

PUBLIC HEARING

before

ASSEMBLY JUDICIARY, LAW, PUBLIC SAFETY  
AND DEFENSE COMMITTEE

on

SENTENCING PROVISIONS  
of  
PROPOSED CRIMINAL CODE

Held:  
March 10, 1975  
Assembly Chamber  
State House  
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Eldridge Hawkins (Chairman)  
Assemblyman William J. Bate  
Assemblywoman Gertrude Berman  
Assemblyman Richard Codey

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ASSEMBLYMAN ELDRIDGE HAWKINS (Chairman): Good morning. We are about to begin. It is about three minutes after ten. We welcome everyone.

We are going to receive testimony today on sentencing. We're going to be interested to hear facts to bolster anybody's opinion about what should happen in the area of sentencing dealing with any particular offense in the penal code. We are not considering drug offenses and we are not considering motor vehicle offenses.

The Honorable Dick Codey is in the House and he will be interested also in your comments regarding the death penalty. I believe young Dick Codey very well may be sponsoring a death penalty provision and the Committee will be interested in hearing just what one has to say about that.

Also because sentencing is inextricably intertwined with parole, we may be interested in hearing what you have to say about that.

The Governor's Office is preparing a position on parole and we may be looking at their particular suggestions but their suggestions won't be incorporated fully or won't be drafted fully until April so, therefore, we're at a loss at this particular time to be able to determine whether or not we're going to be recommending what the Governor's Office recommends or not. So we will be looking at anything that anyone has to say in the area of parole.

So, with that introduction, Mr. Luciani, you're on.

A L F R E D L U C I A N I: Our office has submitted two documents pertaining to sentence and the sentencing provisions of the Code and I don't see any real need to go over, in detail, the contents of those. I would like to make a few points in addition to that material. And

if you don't have copies of our original presentation, I will be glad to make them available.

I would like to point out specific areas in the sentencing provisions of the Code, as it exists now, that have presented problems to us or at least, I believe, warrant comment.

The first one is the area mandating that the Court determine whether restitution to the victim is feasible in a given case. Quite obviously, we are very much in favor of the concept of restitution but we would like to point out to you the possibility that there may be constitutional problems in the provision as it stands.

The provision as it stands now allows the Judge after the trial by jury to determine the amount of the loss involved and to order restitution for the victim. In substance, it's a substitution for a civil trial. The victim no longer has to file a separate complaint, no longer has to prosecute it, and the defendant no longer has a right to contest the damages before a jury.

If it's viewed in that light, given the way it's currently drafted, I believe it will be held unconstitutional. If it's viewed from a penological standpoint, a different result might obtain. But I think we ought to look at the provision and perhaps from a public policy standpoint identify it for what it is. It's intended as a penological aim and to assist as a deterrent to take the profit motive out of certain types of offenses. And I think if it's identified as such, it will have a better chance in the courts if it's ever litigated in that light.

Another area. I think the first statement I should make is that the Attorney General's Office is generally in favor with the sentencing provisions of the

Code, as they stand. We think that the normal provisions dealing with sentences from the disorderly persons --

ASSEMBLYMAN HAWKINS: Excuse me, Mr. Luciani. Would it be necessary then in order to define such a provision as penal in nature as opposed to civil in nature? Would it be necessary, in your mind, to have a monetary limit or can we keep it open?

MR. LUCIANI: The Code as it currently stands doesn't have a monetary limit. The Court can impose a fine for two or three times the amount of the gain but it's called a fine, and the fine then would go to the general coffers of the State. Our problem is when a "fine" is taken and given to the victim, to make the victim whole again, which is in substance a civil cause of action.

I think the State would have the right to do it and should have the right to do it, but I think it's a very delicate situation.

ASSEMBLYMAN HAWKINS: Well, with the existence of a violent crimes commission, would there be any duplication of effort in the two?

MR. LUCIANI: There could be.

ASSEMBLYMAN HAWKINS: Or could we possibly allow that particular commission to have additional powers?

MR. LUCIANI: Yes. That was one of the recommendations that was contained in our original document, at least coordinating the effort under the restitution provision with the violent crimes compensation board. I think there's much to be done. It's an entirely untried area, so anything we do will be a step forward.

ASSEMBLYMAN HAWKINS: I'm sure we'll further define it later. Continue.

MR. LUCIANI: On the general sentencing provision

of the Code, again I think that the Attorney General's Office is pretty much in favor of the sentences as they stand, all the way from the disorderly persons offenses through crimes of the first degree.

There are a couple of exceptions for particular offenses, most of which we've voiced during the course of the Committee hearings, I think. For example, in conjunction with our recommendations on gambling offenses, we believe that the fines available for a gambling offender should be multiplied because in substance the crime is one of profit and if you can remove the profit from such a situation I think it will act as as much a deterrent, if not more, to engaging in such conduct as would certain prison sentences.

Other crimes of profit probably would have the same result. And you would have to go through the Code, in terms of white collar crimes, public corruption.

If we could have a mechanism within the Code whereby the Attorney General would have standing to impress a constructive trust on public officials for breaching public trust, whereby we could recover whatever monies were obtained by virtue of the breach of trust, I think we'd go a long way.

ASSEMBLYMAN HAWKINS: Do you have any proposal drafted on that?

MR. LUCIANI: It's a very simple proposal, Mr. Chairman.

ASSEMBLYMAN HAWKINS: Would you submit it at a later time?

MR. LUCIANI: Certainly.

MR. LUCIANI: Dealing with the monetary limitations, I think that they're modernized and I think we're making a step in the right direction. We can't deal in terms of one or two thousand dollars anymore. I think the economy

just belies it. We're talking now in terms of \$25,000 in certain circumstances, and I think you have to make that available. You have to hit corporations, business entities very heavily because they can't be jailed. You have to insist that there be a punishment, if you will, for organizations of that type. And I think the only way we can inflict a punishment of any sort is either to destroy them - that is, forfeit their charter or penalize them monetarily.

In terms of the actual prison sentences, we have researched the area of capital punishment and at this particular time, given the fact that there is present litigation in the United States Supreme Court, given the hope that nine wise men in Washington will come down with more definitive rulings than they have in the past, we're not prepared to move one way or another on recommending death penalty legislation. We have reviewed several that have been submitted in the past. We have kept abreast of the other 31 states in the Country that have passed it or is in contemplation of passing it but, at this particular point in time, I just don't believe we can say definitively what the United States Supreme Court is going to say on this subject. So I would not include that aspect of penology in the Code at this time.

ASSEMBLYMAN HAWKINS: Let me ask you something. Do you think that any harm or is there any evidence that any harm would come out of our failure to include the death penalty?

MR. LUCIANI: I think that this Committee could rightfully simply reserve itself on the question and quite rightfully say that the area is simply too indefinite in the law to reach a definitive conclusion at this time, without committing itself one way or another.

ASSEMBLYMAN HAWKINS: I think young Dick Codey

wants to ask a question.

ASSEMBLYMAN CODEY: Well, I would like the Attorney General's Office to commit itself one way or the other. I'm not asking him what they think about the Supreme Court or any appeal before that, I'm asking the Attorney General's Office how they feel about the death penalty. Are they for it or against it?

MR. LUCIANI: I really can't say - the Attorney General's not prepared to say he's for it in a sense that it might be considered to be unconstitutional. I know that the Attorney General has personally requested many of the 31 states' legislation on the subject for review. But I believe he thinks it's an important enough step, a drastic enough step to proceed cautiously and I don't believe he's prepared to say he's for it or against it until he can say from a view of reflection, after the Supreme Court has hopefully said something more definitive than it did in Furman vs. Georgia, whether or not it's good for the public policy of the State, in his view.

ASSEMBLYMAN CODEY: In other words, his decision would rest on how the Supreme Court ruled?

MR. LUCIANI: I wouldn't say totally. I think that that would weigh very heavily.

ASSEMBLYMAN CODEY: Okeh.

MR. LUCIANI: When we think of the Code's sentencing provisions I can't separate concepts of parole from them. I don't think the Attorney General would be in a position to support the sentencing provisions of the Code as they stand if there weren't some assurance that parole provisions would be modernized at the same time or concurrently.

ASSEMBLYMAN HAWKINS: Well, we are trying to possibly do that.

MR. LUCIANI: I know that. It was a lead-in

because this has been a theme that we've spoken of for six months.

The sentences in the normal sense are fair, we believe. The extended terms are necessary although I don't necessarily agree with the criteria. I hope that we will have more input on that in the immediate future.

One area that I'm concerned with is the presumption against imprisonment. I know that's one area where the Public Defender's Office and our Office disagrees. The presumption against imprisonment, in my view, is improper as a legislative policy. Sentencing has always been viewed as an individual situation and should be so. You should consider the offender as well as the offense. I think what we should do is create alternatives to prison in the form of diversionary programs, employment programs, things of that sort. Get people that don't belong within the criminal justice out of it as soon as possible; those who do belong in it, have the judges free to impose such sentences as they deem fair without the burden of any presumption. I don't say eliminate the criteria. I think the criteria are good as a guiding light, and I think it's necessary that the judges explain why a particular sentence has been imposed. The Supreme Court, I understand is trying to revitalize a rule that would require that. I think it would be very beneficial to any reviewing authority, whether it be the courts or a parole board, in terms of the sentence that was actually imposed.

ASSEMBLYMAN HAWKINS: Mr. Codey?

ASSEMBLYMAN CODEY: Mr. Luciani, what did you mean when you referred to modernizing sentencing? I thought I got a drift of something like say persons who commit victimless crimes you would not want them sent to

our penal institutions?

MR. LUCIANI: No. What I mean is, I think what we need is an expanded diversionary program; conditional discharge programs; programs that are adequately funded and staffed; mechanisms whereby we can treat people that are ill, whether it be for drug offenses or some other psychological situation; methods where youthful offenders, although they're over the age of say 18 years old, can find a mechanism outside of Yardville to get back on their feet, so that they don't have to go through the horror of defending a criminal prosecution to get a suspended sentence. If a man is going to get a suspended sentence, then we should find an alternative.

