

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

THE NATIONAL PRISON PROJECT

TESTIMONY

of

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of the
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Before the

United States Sentencing Commission

Concerning

SENTENCING OPTIONS

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I am pleased to appear before the Commission, at the invitation of the Chairman, to comment on sentencing options other than incarceration that may be available to federal courts. I am appearing in my capacity as Executive Director of the National Prison Project of the American Civil Liberties Union Foundation.

The National Prison Project since 1972 has sought to strengthen and protect the civil and constitutional rights of adult and juvenile prisoners, to improve conditions in the nation's prisons and jails, and to develop rational, less costly and more humane alternatives to traditional incarceration. We have also engaged in efforts to devise model sentencing codes, prison procedures and regulations.

In furtherance of the activities described above, the Project's staff attorneys and other staff members are engaged in the representation of prisoners incarcerated in penal institutions throughout the country. The Project has been and is presently involved in many important cases concerning the rights of prisoners. In addition, the Project's staff has been consulted by correctional officials and legislative committees in various states. I personally have been a consultant to various state legislatures, the National Institute of Corrections of the Department of Justice, various state Departments of Corrections, and to the American Bar Association's Joint Committee on the Legal Status of Prisoners, as well as others.

Other witnesses, more knowledgeable than I, will address specific alternative sentencing options (e.g., probation, fines,

restitution, community service, house arrest). I will therefore confine my remarks to the broad policy concerns which should dictate a greater use of alternative sentencing options as part of an overall sentencing strategy.

Prison is the largest power that the state exercises in practice, on a regular basis, over its citizens. The excessive use of incarceration in this country has been expensive, criminogenic, and unkind. Professor Marvin E. Wolfgang, Director of the Center for Studies in Criminology and Criminal Law at the University of Pennsylvania, eloquently raised these issues:

It is the prison that is the last resort (except for the death penalty), and it is here that the most troublesome aspect of democracy pricks our conscience. The prison remains with us as a necessary, noxious aberration of one of democracy's most cherished values--liberty. Because we cannot clearly and accurately attribute cause to each crime and its author, prisons represent society's failure. Whether we blame the criminal citizen, his family, educational, economic or other institutions, or the entire social system, the prison remains symbolic of pervasive, systemic failure. It offends our sense of equality and equity, it reflects our lack of successful socialization, it cripples our confidence in good genes or the good society. It is the opposite of love, friendship, and harmony. It is the very antithesis of freedom. The prison remains because we are imperfect specimens of our own visions of proper humanity. As an end product and as a temporary solution to our imperfections, the prison continues to pose perennial questions: Who should go to prison? for what crimes? for how long? under what living conditions?

Prisons: Present and Possible, p.1
(Lexington, Mass., D.C. Heath, 1979)

Because deprivation of an individual's physical freedom is such a severe interference with a democratic society's concept of

liberty, and because imprisonment is harsh, frequently counterproductive, and costly, there should be a heavy burden of justification on the imposition of a prison sentence. Parsimony, the least restrictive punitive sanction necessary to achieve defined social purposes, should be the guiding principle.

The Commission must reject the current mythology, perpetrated by political rhetoric, that this country is "soft on crime." That is just not true. We already have, and have for some time had, the harshest sentencing practices in the free world. Our current per capita rate of incarceration is substantially over 200 per 100,000 of population, more than twice the rate of almost every Western European country. (Appendix A). It is ironic that the only countries that have incarceration rates similar to ours are Warsaw Pact nations. (Appendix B). And, after imprisoning these large numbers of our citizens, we keep them behind bars for two to ten times longer than any other democratic country.

Justice E. Leo Milonas, Deputy Chief Administrative Judge of the New York City courts, has written: "It cannot be asserted too strongly that the problem of crime -- which is as disturbing to judges as it is to everyone else -- cannot be solved by an approach that relies primarily on punishment by incarceration." And yet that is our approach, despite overwhelming evidence that it should be used sparingly. Incarceration is a destructive and dehumanizing experience which further alienates the inmate from society and breeds more crime. As Norman Carlson, Director of the Federal Bureau of Prisons, has stated: "Jails are tanks, warehouses. Anyone not a criminal when he goes in will be one

when he comes out." And most prisoners do come out. Unless we are prepared to put people away for thirty or forty years for all crimes, which even the most zealous law and order advocates are not calling for, we are going to continue to see a stream of damaged, embittered and criminalized human beings emerging from our prisons.

