in *Specht* take on added significance in the context of the discretion given the

48. Some of that evidence may be withheld from the defendant at the trial court's discretion. 18 U.S.C. § 3575(b) (1970).

49. Testimony of Professor Peter Low, *Hearings on S.30, supra* note 5 at 187.

50. The *Stewart* court mentioned these added safeguards, 531 F.2d at 332, but failed to explain why they were included if the mandates of *Williams* govern instead of *Specht*. *Id.* at n.2.

51. 386 U.S. 605 (1967); *see also* Oyler v. Boles, 368 U.S. 448 (1962); Chandler v. Fretag, 348 U.S. 3 (1954); Gerchman v. Maroney, 355 F.2d 302 (3d Cir. 1966) (cited with approval by the *Specht* court).

52. 18 U.S.C. § 3575(b) (1970).

53. *In re* Winship, 397 U.S. 358 (1970).

54. The use of this lesser standard was raised as a central objection to the constitutionality of the statute in the *Duardi* decision. 384 F. Supp. at 882-83.

55. Hannah v. Larche, 363 U.S. 420, 442 (1960).

judge under Title X. Heavier penalties demand equivalently greater protection—at least equivalent to the protection given in the determination of guilt for the triggering felony. The Supreme Court has made clear that the severity of a possible punishment is a major factor in determining if a trial is subject to the sixth amendment jury mandate.[56] Title X, however, denies the defendant a jury verdict that he is a dangerous special offender, which determination may imprison him for as much as twenty-five years, while guaranteeing him a jury trial for the triggering felony, which may be a minor crime with a sentence of two or three years! By casting Title X as a sentencing provision only, Congress has attempted to avoid these constitutional pitfalls, but has only succeeded in raising grave questions. The *Stewart* case has not provided satisfying answers.

## V. Conclusion

It is difficult to summon much concern for the habitual or professional criminals with whom this statute attempts to deal. The problem of protecting the community from dangerous criminals, or of reaching professional criminals who can insulate themselves from the law, is a matter of grave concern to all of us. But this statute seeks easy answers to these hard and complex problems. It offends the essence of fair dealing which, under the name of due process, is the cornerstone of American justice. The ruling of the *Stewart* case will undoubtedly prove popular with a public that perceives the courts as being too soft on criminals, placing the rights of criminals ahead of those of the victims of crime.

It is easy to understand the mood of the public and its reflection in the courts. But empathy is not the same as agreement. The *Stewart* decision seems to represent a potentially dangerous erosion of constitutional protections. These rights protect not only offenders, but also the innocent, from intimidation and harassment by the state. While it is true that all the offensive potentialities of the Dangerous Special Offender Act *may* be avoided by the courts, it is clear that Title X contains few internal controls, relying entirely on judicial discretion. Indeed, the loose definition of dangerous and the admissibility of any conceivable type of information, proven or otherwise, under the guise of a sentencing format seems to encourage law enforcement officials to use any method to obtain damaging evidence of dangerousness.

A vague, overbroad statute is risky precisely because it may be used in ways the legislature never intended. Within Title X's vague

56. District of Columbia v. Clawans, 300 U.S. 617, 625 (1937).

definition of dangerous and its failure of due process safeguards lies the possibility that it could be used against anyone currently thought to be dangerous - eccentrics, resisters, revolutionaries, innovators. In different times and different places, it could be applied against blacks, chicanos, communists, student militants, or civil rights workers. The vagueness of the statute could have been clarified by a judicial holding that its application must be strictly construed and narrowly applied. The *Stewart* court failed to do this, leaving us with a vague, uncertain statutory requirement of "dangerousness," the judicial determination of which "needs only the mumbo-jumbo of soothsayers, arrogance, and enough fear."[57]

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57. Seney, *"A Pond as Deep as Hell:" supra* note 28 at 637.