ASSEMBLYMAN CODEY: Alternative to criminal prosecution?

MR. LUCIANI: If possible, and I think we should look to the diversionary and conditional discharge programs to take that class of offender out of the criminal justice system. Let's make crimes crimes again.

ASSEMBLYMAN HAWKINS: Yes, sir. I'm inclined to agree with you.

MR. LUCIANI: And let's put offenders that are convicted of criminal offenses in a situation where they know the punishment is speedy, just and certain. This is where you get into the area of some people saying true sentences are necessary. I think a lot of people believe that and I don't necessarily disagree with it.

ASSEMBLYMAN HAWKINS: Is the Attorney General in favor of true sentencing or not?

MR. LUCIANI: No, I don't think it's practical. I think you're going to find exceptions and everybody here is willing to make exceptions for particular offenders. There will be offenders that if you cut the sentences by a quarter or by a half or by a fifth you're going to reduce

them to such an extent that you're going to be fearful to walk the street because there are people who are not fit to be out on the street. By the same token, if you make them real, there are offenders that, despite the fact that they didn't enroll themselves in a conditional discharge program or diversionary program, maybe the prosecutor had some disagreement as to this man's capabilities, but after six months or a year the individual is fit to be out on the street, can make a useful contribution to society.

ASSEMBLYMAN HAWKINS: Let me give you an example, Mr. Luciani. Say right now on a 3 to 5 you're eligible after 18 months. So if we incorporate true sentencing, say we knock the sentence down to 2 to 4, it means actually just six months more that he would have to wait before he would be eligible for parole, and one year less if he had to serve maximum. That seems rather reasonable, doesn't it?

MR. LUCIANI: It depends on the offender, on the offense, and now you're talking about --

ASSEMBLYMAN HAWKINS: Well, on the offender he would still have to wait 18 months to get out anyway.

MR. LUCIANI: Certain offenders wouldn't have to spend that period of time unless you're thinking in terms of retribution, actual punishment for an offense. Now actual punishment, if you're looking for that, what we should have is a trial and incarceration the day after the offense is committed, like when you were a kid you stuck your hand in the cookie jar, you didn't get slapped in the face three weeks later when you forgot what it was all about, you got hit then and there.

Now if you can find a way to reduce the delay have a trial as close in time after the offense as is physically possible, I don't think you'll need lengthy prison terms at all. I mean, that's my personal point

of view. But I think what we're losing in this criminal justice system by its complications is a correlation in an individual's mind between the punishment and the offense. It doesn't mean anything anymore.

ASSEMBLYMAN CODEY: As evidenced by the high recidivism rate.

MR. LUCIANI: Well, it certainly would contribute to it.

ASSEMBLYMAN HAWKINS: Isn't the high rate of recidivism showing that there may be some people who we have to separate from society and we can't let out?

MR. LUCIANI: There's no question that there are some people who have to be separated from society. I think anybody would be naive to say there aren't. The point is though, sir, that not everybody is in that class and I really don't believe - I'm not so much of a cynic as to think that every man who has committed a crime for a second time, every man who is a recidivist is not fit to live in society. And, again, I think you're talking selectively in terms of the type of offenses that are involved.

I believe it would be harsh treatment for a gambling offender, a low eschelon gambling offender to be mandated to serve two, three or four years under a true sentencing situation.

ASSEMBLYMAN HAWKINS: Well, if he keeps doing it, you know, if he's a second or third offender, what we're doing is saying -- he's saying to you, listen, it's profitable enough for me to take the risk and take the gamble because doing two years is not that bad. Just the same as a drug offender when he gets 12 years and he can get out in 4, what the hell, why not make a million and take a chance on serving the 4 years.

MR. LUCIANI: If you're talking about true

sentencing or an increased minimum for recidivists, that's a different question. If you're talking about true sentences for first offenders, I think you run into a world of problems because there are too many relative factors involved. Apart from the offender, just think of the offenses. Are we going to go back to Title 2A where you're going to have a different punishment for every offense? And then, are we going to go into different parole eligibility for every offense?

I think what we have to do is rely upon, for lack of any alternative, the sentencing court, the parole authorities, within the guidelines that you're willing to give them. And that's one thing I believe wholeheartedly in. I think people have been, in certain instances, released too early on parole. There's no question about that in my mind but it's an individual case situation. And what I think this Legislature should do is give guidelines, give criteria, give a checklist, if you will, to the parole board and wait until A, B, C and D are fulfilled before the man can be released.

ASSEMBLYMAN CODEY: Well, as our system works now, has it worked?

MR. LUCIANI: What do you mean, has it worked?

ASSEMBLYMAN CODEY: Well, the way our parole system works now.

MR. LUCIANI: I can only say that I think the parole system hasn't worked because I believe our prisons have failed to rehabilitate. The parole system can't work if the incarceration that we provide just fosters criminality.

ASSEMBLYMAN CODEY: So, in other words, you're saying a great number of people can be rehabilitated in prison?

MR. LUCIANI: Can be?

ASSEMBLYMAN CODEY: Yes.

MR. LUCIANI: I think certain people can be rehabilitated in prison; I think others prison is totally unnecessary for.

ASSEMBLYMAN CODEY: Are there some people who go to prison and after they come out they sure as hell don't want to go back, that imprisonment serves as a deterrent to?

MR. LUCIANI: Yes, I think it's a deterrent to an individual but the concept of deterrent I believe is intended or directed toward society in general.

ASSEMBLYMAN HAWKINS: Mr. Luciani, you made a statement that prisons as they exist foster criminality. --

MR. LUCIANI: I think in many cases they do.

ASSEMBLYMAN HAWKINS: -- which is bolstering, contrary to what your opening statement was, I believe, the belief that we shouldn't put people - or maybe it is in line with your statement - that we shouldn't put people in prison if they don't belong in prison.

MR. LUCIANI: This probably will get me in trouble but what I'm suggesting is that the prison system as it exists in this State is inadequate, to say it in the nicest way possible. I think that prison is necessary. I think that different types of incarceration are necessary. I think that work and education are necessary. We don't have very many of these programs on an organized basis. Trenton State Prison, you can't describe it. I don't agree with you that I'm suggesting that prison isn't necessary; prison reform is necessary and so are sentences. I don't think that this Committee should fall victim to the popular belief that because the conditions are abhorrent in the State's prisons that we should open the doors, because I, as a citizen, and you, as a citizen, and my family have rights too. And I think that everything we

do has to be a balancing act. We have to balance their rights against ours. And right now I'm willing to say that even though those prisons are abhorrent my rights are greater than theirs because I'm out here on the street and I'm a free man in the sense that I don't think I've done anything wrong that would justify my being put in there, and they have.

ASSEMBLYMAN HAWKINS: They have been found guilty of doing such.

MR. LUCIANI: Well, that's our system. So they have in fact by a jury of their peers been found guilty of committing the offense.

ASSEMBLYMAN HAWKINS: Do you have anything else?

MR. LUCIANI: I have a couple of more specific areas that I would like to mention.

The de minimis infraction section, I think, ought to be eliminated. And it's not said from some prosecutorial zeal that one might impute. I think the de minimis infraction section will frustrate one of the main objects of the code, and that is uniformity in sentences, more uniformity in sentences. You're going to have judges making individual decisions again; you're going to have judges reviewing a set of facts, after a jury has come back with a verdict of guilty, found all the elements to exist as a matter of law, and the judge coming back and nullifying their verdict.

Rather than do that, have the judge, when he sentences them, sentence them to a low term of years within the degree that he was convicted of with a statement, as has been recommended in our document, - a statement to the effect that this is a marginal case, the man is a good subject for rehabilitation and let that go to the parole board, let that be a factor in their consideration.

By the same token, when a judge comes across an individual where the mere setting of a maximum term is insufficient to do justice, he should have the ability to recommend a minimum term. Now this isn't the across-the-board minimum that everybody objects to, not like under the old Uniform Narcotics Drug Law. What this would be, if you have a situation where you have a particular heinous offense or where you have a particular breach of trust or some other type of offense that is considered abhorrent to our system, the judge will be free to recommend that a certain minimum term be spent before the individual would be paroled stated in reasons on the record. That aspect of it could be appealed to the Appellate Courts. If they agree with it, it doesn't become binding but it certainly becomes very persuasive in release. And the prosecutor, be it the county or the state, should have the opportunity to be heard on any parole release that would be subject to a release before they recommended minimum.

I think in that way we can accommodate the concept that certain people have to have a punishment, they have to be removed. But by the same token, we don't have to sweep with such a broad brush, we don't have to get every offender in. And I think that's really what we're looking for. Give us enough flexibility to work and I think we can create a system that will work a little bit better than the one in the past.

ASSEMBLYMAN HAWKINS: We can discuss that a little later also in more detail. Have you finished?

MR. LUCIANI: That's generally it.

ASSEMBLYMAN CODEY: I want to just find out what was the feeling in the Attorney General's Office with regard to plea bargaining?

MR. LUCIANI: Plea bargaining? Well, it's

looked upon as an "evil" that's necessary, given our system of justice.

Now I recommended before a great expansion of diversionary and conditional discharge programming. If we can make our system efficient again, we may be able to eliminate or limit plea bargaining. And if you look at it in that way, if you look at expanding conditional discharge and diversionary programs to an extent where we can eliminate any backlog based upon cases that ought not be prosecuted criminally, we could concentrate on the most important cases.

ASSEMBLYMAN CODEY: How do you feel about someone who plea bargains to a lower offense which mandates that he be given the maximum for that lower offense?