This Commission, because its work will be examined closely and, indeed, emulated by the states, is in the unique position of being able to reverse the recent trend towards longer and harsher sentencing schemes.

The range of possible alternative sanctions, some of them standing alone and some in conjunction with others, is limited only by our imagination. They include probation, fines, restitution, community service, house arrest, intensive community supervision, work and education release, and community treatment programs. Working models of each exist throughout the country.

The Commission should require that the following preconditions be met before a prison sentence is imposed:

1. Imprisonment is the least restrictive sanction appropriate in this case because:

- a. any lesser punishment would depreciate the seriousness of the crime committed, and

- b. imprisonment of some who have done what this person did is necessary to achieve socially justified deterrent purposes, and the punishment of this offender is an appropriate vehicle to that end, or

c. other less restrictive sanctions have been applied to this offender frequently or recently.

2. Imprisonment is not a punishment which would be seen by current mores as undeserved or excessive in relation to this last crime.

In the aftermath of the tragic New Mexico Penitentiary riot in February, 1980, the state legislature mandated the then Attorney General, now United States Senator, Jeff Bingaman, to report on the events which took 37 lives. He concluded his September, 1980, report by saying:

A final message which our investigation has made clear to me, my staff and the Citizens' Panel: Prisons simply do not deal with the basic problems of crime in our society. Prison is a dehumanizing experience, and most persons come out the worse for being in. Nearly all criminals, even under the strictest sentencing practices will return to society. Even a well managed bureaucracy, necessary to run prisons, cannot change these basic truths that have become clear from the more than 300 interviews my staff has conducted.

If New Mexico's heritage of rich and deep familial and community roots is to be realized, communities must play a part in housing, resocializing and accepting persons who have violated the community's laws. If New Mexico does not dramatically change its philosophy and practices about how to deal with criminals, there will be more tragedies and the need for more reports by Grand Juries, by Citizens' Panels, and by the Attorney General. Ultimately, there will be more bureaucracy, more waste of taxpayers' money for architects and buildings, more crime and more human waste.

This Commission has a most difficult job. I hope that, guided by the principles set forth above and by a sense of fundamental fairness, decency and justice, it will provide the

leadership so long lacking in our approach to criminal sanctions in the United States.

International Rates of Imprisonment

(February 1985)

<u>Country</u>	<u>Rate of Imprisonment</u> (per 100,000)
Austria	111.5
Belgium	66.9
Cyprus	33.3
Denmark	68.0
France	79.9
Germany (FDG)	99.7
Greece	37.4
Ireland	47.3
Iceland	33.7
Italy	77.5
Liechtenstein	---
Luxembourg	69.3
Malta	28.4
Netherlands	34.0
Norway	50.7
Portugal	87.0
Spain	50.7
Sweden	58.0
Switzerland	68.3
Turkey	147.0
United Kingdom	90.0
England and Wales	87.8
Scotland	97.4
Northern Ireland	135.0

Source: Prison Information Bulletin, June 1985, p. 22 (Council of Europe)

AVERAGE ONE DAY COUNTS FOR ADULT AND
JUVENILE PRISON POPULATIONS FOR 1980

Country	Prison Population	Rate Per 100,000 Total Population	Sentenced Per 100,000 Population
U.S.	520,122	241.2*	202.2*
Belgium	5,797	58.8	43.5
Czechoslovakia	...	...	232.1
Denmark	3,439	67.1	48.3
Finland	5,032	105.3	93.7
France	45,655	85.0	55.2
FRG	85,053	94.3	70.7
Greece	3,135	32.7	25.8
Ireland	1,214	36.7	33.8
Italy	31,765	56.6	19.2
Netherlands	3,873	27.4	17.3
Norway	1,797	44.0	34.3
Poland	95,696	269.0	226.0
Spain	18,263	48.8	22.0
Sweden	4,795	57.7	49.0
United Kingdom	49,451	88.4	79.6
Yugoslavia	...	...	74.2

Main international information from the Second United Nations Survey on Criminal Justice Systems in Europe as compiled by the Helsinki Institute for Crime Prevention and Control, publication series No. 5., 1985.

- * U.S. data taken from the Source Book of Criminal Justice Statistics - 1982, U.S. Dept. of Justice.
- * U.S. juvenile data from 1979 one day count, U.S. jail data from 1978 one day count.