MR. LUCIANI: I don't think it would be appropriate because again I think it would be too broad a sweep. You'll have a situation where a prosecutor, although all the elements may be colorably there, may have a weak case and you have a situation where an individual may colorably have committed all the elements of the offense but be a peripheral character. And to automatically impose the maximum sentence, even if it's a lesser degree, doesn't take into consideration all of the factors that ought to be taken into consideration.

I think you may run into a problem constitutionally because you remove the discretion of the court in imposing any sentence other than the maximum.

ASSEMBLYMAN HAWKINS: A further example. It's quite possible that, as you have stated, the prosecution has a weak case, if the prosecution were to force a maximum of a reduced penalty on the offender, if they were to agree to plea bargaining, the offender may not agree to it, may go to trial and be found not guilty and then you get nothing, there is no justice because we refuse to plea bargain.

MR. LUCIANI: A lot of people feel there's no justice the other way.

ASSEMBLYMAN HAWKINS: A lot of people very well may be able to get away clean if the prosecution did not have the ability to plea bargain.

MR. LUCIANI: Assemblyman Codey, I think the criticism of plea bargaining in many instances is well taken. I don't think it's particularly apt for this State. I think we hear a lot about it but I don't think that the State's prosecutors or the county prosecutors are involved in cases that you would read about in the newspapers in terms of the concept of justice becoming a victim.

ASSEMBLYMAN CODEY: Yes, well how about - I think we mentioned in Committee about the Campisi trial, where a confessed murderer confessed that he killed four individuals.

MR. LUCIANI: That's not a consideration of plea bargaining. Are you talking about Tully or Pesnick?

ASSEMBLYMAN HAWKINS: I think that's who he's talking about.

MR. LUCIANI: Which one?

ASSEMBLYMAN HAWKINS: Tully.

MR. LUCIANI: Tully?

ASSEMBLYMAN CODEY: Didn't they make a deal with him where he would be eligible to get out in four years?

MR. LUCIANI: The only deal that was made was that he plead to a term of 20 years. Now when the Parole Board intercedes and releases him is another consideration. We don't really have control over that.

ASSEMBLYMAN CODEY: Yes, but they've made it possible for him to kill four persons and be out in three and a half or seven years.

MR. LUCIANI: It's possible. It shouldn't happen

in that case. But you have to rely on the system.

Now the point that we discussed up in Committee also was the fact that based upon our case, the quantum of evidence, the Attorney General made a decision that it was necessary to get the testimony of this individual to assure convictions in the other nine cases.

ASSEMBLYMAN CODEY: Did you see what those convictions were, though?

MR. LUCIANI: Certainly I saw what they were.

ASSEMBLYMAN CODEY: Well, I didn't think they were too great for the offenses.

MR. LUCIANI: Again you have to deal with the individual involved. Now an indictment is merely a public charge. Based upon what we had in our files in terms of real hard evidence, based upon what the witnesses were able to tell us, we were able to tell who were the main operating characters and who were peripheral characters, and on that basis entered into the final arrangements that were made. I doubt very much that there's a very real difference in terms of our contemporary law, the one that we're acting under here, between a 25 year sentence and a life sentence.

ASSEMBLYMAN CODEY: Do you feel we should make life more realistic?

MR. LUCIANI: In the past we made a recommendation based upon some bills that have been submitted to the Assembly and Senate that would allow for, in certain circumstances, based upon certain given criteria, to have a more real life sentence, say with a 30 year minimum sentence based upon the offense but based upon objective criteria to limit --

ASSEMBLYMAN CODEY: In other words, you would give the judge discretion as to whether life would be say 13, 14 1/2 or 30 years. So, in other words, life could range from 13 to 30 years.

MR. LUCIANI: Well, that's the minimum time.

ASSEMBLYMAN CODEY: That's what we're talking about.

MR. LUCIANI: Well, our suggestion was that you have the same criteria that you would or that has been recognized or applied to a death penalty situation in other areas of the State. If it's A, B, C and D and they coalesce then it may justify a life term with a minimum of 30 years. But it would depend totally on the facts and totally on the criteria that was selected.

ASSEMBLYMAN CODEY: Yes, but at least the most serious ones could be put away for at least 30 years.

Let me ask you, do you feel that we should allow persons to plea bargain, who have committed a felony with a load of firearms, to a lesser offense?

MR. LUCIANI: There are firearm offenses and there are firearm offenses. You have possessory offenses. Felonies in this State are misdemeanors. Some of the possessory offenses, which fall into a serious type crime category, even though it wasn't used, - sales of guns, for example. I'm not sure but what again it wouldn't be sweeping with a broad brush. I think that one of the reasons for extended terms in the code as it is now is the use of a firearm during a crime. That's one of the provisions for an extended term under 151-5 in Title 2A now. It's used. But we're not sure whether it deters. There aren't any statistics available. But what we can say is that it does --

ASSEMBLYMAN CODEY: We don't know what's in somebody's mind.

MR. LUCIANI: There's no way to know.

ASSEMBLYMAN CODEY: You seem to be making statements on something general because it wouldn't

affect all. Of course, each case is different.

MR. LUCIANI: That's the point. Each case is different and you have to consider the particular offense involved and the particular offender. And if the judge thinks that a more extended term should be available - I'm not averse to giving him the discretion, what I'm averse to is in every single case involving a firearm to have a mandatory minimum term --

ASSEMBLYMAN CODEY: A loaded firearm.

MR. LUCIANI: A loaded firearm.

ASSEMBLYMAN HAWKINS: I can give you an example. I had an individual - for Dick Codey's benefit -- I had an individual who was a private practitioner arrested with three loaded weapons --

ASSEMBLYMAN CODEY: That he used during a felony.

ASSEMBLYMAN HAWKINS: No.

ASSEMBLYMAN CODEY: Well, I'm talking about --

ASSEMBLYMAN HAWKINS: Well, a felony, that's a felony. If he has three loaded weapons he's guilty of a misdemeanor that's considered equivalent to a felony. And it was obvious to everyone that he had them for a particular reason, he had a station that - two of the weapons weren't his anyway, they happened to be his parents. One weapon he carried with him under the seat for protection when he took his gas money home during the day. Now, obviously, he was breaking the law and wasn't supposed to have these weapons but the judge, the prosecutor, the police, everybody there knew why he had the weapons. There was no dispute. He did not have them for any illegal purpose other than possessing them illegally. The Judge in Essex gave him a 6 months suspended sentence with no fine because he was otherwise a good citizen.

ASSEMBLYMAN CODEY: You're using the wrong

terminology. I'm talking about armed robbery. I'm talking about someone who is carrying a loaded firearm, saying he's carrying it in the course of the robbery.

MR. LUCIANI: If it's limited to circumstances like that, I don't think we'd be averse to it.

ASSEMBLYMAN CODEY: That's what I meant to say. I'm sorry.

MR. LUCIANI: I think there wouldn't be any sense to limit it to a firearm because a knife is nearly as dangerous. I think again it would require an examination but if it were properly limited, the only thing you would have to consider is its application, and its application might be broader than you would be willing to accept. As a citizen, for example, I think that most of the offenses committed in the cities involve dangerous weapons and involve youthful offenders. And if the prosecutor lost all discretion in terms of levying a charge like that, if he must levy that charge because it involved a dangerous weapon then if he gets a conviction that individual must be imprisoned.

Now, if you're willing to go that far - it's a legislative policy and we're bound by it. If it could be narrowly drawn to reduce the threat, if you will, on the streets, we certainly wouldn't object to it. What we're concerned about again is just overapplication and to lose somebody who could have been rehabilitated by putting them in Trenton State Prison. Because, as I said before, I think in many instances criminality is fostered by our institutions as they exist. So you have to be selective in terms of who you are willing to put in there and how soon you are willing to let them get out.

ASSEMBLYMAN CODEY: Let me ask you one last question. Would you say the Attorney General's Office - you know, how would you say we should attack crimes? Should we beef-up law enforcement? should we go at the

roots or so-called causes of crime or should we have bigger deterrents?

MR. LUCIANI: Well, I think it's probably a combination of those three and more. I think one of the problems that we've had is cooperation from citizens in general, not cooperation necessarily in terms of becoming a witness when they're at a particular scene, which is a problem, - don't get me wrong. Reporting crime is astounding, the number of crimes that go unreported would shock you, nationwide. Community involvement, getting an understanding of the criminal justice system is, what it's intended to be, having the community become responsive and responsible is important. I'm talking about public awareness, really. It's a massive educational program. For one reason or another, it seems to me, the public has lost touch with what we're supposed to be doing. And in some instances I think prosecutors are not responsive anymore.

ASSEMBLYMAN CODEY: I would question whether they have lost touch, I think maybe they've lost faith.

MR. LUCIANI: Well, it's a combination of two things. We're not mystics. We can't know which of the crimes, the Legislature has denominated as such, you want us to enforce. If you say gambling is a crime and you say mayhem is a crime, we enforce them both. Now if you want to reduce the number of crimes so that we can be more selective in our concentration, that's a legislative policy decision.

I think the public has become dissatisfied, not so much by what law enforcement has done but I think what publicity has been generated over what the courts have done, down in Washington, all the way through the state court systems. I think they are concerned, and rightfully so, that their rights are

being subrogated for the rights of an individual, an individual offender. But I think --

ASSEMBLYMAN CODEY: In other words, we're more concerned about the criminal than the individual.

MR. LUCIANI: I think they have that image. I don't think it's necessarily true.

ASSEMBLYMAN CODEY: No.

MR. LUCIANI: But I think that's part of the problem and that's what I'm talking about, public education and public awareness, have an understanding of what the criminal justice system is. I think you're right in certain areas, if we can have a deterrence and have a deterrence made meaningful, it might work. I don't know. But I don't know too many offenders, especially with the crimes you're talking about, Assemblyman Codey, the street crimes, that think about what the punishment is before they're committed. That's the problem with deterrence.

ASSEMBLYMAN CODEY: Well, you don't think --

MR. LUCIANI: They think they may get caught and they may go to jail but I don't think it matters to them.

ASSEMBLYMAN CODEY: May - that's the problem, may.

MR. LUCIANI: But it will always be that way.

ASSEMBLYMAN CODEY: I forget the statistics but how many persons commit muggings or assaults and never even see the inside of prison.

MR. LUCIANI: You would be even more surprised how many are never reported.

ASSEMBLYMAN CODEY: True.

MR. LUCIANI: But that doesn't make the criminal justice system work. I mean, it's a combination of all the different things, all the different problems that

we've mentioned. It's not just one thing.

ASSEMBLYMAN CODEY: Let me read something, very briefly, that was in the New York Times Magazine yesterday, an article on crime, and I thought it was very significant. In ending he says: "Some persons will shun crime even if we do nothing to deter them while others will seek it out even if we do everything to reform them. Wicked people exist. Nothing avails except to set them apart from innocent people. And many people, neither wicked nor innocent but watchful, dissembling and calculating of their opportunities ponder our reaction to wickedness as a cue to what they may profitably do. We have trifled with the wicked, made sport of the innocent, and encouraged the calculators. Justice suffers and so do we all."

I think that really sums up my feelings.

MR. LUCIANI: Well, I think it sums up everybody's feelings in particular cases. I mean, there is no question that our criminal justice system is behind the times. I don't think anybody is going to seriously question that. But I think there is more than one problem. It's not only the punishment that's behind the times. They used a word in there that's very important to me and that's "profit". Now, you take the profit out of crime and I think you're going to reduce crime. It's as simple as that. And whether a man has to go to jail not to profit is another question. I'm not bright enough to be able to answer it but I know, as a citizen and as a public prosecutor, that there are certain individuals that have to be isolated, and there's no question that we should have the mechanisms to deal with that. But by the same token, I think there are certain people that do not. And merely because of a coincidence that an individual stole a loaf

of bread to feed his family doesn't mean he should go to jail for that. I think we would do the same thing if the circumstances were bad enough.

You know, crime is merely a definition of anti-social conduct, and we deal with antisocial conduct every day at all different levels and in all different forms. And our response to every piece of antisocial conduct is not always the same.

ASSEMBLYMAN CODEY: Yes, but I think that thing about a person doing that to feed his family is greatly overused and overexaggerated, to put it mildly.

MR. LUCIANI: You can analogize that situation to a situation where a kid is on the street suffering from use of narcotics and withdrawal. He's compelled; he's sick. Now if you treat him as an individual, you treat him for being sick; if you treat him simply as a criminal offender, you put him away. And that's really what the issue is. Do you treat him as an individual? Do you try to help him and get him back to become a productive member of society or do you put him away and write him off? That's why I think in many instances these diversionary programs and conditional discharge programs hopefully are the wave of the future; they're going to reduce, hopefully, the backlog; they're going to ferret out the insignificant offenders and leave in the significant offenders; they're going to reduce the need for plea bargaining.

Now, if it can be done in that manner, I think everybody would be satisfied. We don't know how successful it's going to be until we try it.

ASSEMBLYMAN HAWKINS: Any other questions from the Committee? Hearing none, I thank you, Mr. Luciani. We will be discussing everything a little bit later so please be available.

Mr. John Cannel, outstanding man with the Public

Advocate's Office. Welcome.

J O H N C A N N E L: Thank you. As the Code is presented before the Committee, as it came out of the Commission, I have certain problems with the sentencing provisions.

Sometime ago I submitted to the Committee a joint draft with the Department of Institutions and Agencies. I am not really convinced that this is the best of all possible things and I haven't asked that they be made available to all the Committee members. But the point of that draft is that we have serious problems with the whole concept of extended sentence and with the particular terms which are chosen in the particular Code.

As Mr. Luciani said, there are problems with the particular criteria used. I tried to draft other criteria; I have the criteria I attempted back in my office and could come forward with it but I was so dissatisfied with the criteria or any criteria that could be drafted for extended sentencing that I abandoned that entirely and went to accepting their regular terms as the general maximum terms. I think the terms as they are drafted there are either equal to or in excess of what we now have, and I don't think there is anything to be gained by extending sentences further. I think we've seen that prisons don't do much and if there is an effective time in the prison it is that first shock of being put in prison. After you learn to live there and get by, the effect declines day by day and the educational effect of being put in the society composed completely of other criminals takes over.

Most of the people you send to prison you are writing off. What you are saying is, when we send you here we know you are going to come out a worse criminal than when you went in, but we are willing to take that risk because we have to do something. I think that

should be done to a small group of people and we should minimize that effect by having the term as short as possible.

Now I know that doesn't cover all cases, as Mr. Luciani said, and I must agree. There is a class of people who at least in both the present state of knowledge and our present knowledge of that particular person - that sort of person must be assumed to need long-term incarceration because we just can't predict the time when he's going to be safe on the street. So, fine. Give him a long sentence, watch him through the whole time and if at any time he becomes safe for the street, let him out.

The basic point that I'm making is there is only one purpose to the whole sentence provision in the Code and that is to make it safe to walk the streets, to prevent crime. Anything that will prevent crime, I think you can count on the hearty support of the Public Advocate's Office and the Public Defender's Office, and everyone else.

The problem is that some of the things which sound nice --

ASSEMBLYMAN HAWKINS: May I interrupt?

MR. CANNEL: Yes.

ASSEMBLYMAN HAWKINS: You say there is only one purpose, to prevent crime. What about a duplicitous purpose in rehabilitating the individual.

MR. CANNEL: I think that that is justifiable in terms of preventing crime. Most of the people whom we send to jail --

ASSEMBLYMAN HAWKINS: What about just the humane purpose of rehabilitating the individual?

MR. CANNEL: Okeh. I'm sorry. I will accept that as a second purpose. There's no question. But I think it

can be justified in terms of preventing crime. Most of the people who go to jail are going to be out again.

ASSEMBLYMAN HAWKINS: If that's what it's all about, we could just have the death penalty for everyone who has committed a crime.

MR. CANNEL: Shoot them all.

ASSEMBLYMAN HAWKINS: Right.

MR. CANNEL: Society is not willing to do that. We never have been willing to do that. The reason that the death penalty was cut back in the nineteenth century was --

ASSEMBLYMAN HAWKINS: What I'm saying is, there is more to what we're doing than to make it safe on the streets.

MR. CANNEL: All right, I will stand corrected in that the broadening of the point is correct. But, basically, if we don't rehabilitate these people, they're a danger when they get back out. We must do what we can in jail, knowing that it is the least effective place to do it. And if we can do it someplace else, fine; if not, let's do the best we can in prison. But to that point, there have been a lot of suggestions that no sentence in the ordinary case be more than five years, on the theory that anything beyond that is no longer useful, it actually harms.

ASSEMBLYMAN CODEY: Would you back up on that?

MR. CANNEL: That no ordinary sentence --

ASSEMBLYMAN CODEY: What do you mean by ordinary sentence?

MR. CANNEL: That is no sentence for a person who does not meet special criteria for extended sentence because of his special nature or the special nature of the crime.

This recommendation came out of the National

Commission on Standards and Goals for the Criminal Justice Process. It's been around before.

ASSEMBLYMAN HAWKINS: It's being followed by Sweden, I believe.

MR. CANNEL: Oh, the sentences in the United States are among the longest in the free world, with the exception of certain strange oddities, Saudi Arabia has a longer sentence, stranger ones too. But, with the exception of places like that, the American sentences are among the longest. But it hasn't reduced our crime rate. I'm not sure if we were to shorten them that that would reduce our crime rate either. I don't think there is a simple answer. But I don't think that we can just abandon the things which appeared from what we know about sociology to work just because we have troubles with the high crime rate. We have troubles with the high crime rate. It was falling before the last economic downturn. It had begun to turn around in the cities and maybe the economic problems are the reason why the crime rate has gone back up. I don't know. I just don't know.

ASSEMBLYMAN CODEY: Another problem is that with regard to other countries or whatever, that in other countries they commit a crime and go to prison whereas here --

MR. CANNEL: I'm not sure that's so, although it may be. The statistics in the United States - they're not reliable at all because of the very nature of them - say that there is about a one-in-two or one-in-three chance that if you commit a crime you will be reported, and if the crime is reported it has about a one-in-ten chance of yielding a conviction.

So, to begin with, before we get to the sentencing point, we're dealing with between a one-in-twenty and one-in-thirty chance of being convicted. That being the case,

no deterrent will ever work. If you were told to follow through with the cookie jar analogy, which is not a particularly good one but it will do, - if you knew that you could put your hand in the cookie jar and take cookies and 19 times out of 20 or 29 times out of 30 you wouldn't get caught, the fact that you would get smacked pretty hard the 30th time or the 20th time would have no effect on you at all.

ASSEMBLYMAN CODEY: Each person is going to make a determination for himself whether it's profitable enough for him to do it.

MR. CANNEL: As a psychological matter, I don't think that's so. People don't sit there and calculate what they do. They say, ah, I'll never get caught.

ASSEMBLYMAN CODEY: So in other words you mean to tell me there are not some people who deal in drugs to make that money that will hold them for a lifetime, realizing that if I'm caught I'll serve four years - you know, it's worth it.

MR. CANNEL: Well, I've had very little experience with the big drug cases. I can't tell you for a fact there are none. Most of the drug traffic in New Jersey is a lot less calculating than that. It's people who are living in the present, they're here for today. They want the money to spend tomorrow; they don't believe they're getting caught.

ASSEMBLYMAN CODEY: So don't you accept the fact that some people go into crime just for the profit?

MR. CANNEL: Yes, but they don't ever believe they're getting caught. I think that's the important thing. They don't sit and say, well 7 years I'll take the risk for but I wouldn't, because they say, I'll take the risk because I don't think I'm ever going to get caught. They never believe - these are people who

do not believe that the law will ever catch up with them. And when it does, it usually makes the whole thing unprofitable by any reasonable calculation. But by then the crimes have been committed and it's all over.

The same is true of the death penalty. There has been no showing that it has any deterrent effect at all. As a matter of fact, the old statistics - I don't put too much credence in them - say that the murder rate rises the day before, the day of and the day after an execution, that the furor associated with an execution brings out this kind of thing in people. And there are a certain number of people who commit capital crimes and get killed.

ASSEMBLYMAN CODEY: So you don't feel there are certain individuals who, if the possibility of the death penalty existed, would not plot to kill someone.

MR. CANNEL: I think if you were to apply it to certain kinds of white collar crime it might be effective.

ASSEMBLYMAN CODEY: I didn't know murder was a white collar crime.

MR. CANNEL: No, that's not what I'm saying. I'm saying, leave out murder. I don't think you can deter murder.

ASSEMBLYMAN CODEY: Well, we're talking about the death penalty.

MR. CANNEL: I know but if you're talking about the death penalty - if you're talking about deterrents, it would probably deter, oh, misconduct in office, things like --

MR. CODEY: I'm talking about the death penalty and murder and you're talking about misconduct in office, so we got into politics.

MR. CANNEL: No, the person who steals from a bank, the person who misappropriates funds from a corporation or the person who otherwise does a white collar crime is deterrable. What I'm saying is, a death

penalty for murder will not deter. If you talk about death penalty in terms of murder, forget it.

ASSEMBLYMAN CODEY: So, in other words, you feel there is nobody who, you know, might not go out to kill someone.

MR. CANNEL: Out of profit? It's such a small part of murder, it is conceivable there are some but most - statistically the largest number of murders are what the police call "friendly" murder, that is the victim was known --

ASSEMBLYMAN CODEY: I didn't ask you about friendly murders.

MR. CANNEL: Okeh.

ASSEMBLYMAN CODEY: I asked you about plotted murders, premeditated murders.

MR. CANNEL: Plotted, premeditated murders are so few that I don't think it's possible to make any statement about them. It's a very rare crime, and I don't know what deters it and what doesn't deter it.

ASSEMBLYMAN CODEY: Wasn't there a group in New York that went around killing policemen as part of their --

MR. CANNEL: Yes. I'm not sure that that fits in as those people were a little abnormal mentally.

ASSEMBLYMAN CODEY: Well, obviously they were.

MR. CANNEL: I'm not sure, therefore, they're the kind of person that's going to calculate based on a deterrent. What you're really talking about is a person who is in the business of committing murder for profit. There are such cases. Usually they use - the Campisis who were charged with that kind of operation were not accepted as full members of the Mafia because they were considered too bad calculators, too mentally unstable for admission in the Mafia. These are the most planned, these are the most calculating people.

ASSEMBLYMAN CODEY: Did they commit murders?

MR. CANNEL: I don't know. They pleaded guilty to murder, I assume they committed murder.

ASSEMBLYMAN CODEY: Okeh. Some of them were sentenced to five years or seven years.

MR. CANNEL: No one who pleaded guilty to a murder was sentenced to that length of time. I'm not familiar enough with the particular sentences involved but they were very happy to get them.

ASSEMBLYMAN CODEY: Well they were great sentences for them.

MR. CANNEL: I mean, the prosecuting agency was very pleased to get them behind bars. For a long time it looked as though it was going to be a not guilty.

But the particular case like that yields - if it's a hard case it's apt to yield bad law. There are some cases where the prosecutor has to practically give away the court house to get a conviction if he considers giving away the court house is less of a miscarriage of justice than, as Assemblyman Hawkins said, letting the man go free if he doesn't have sufficient evidence to convict him in an open court. I don't know what's a more extreme carriage of justice. But I will say that in the State of New Jersey, by and large, with some exceptions, plea bargaining is not a problem, that generally the person who pleads gets the same sentence he would have if he went to trial.

ASSEMBLYMAN CODEY: Then why would a lawyer plea bargain?

MR. CANNEL: For the guarantee, to know in advance.

ASSEMBLYMAN CODEY: A good lawyer --

MR. CANNEL: It's a matter of avoiding a gamble. You know that the odds are very great..your client will get no more than one to two, but he's facing two charges which could give him a lot more than that. If you can guarantee

to him in advance that he will get what everybody assumes he will probably get, there will be a plea, and you don't need to try a case that nobody contests. And I think for that it's very useful. But it doesn't have the same significance. If no one were to plead guilty again in most of New Jersey, the courts could handle the load.

ASSEMBLYMAN HAWKINS: Let me make a suggestion on that. Dick, if someone were to be charged with two armed robberies and it was obvious to the defense attorney the odds are his man is going to be found guilty of one of them and the prosecution may say, well, we're going to find him guilty of one of them, but maybe the prosecution wants to save the time and money that it would cost the State to prosecute, and the judge would still have the discretion to sentence. And everyone feels he's going to get sentenced, justifiably so, enough time by saying he's pleading guilty to one, why go through the process of two when there's a possibility he may be found not guilty. In other words, everyone weighs certain things.

MR. CANNEL: But in one county our office is trying half of its cases, that is, for every one that ends in a plea there is one that ends in a trial. There is no burden on the courts and the sentencing pattern there is no different from anyplace else.

ASSEMBLYMAN CODEY: What is your feeling about the way we use judges with serving concern, you know, sentencing concurrently?

MR. CANNEL: What the judge is really trying to do is decide what time that particular man needs as a sentence and if there are six charges and he makes them concurrent, - I don't know, 10 to 15 on all six, say armed robberies, that really is no different from giving him a series of small sentences and running them one after another. What he has decided is, I have a particular man before me, the maximum he's going to need

to spend in jail is 15 years.

ASSEMBLYMAN CODEY: That's fifteen and he's eligible after a third of that.

MR. CANNEL: Yes, he's eligible earlier than that but what the judge is saying therefore is the maximum is 15. When you're dealing with a large number of charges as part of a plea bargain, the man will probably not get out in the minimum. The Parole Board has discretion. The theory of the discretion is that if you are going to have workable projects in the prisons, you have to be able to reward the man who has made strides in rehabilitating himself by letting him out, because if you don't, you make those projects impossible and you just put an unreconstructed criminal back on the street. This is the only purpose of parole, to aid in the rehabilitation of inmates. And the primary purpose, although not the only purpose of that, is for safe streets.

ASSEMBLYMAN CODEY: You just said something, you know in regard to true sentence, you said about sentencing a man to 10 or 15, and the public's problem is he was sentenced to 10 to 15 and I see him out after 5, what's the story, what's going on, don't tell me he's sentenced to 15 when he's out in 5. You know, be honest with it and not sentence him to 10 to 15.

MR. CANNEL: I think that maybe the way to handle that would be more education, that is if the public knew the 10 to 15 is a deceptive sentence. If you were to say indeterminate to 15 and everyone knows that 15 is the maximum, then people aren't surprised. There is a lot of lack of knowledge on the part of the public about the system. Most people, for instance, would ask whether our sentences are high enough and say they are not. When, on the other hand, they're told the particular sentences and which are the sentences for the particular crimes and are asked whether those sentences are too high or not high

enough or about right, they all say those sentences are too high. So, in fact, the public in terms of polling has shown an inconsistent view - one, that the sentences are too high; and, two, that they're not high enough.

ASSEMBLYMAN CODEY: Well, they might say if he serves 10 to 15 that they're high enough but if you tell them he's probably going to get out in 5, then they'll say no.

MR. CANNEL: No, but what they're really saying is that they think the maximum sentences for crimes are a lot lower than they are. And that's just a function of education. Besides, I think we owe to people to do the best we can to prevent crime, and if that means having to do a massive education program to convince people that, look, I know it seems to you like a short time for him to spend in jail but if he's safe for the street when he is done with the time, that's what important.

Now I think we have to redo our parole. I think right now in some cases we're letting out people too early because they're not ready, and others we're holding in too long after they're ready. And often you undo all the good you did. But that's a matter of reforming parole and taking a look at that structure, much more than doing it in terms of what the maximum sentences are.

ASSEMBLYMAN CODEY: Well, we are considering that also, if you want to comment.

MR. CANNEL: Well, in terms of parole, I think the important thing is to draft a statute and state clearly to the parole board what they're trying to decide is whether this person can be safely released. There has been too much in the past of use of parole to keep quiet in the prisons. What the structure has said, there has been a tendency that the man got into no trouble, therefore he should get out. That isn't the way it should be. He should get out earlier than the time we now let him out in

if he's safe, and he shouldn't get out at the time if he isn't safe. And it's a matter of putting a lot more structure in parole, in the parole decisions. There should be a formal report, there should be studies, there should be special programs which are geared directly toward a person's release, plus, of course, there should be less use of prisons.

ASSEMBLYMAN CODEY: So what you're saying is that people are paroled not because they're "rehabilitated" but because they have the intelligence to mind their own business and not get into any trouble.

MR. CANNEL: The good convict, the person who gets into no trouble, the person who does, again in prison language, quiet time will get out rather quickly. He also has shown that he can adjust to the inside of a prison. He hasn't shown a thing about what his adjustment on the street is going to be like. Either we have to develop programs which will tell us that in prison, which is very difficult, or we have to do more on-the-street rehabilitation. You cannot train a man behind bars to live without those bars unless you want to walk around with a cage around him the rest of his life. You're going to have to do something which trains him how to live in a society where there are temptations, where there aren't guards and where there aren't bars. And in some cases that is impossible but in the great majority of cases it is a matter of working at it rather than taking the simple solution of, well an armed robbery is worth 3 to 5 today and off he goes for 3 to 5 which is a mindless sentence. I don't know what part of it he will serve but whatever he serves of it will be useless. He shouldn't have been there if he didn't need it and, if he needs it then something should be done --

ASSEMBLYMAN CODEY: What do you mean, he shouldn't

have been there?

MR. CANNEL: That he shouldn't go to jail at all, even for a robbery, if that will not serve the interest of society.

ASSEMBLYMAN CODEY: Where does he go?

MR. CANNEL: Well, a certain number of offenders get probation, often with special projects - the Newark Defendant Employment Project, for one very useful project in a town I know of, but there are others.

ASSEMBLYMAN CODEY: In other words, if somebody robs me and he just goes on a special work project.

MR. CANNEL: If someone robbed you, that's a problem to you and to society.

ASSEMBLYMAN CODEY: Well, I see it as a problem --

ASSEMBLYMAN HAWKINS: May I make a suggestion on another case. In a matter that I represented an individual he robbed a liquor store because he was drunk and he wouldn't be the same type of individual to get into trouble. In fact, he never got into trouble before and he hasn't since then. Because he was an alcoholic he robbed a liquor store. And the people, the judge, the prosecution, everyone allowed him to enter the project that was just opened up by Mr. Cannel. And I think justice was served.

ASSEMBLYMAN CODEY: I don't think extremes make good rationale.

MR. CANNEL: Even if we threw away the extremes and say this was a person who committed a crime without some very unusual thing in his background. Still, if we had a magic wand that we could wave that would make him safe for the street, that he wouldn't commit crimes again, it wouldn't bother me as the victim that all they did was wave the wand over him and he didn't make him unhappy that he wasn't punished in any way. The important thing is, can you make him safe for the street. And if

that's done in terms of prison, fine; if that's done outside of prison, that's also fine.

ASSEMBLYMAN CODEY: In other words, if we gook somebody who assaults somebody on the street and robs him and we put him away for a long time for that kind of a crime, say maybe six years, you don't think that he's going to think twice of knocking some old lady over again and robbing her because it sure as hell is not worth it?

MR. CANNEL: I wish I could say that that were so because it would be very nice and straightforward and simple. In my limited experience, representing people --

ASSEMBLYMAN CODEY: I'm talking about the majority, not the extremes that you want to use.

MR. CANNEL: Well, I've represented a great number of people and most of the ones I've represented had done it before.

ASSEMBLYMAN CODEY: They didn't get anything for it, in other words 9 out of 10 people who commit burglary don't see the inside of a prison.

MR. CANNEL: Well, that's so because most of them aren't caught.

ASSEMBLYMAN CODEY: No, caught.

MR. CANNEL: Okeh. Maybe that's true, and I'm not sure if that's good or bad, is my point. Most of the burglars whom I've represented who were old enough to have spent time had spent time in jail and it hadn't deterred them in the slightest.

ASSEMBLYMAN CODEY: Because the deterrent wasn't there. It wasn't long enough. It was profitable enough to be a burglar.

MR. CANNEL: No. I've talked to people who have spent over half their lives in jail, of one sort or another, so it isn't a matter of any reasonable person who was calculating wouldn't commit burglary. These people know nothing else, and all they've done in jail is hone

their skills to where they're better burglars.

ASSEMBLYMAN HAWKINS: Has there been any evidence produced to you that would show that the length of the term would serve as a deterrent?

MR. CANNEL: The statistics go the other way. The longer the term, the more likely the higher the rate of recidivism until you get beyond a certain age of release. That is, people do burn out. It takes a certain amount of agility to be a burglar, and beyond the age of 35 or 40 you don't find many burglars. There are some.

If you were to take everyone who committed a crime at the age of 15 and hold them until the age of 30, you would reduce crime a great deal.

ASSEMBLYMAN CODEY: As long as they're in prison they are not a threat to society.

MR. CANNEL: That's true. But if when they get out - I represented a juvenile for whom I fought very hard to keep out, and lost. He had stolen a car. After his first term away, he was a burglar. After his second term away, he was an armed robber. The terms were of increasing length and each time he came out he was more dangerous to society than before. When I knew him, back in the first time round, he was a kid who could have been saved. I had at least my own personal confidence that he could be. Now I don't know where he is. I've stopped following him because I don't want to know the next thing. But unless you're willing to keep people in for a very large portion of their lives, the length of the prison sentence does no more than, as you say, keep them out of circulation for a little while but gives him an education which makes him more dangerous when he's back in circulation again.

Now it's a trade-off. In serious enough crimes, let's say of a compulsive, repetitive sex offender, we give such people a maximum term of 30 on the theory that

that's lots of time - essentially, that's life - and that is just so dangerous that we are willing to override all of our other considerations. At the same time, a burglar, it may be that it's worth a lot more to us to try to rehabilitate him, even if we're not successful in every case.

I didn't come here with any easy answers. I would hate to see the sentences which are imposed by this State be increased by the Code. I think as it is now drafted those sentences would be increased. I think the criteria for extended sentences, as they're drafted, as Mr. Luciani said, are not good, and I will do what I can to help in any way to help in tightening those down if you want to continue with the extended sentence.

Beyond that, I believe that people should be eligible for parole from the moment they enter prison. And I think the people who deal with them, the prison staff, are the ones who are best able to tell us when the prisoner is safe for society. And I think we have to give to them and to the parole board --

ASSEMBLYMAN CODEY: They should be eligible when?

MR. CANNEL: Immediately. I mean, reformatories, for instance, people are eligible for parole immediately. It doesn't mean that they spend one day there. I've never known anybody who spent one day.

ASSEMBLYMAN CODEY: In other words, armed robbery, under your theory, a day after the prisoner enters he's eligible for parole.

MR. CANNEL: That's right. And I don't suppose he'll get out.

ASSEMBLYMAN CODEY: I sure as hell hope not.

MR. CANNEL: I can conceive of situations where a man was on the road to Damascus, in his second day of prison, and you've got a very different man the third day, and then he should be out.

ASSEMBLYMAN CODEY: But you have a lot of con artists too.

MR. CANNEL: Well, that's why we have prison staff who should be able to separate them out. And I think that's something that's legitimate and deserved.

ASSEMBLYMAN CODEY: Well, they haven't done it up to now.

MR. CANNEL: I'm proposing some changes.  
Thank you.

ASSEMBLYMAN HAWKINS: Any other questions?  
Thank you, Mr. Cannel. We will be looking forward to discussing it further with you, sir. You will be around later?

MR. CANNEL: I will be back later.

ASSEMBLYMAN HAWKINS: Thank you.

David Gilman, National Council on Crime and Delinquency.

ASSEMBLYPERSON BERMAN: Mr. Chairman, I was wondering if I could make a request. I wondered if we might follow the more traditional pattern on a hearing and allow whoever is appearing before us to get through with their statement before we try to question them because I find that perhaps we're losing the total impact of what they're trying to say. So, could we let them make their statement and then question them at whatever length we might wish to.

ASSEMBLYMAN HAWKINS: There will be no problem with that.

D A V I D G I L M A N: Mr. Chairman and members of the Committee. I have prepared this statement but I thought it would be best if I just give this to the Committee and you can read it at your leisure because I think the give and take of a discussion will highlight for us the issues that we are most concerned about.

ASSEMBLYMAN HAWKINS: In other words, are you suggesting then that we --

MR. GILMAN: You can interrupt me at will but we've done an analysis of the sentencing and parole provisions of the Code. I will speak to them but I would not just read it to you because I don't think that would be as profitable to you. (See p. 1 X)

ASSEMBLYMAN HAWKINS: In other words, you are suggesting to us that we have a dialogue and interrupt you. Is that right?

MR. GILMAN: If that's what you wish, yes.

I would first like to state that I would hope that the Committee would give serious consideration to delay of introducing this Code before the Assembly.

The questions that arise in our minds, as we analyzed the provisions of the proposed Code, were: What would be the effect of this Code upon crime in New Jersey? Would it reduce the swollen population? Would it clearly delineate between those who are dangerous and those who are not dangerous, in terms of long prison sentences? Is the parole procedure one that would, in effect, make simpler and less complex the release procedures? What are the criteria for imprisonment? Who shall be imprisoned?

And as we look at this Code, we are concerned that we're not going to affect criminal justice very much in the State of New Jersey; that the Code provisions are not in any substantive way going to bring about a reduction in the prison population or protection of society with the imprisonment of dangerous offenders.

Now, we may be wrong or we may be right in terms of our analysis of the Code. But I suggest that you be right, that you set up a revision commission, a continuing revision commission that will analyze the effect of whatever code you pass, that will report back regularly to your Committee and to the Assembly

and offer amendments on an interim basis to improve those aspects of the code which are not working. Because to do a massive code revision every few years is an enormous job and a difficult one, but a continuing revision commission, to give you the kind of input that you will need on a day to day basis to see how your code is operating.

And the problem we have with the Code is that it doesn't have a philosophy; it doesn't say to the public, and it didn't say to us when we read it, that we are concerned about dangerous criminals, we are concerned with those criminals that threaten society with physical violence. That is one of the major problems with the Code, it's overextended - the extended terms, the ordinary terms, the criteria for extended terms, the criteria for ordinary terms are so sweeping and so vast that it just about takes in everyone.

For example: Start with Chapter 43. You have a provision for extended terms - I'm on page 2 - you authorize very long periods of incarceration, extended terms. A defendant who had been previously convicted of two or more crimes of any kind could be incarcerated up to a period of - well, for second degree he could get as long as 20 years maximum term. He could have two priors on his record but they may have nothing to do with any threat to another individual, may have nothing to do with any kind of violence or assaultive behavior, it could solely be a property crime.

ASSEMBLYMAN CODEY: Wouldn't the judge use his discretion there?

MR. GILMAN: I wonder how the judge could use his discretion because what is the guidance that the Legislature is giving.

ASSEMBLYMAN HAWKINS: You are suggesting that we tighten our language.

MR. GILMAN: I am suggesting that you do what our Model Sentencing Act does, divide crime into at least two categories - dangerous and non-dangerous - and talk in terms of crimes against the person as being dangerous and crimes against property as being non-dangerous.

Under your extended term provision you could have someone who only did property crimes going away for a 20 year maximum.

ASSEMBLYMAN CODEY: The problem is, you always want to go into the extremes that are in most cases not going to happen, to use that to supplement your argument.

MR. GILMAN: I suggest that that's exactly what does happen. When we speak to wardens and people in correction they tell us that most of the people who are in prison should never be there, that they are people who are not dangerous, not the violent offender, not the young man described in the New York Time Magazine article yesterday, the kid with the knife and the man with the gun. We find people in there for thievery, for burglary, for car theft or bad check writing, or larceny, we find people there for all sorts of property crimes. And when I ran down the list of crimes that are included as second degree felonies, I saw more property crimes than I saw crimes against the person.

I'm suggesting that you take our Model Sentencing Act - it's not perfect, there is no code that is perfect, but you look at it in terms of crimes against persons - those are the ones - and you build criteria for judging who are dangerous and who are not dangerous. Eliminate the property crimes. They make up over 60% of the people in prison across this country. We have a swollen prison population because we overextend the net.

ASSEMBLYMAN HAWKINS: Incidentally, are you going to be available later, sir?

MR. GILMAN: If this Committee would like, I will be here later.

ASSEMBLYMAN HAWKINS: Because this Committee will be meeting this evening and tomorrow, in session, not before the General Assembly but in a meeting room, trying to tighten up this entire Code and you are welcome to stay, if you wish.

MR. GILMAN: I will certainly try to do that.

ASSEMBLYMAN HAWKINS: Continue. I'm sorry to have interrupted.

MR. GILMAN: No, that's all right.

We suggest, for instance, on 2C:43-7 when you talk about criteria, you be specific about the kinds of crime. We would suggest, for instance, - you talk about repetitive violent - a man who has a repetitive violent criminal record. That would seem to me that you structure it and you gear yourself toward a philosophy that it's violent crimes that you're concerned about, not property crimes.

For instance, you have a Section C which talks about what I think you were trying to do which is talk about the professional criminal, and you say, one who commits a felony and circumstances show that he has devoted himself to criminal activity which constitutes a major source of his income - but in all the language of that sub-section there is no talk about being a member of an organized criminal ring. It could be a sole offender going out and stealing TV sets. Is that the man you want to label to be a member of an organized criminal ring? I don't think that's what you want. Our Model Sentencing Act though gives you a guide to defining the professional criminal with more specificity and more exactness in terms of what kind of behavior and with whom and how.

ASSEMBLYMAN CODEY: But how do you define or what criteria do you use to say somebody is a member of an organized crime ring?

MR. GILMAN: Well, in our Model Sentencing Act, for instance, we talk about working in a group of four or five people. I don't have my Act in front of me but if you give it to me, I will read you the definition.

Now this is our definition on the dangerous offender - we're talking here specifically about organized crime: The defendant that is sentenced for a felony committed as part of a continuing criminal activity in concert with five or more persons, the defendant having been in a management or supervision position or having given legal, accounting or other managerial council, or as a public servant having unlawfully done or admitted to do anything in order to promote the criminal activity.

I do not think that is a perfect definition. You can challenge that, as you can challenge them all, but I think it brings us closer to what I think your intent was but what your language failed to do. Because under the language in the proposed code I think it exaggerates and doesn't give us enough specificity to come in to do what I think you are trying to do. In other words, I think you have to tighten that in terms of being more specific about what it is that you're getting at because I could read that to mean the Lone Ranger type criminal, a soul offender, and that I don't think is what your intention is or was when that was put together.

For instance, Subsection C on your criteria talks about a felony offender and you don't say what degree of felony offender - I don't know whether he's a fourth degree or a third degree or a second degree - whose mental condition is abnormal - who is going to make that decision about abnormal? - whose criminal conduct has been

characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior.

That does not mean to me, at least, that you're talking about a violent offender. Too vague. It could be violent, it could be nonviolent. Aggressive is a word that is a layman's term and I would hate to leave that to a judge to make that kind of decision about what you mean by aggressive. Is an aggressive con artist the man who you mean to bring under sub-section C? It could mean just crimes against property.

And what we are suggesting is that one thing that prison does not do is rehabilitate. And at least we have to begin to eliminate the population in prison who could best be served with a less restrictive sanction. And by those we mean crimes against property.

We have a problem with the extended maximum term because we think the ordinary maximums are long enough. Twenty year maximums for first or second degrees is a long period of time. We do know that men who spend over 20 years in prison become institutionalized so that they become disfunctional when they are released. A life term is a period that stretches into oblivion. What chance does any man have to avail himself of whatever program is made available to him if he's doing a life term. What we hear from inmates in prison is that the only ones who get a chance at the programs are those who are in for short periods of time. Why would a lifer be involved at all in a rehabilitation program.

I understand you have parole provisions. That means that he could get out earlier. But we think that those extended maximums are far, far too long. Your ordinary maximums with your mandatory minimums really can do the job that you want if you limit those who its going to be applied to. By that we mean, look at the question of dangerous versus non-dangerous, concern

yourself with violent attacks upon citizens, and don't use prison as a way of sanctioning white collar crime and property crime.

We have problems looking at the parole provisions. I must be frank with the Committee. I do not understand when you talk about parole terms, whether you're taking about a man who has a 20 year maximum whether he gets a 5 year parole term after that maximum - in other words, if he completes his full term and never gets paroled does he have a 5 year parole term thereafter - therefore, a 20 year term becomes a 25 year term and a 10 year term becomes a 15 year term, 10 in and 5 out. I wasn't clear about that and I think it should be made clearer.

Secondly, I have a problem with the mandatory minimums as they relate to parole. If a judge has a range and you cut the range - I would suggest that you cut it even further -- for second degree felony he has between 5 to 10 years on an ordinary term. Now, how would parole work? Well, the Code says that after 6 months he would be eligible for parole but, as a matter of practice, what will Parole say? They'll say, here's a man who got a 7 year fixed term, the judge could not give him less than 5 because the Code says you have to give between 5 and 10 and, if you give between 5 and 10 you have to fix it in that range. Isn't Parole going to say to itself, let that minimum 5 become the minimum eligibility for parole? It will actually inhibit parole for early release because they're going to look at the minimum, not just in terms of the sentencing function but in terms of parole function.

Serious, serious questions about how parole is going to be utilized in that way. And I have also a question - and some would raise this issue - about whether the Legislature is really giving to Parole the

function of establishing the sentence. In other words, if you say that a man has to serve at least five years but no more than seven years of a fixed term, why are you leaving it to Parole to let him out in four years or any period after six months if you are going to establish that minimum. Why have the minimum at all, then. All the minimum will do is to pressure Parole not to release him until the minimum is served. And that abrogates what you were talking about in the Act about everyone is eligible for parole after six months. I don't think it's going to work. A man who has a 7 year fixed term is not going to be out in 2 years.

Our third problem is with the conditions of parole. We see no reason why a man who is out on parole and violates a condition of parole should be sent back to prison because he violates the condition.

It seems to me that what we know about rehabilitation, not what we wish but what we know is that the rehabilitated man or woman is the man or woman who doesn't commit another crime. We have no standards for judging rehabilitativeness. We don't know what makes a good member of society or not. We know what we would like to see happen. We have no way of predicting that it will happen. And I would suggest that if a man gets out of prison and he's on parole, he doesn't work, he's a nasty kind of guy, hangs out on the street corner, but he doesn't commit another crime, as far as I am concerned he's rehabilitated. If he does commit another crime, then he is not.

So I would suggest that some consideration be given to doing away with the conditions of parole in terms of revocation, because sending a man back to prison because he went into a bar and had a drink or got into a car and took a ride --

ASSEMBLYMAN HAWKINS: Or lived with a woman.

MR. GILMAN: -- or lived with a woman, that may be a very rehabilitative step in his particular case, and I would think --

ASSEMBLYMAN CODEY: It depends on what he did in prison.

MR. GILMAN: Well, that's true too. What I'm suggesting is violations of the law should be the basis for revocation, not violations of vague standards of rehabilitativeness which we neither understand nor can enforce.

ASSEMBLYMAN CODEY: What you're saying is, maybe we don't need parole officers or anything like that because from what you're saying, you're saying there is no sense to it.

MR. GILMAN: Well, my Agency would not take that position.

ASSEMBLYMAN CODEY: I think you said that.

MR. GILMAN: I would say to you there are some who would make that argument, that we really know very little about rehabilitation. We don't know how to define it; we don't know how to tell who is rehabilitated from who isn't; we're not able to tell how people are going to act in the future based upon the way they acted in the past; and that maybe it's time to say a man who commits a crime should be punished for the crime that he has committed and he should be released and, when he's released, if he doesn't commit another crime it's okeh with us.

Some would suggest that that is the posture we ought to take.

ASSEMBLYMAN CODEY: Then wouldn't it be quite possible that some people would wait until the parole is over to commit the next crime?

MR. GILMAN: It is possible that some would and it is possible that some wouldn't. But the point

is that what we hear from parole people, not from the academicians and the civil libertarians, is that the conditions of parole do not make it any easier for the person to reintegrate into society, it makes it more difficult. And all the writing which I have read, which argues for doing away with the conditions of parole, comes from parole people. They are the ones who are leading that battle.

I see a role for parole in terms of helping to reintegrate but you can't be a caseworker and a cop, you're one or the other. And I think that the mixing and the fusing of those two roles makes it more difficult to create an environment for reintegration into a community than does the separation of those two roles.

If a man knows I have to report to my parole officer because I'm being punished for the act that I did, he can accept that, but if the parole officer comes to him as a caseworker and is also checking him out to see whether he has been in a bar or not, then the role becomes confused and the offender sees that as surveillance and not as a casework function. And we have to be clear about what we want to do with people.

So my suggestion is again to take a look at parole in terms of conditions. I would also, just in passing, say that I do not understand the logic about a disorderly person receiving a 6 months prison term. This runs right back to the first issue that I wanted to stress. A disorderly person, 6 months in prison - why? A property offender in prison - why? A white collar criminal in prison - why? Who is it that we fear? I suggest to you it's the people who are described in the New York Times Magazine section the last two weeks - the man with the gun, the man with the knife, the rapist, the killer, the assault artist. Those are the people

who should be in prison and not the majority who are property offenders and disorderly conduct.

ASSEMBLYMAN CODEY: I don't argue the big difference between the two. I am in agreement there. You know, you say don't put them in prison, what do you do? If the man embezzles a couple hundred thousand dollars --

MR. GILMAN: The way the law works now, a man can embezzle a couple hundred thousand dollars and do a year and a half in prison and come out and move to another state and spend the hundred thousand dollars that he embezzled. I would like to see that man not only pay back the hundred thousand dollars --

ASSEMBLYMAN CODEY: Well, how is he going to pay back a hundred thousand dollars? You know, let's be logical and reasonable.

MR. GILMAN: What I'm suggesting is that prison is not a response that makes any social sense for white collar crime. It doesn't stop it.

ASSEMBLYMAN CODEY: Okeh. Will you give me a solution then?

MR. GILMAN: A solution, I cannot give you. No one can give you a solution. I can give you some suggestions. My suggestion would be that you punish the person in terms of who he is and what he is in the community. For example, if a construction worker steals a piece of equipment off a job, if you put him in prison he loses his job, his family goes on welfare, he loses his pension, he loses his Blue Cross and Blue Shield, who gains from that? Maybe better yet that his pay is docked 10% or 15% per week and he's required to continue to work to support his family because he may be, one, a good provider, may be a good father, he may be a good husband, but he also may be a thief. And by fining him and by making him pay restitution for the wrong that he did, it may be more advantageous for us all than to

lock him up and we have to pay these tremendous prison costs.

ASSEMBLYMAN CODEY: That's fine and good but you know and I know that the kind of individual you're talking about would not see the inside of a prison, in most cases.

MR. GILMAN: Well, I question that.

ASSEMBLYMAN CODEY: Well, I would question your question.

MR. GILMAN: I think that they find the inside of a prison far too often. All you have to do is speak to the Warden of Trenton State Prison. Let him talk to you about how many people are in prison who should not be there, and they're talking not about 20 or 30%, they're talking about 65 and 70%. Bring them down here and you speak to them and let them tell you who should be in and who shouldn't. You will see that they'll be talking about the very thing that we're talking about, dangerous, violent offenders. Kids who steal cars. What are they doing in prison? Con artists, you put them in prison, they come out and they write bad paper again. Prison doesn't stop it but it costs us \$20,000 a year to house them.

I am suggesting that we have to find alternative sanctions other than imprisonment to deal with most of the people who are now in prison and use prisons as a limited sanction for violent and dangerous offenders.

ASSEMBLYMAN CODEY: Where do you put the embezzler?

MR. GILMAN: You put the embezzler - let me tell you what they did in New York with a murderer. A doctor who was a murderer who was charged with manslaughter got a sentence of spending every weekend for two years in the prison fixing inmates teeth. He was a dentist. Well, he went to Rikers Island and he found out that the dental

equipment was so terrible that he said that he would bring a civil suit against the State if they didn't get him some decent equipment to work with. I think that was a good sentence.

ASSEMBLYMAN CODEY: But you didn't answer my question.

MR. GILMAN: I suggest that the embezzler would either through fines, restitution, restriction of his liberty which can be less than imprisonment - maybe he'll have to work for his victim so many hours per week, maybe he'll have to pay out a certain public duty.

ASSEMBLYMAN CODEY: Or work for the State?

MR. GILMAN: Or work for the State. We can be very imaginative when we wish to, when we want to avoid imprisonment for high professional white collar criminals but when it comes to a street person who gets himself into a jam and is not violent, the first thought is prison. Let us take the time that we have spent talking about prisons today, talking about alternatives to prison and you will see the kind of code that we could put together. Our National Council on Crime and Delinquency will be more than happy to spend as much time as this Committee would like to spend working on that very issue.

ASSEMBLYMAN HAWKINS: We've got tonight and tomorrow, sir, and I hope you are going to be around.

MR. GILMAN: Well, I didn't plan to but I accept your invitation.

ASSEMBLYMAN HAWKINS: Thank you.

Also, I have a proposal I would like you to study. It's my only copy but I would value your comments on it later, if you have time. You can return my only copy.

There is a question for you, sir.

ASSEMBLYPERSON BERMAN: As I understand it, the basic complaint you have about the provisions of the Code

have to do with a lack of philosophy, and you indicate that one of the main points of the philosophy that your organization espouses has to do with separation of dangerous and non-dangerous crimes. Are there any other areas of that philosophy which you might want to highlight at this point?

MR. GILMAN: Yes, I mentioned the issue of parole.

ASSEMBLYPERSON BERMAN: Right.

MR. GILMAN: I think that's a confusion. There is the question of disorderlies. There's the problem of -- but those are the highlights of the bill in terms of the sentencing and parole provisions. And we really came here today prepared to talk about sentencing and parole. We did not do a complete study of every provision because we think that is the major thrust of the bill in terms of what happens on that. It's extended terms, it's ordinary terms and the parole provisions that we were most concerned about.

ASSEMBLYMAN HAWKINS: We'll discuss it more completely later. As I said, you are more than welcome to stay and I hope you do.

Any further questions?

Thank you very much, sir.

MR. GILMAN: Thank you.

ASSEMBLYMAN HAWKINS: Next, we have a Mr. Steven Gifis, Esquire.

First we will take a short recess.

(recess)

ASSEMBLYMAN HAWKINS: We will proceed until one o'clock or close thereto and then break until two o'clock.

Our next witness on the list is Steven H. Gifis, Esq., Rutgers University School of Law. After his testimony, we will hear Mr. Philip Showell; Mr. Martin Barrett, who, I think, might have an opportunity to speak before we break; and Mr. Richard Singer.

Mr. Gifis.

S T E V E N     H.     G I F I S: I appreciate the opportunity to appear before the Committee to give my views on the question of sentencing and parole.

I intend this morning to talk to you a little bit about the Special Study Committee that I headed up of the New Jersey Association on Correction, which has issued a fairly lengthy and detailed report, arguing essentially for an automatic paroling system.

ASSEMBLYMAN HAWKINS: Pardon me. Is Mr. Philip Showell also going to be testifying?

MR. GIFIS: Mr. Showell will testify, but he will speak specifically to some other issues that concern the Association. So there won't be any overlap in our testimony.

ASSEMBLYMAN HAWKINS: All right.

MR. GIFIS: I am speaking both as Chairman of that Committee and as a Professor of Law at Rutgers Law School and interested and specializing in the area of criminal corrections.

Before I get into some prepared remarks, I can't help but engage in the debate that has been going on this morning. I think, Assemblyman Codey, that you have asked legitimate questions of the previous speakers as to what do you do, for example, with an embezzler. I don't think a fair answer is that you fine them or tax them because as James Q. Wilson said in that article, that demeans the criminal process when you treat criminal offenses as

though they were civil wrongs.

If a bank president misapplies funds or embezzles, he not only commits a wrong that is tortious against those depositors, but he violates a public law that condemns that criminal activity.

I would go further and say that nothing should be in your Penal Code unless you are persuaded that it is morally wrong. However you define that term, the criminal law attempts to direct conforming behavior through the promise of a sanction for conduct that we deem wrongful. I notice, for example, on the question of prostitution, the Committee felt on the one hand it ought not to be a crime, but on the other hand there would be a public outcry if it wasn't proscribed in some manner. Before you include it in the Penal Law, you should reach the firm conclusion that it is morally wrong in your opinion to engage in the proscribed conduct. If not - if a person is just sick and not a criminal - then he ought not to be processed in the criminal system. The addict, for example, who is not a pusher or who is an incidental pusher to a very small extent, and who is genuinely sick, should not be rehabilitated at Trenton State Prison. He should not be processed in the criminal process. He should be diverted out in some appropriate program that is, in fact, directed toward rehabilitation.

ASSEMBLYMAN CODEY: Mr. Gifis, may I interrupt you for a second. Are you trying to say that we should determine which crimes are sick crimes, in the sense that the individual is sick mentally or physically?

MR. GIFIS: Well, yes, I would say something like that. I distinguish in my analysis between what I call calculated criminals, people who are the arch type, who plot, as you put it this morning, to kill someone, and people who are essentially treatable.

ASSEMBLYMAN CODEY: But wouldn't most people agree that someone who plots to kill someone is sick?

MR. GIFIS: But that person may not be treatable under our system and he is definitely a danger. Sure, you can argue that every person who commits crime is sick. Then you can treat them to death, if you want, by rehabilitating them. But I don't think that that is a very helpful way to analyze the criminal law. Instead of starting, as so many of us do, with the crimes that are genuinely of situational stress, or of economic or addiction character, I prefer to start with the arch type of crime.

Think of any crime at all and you ask yourself; how should you handle the sentencing and parole provisions with respect to that crime. But think of a crime that is a crime that in the theory of the criminal law people could actually plan, consider the sanctions and react to it, like maybe tax evasion, as a typical kind of crime of this character. A tax evader looks at his income situation and decides that he wants to build a swimming pool instead of paying the State of New Jersey or the federal government a just portion of his earnings. That person made a calculated risk. If he gets caught, I don't think the person should be fined or taxed. The person should be punished.

ASSEMBLYMAN HAWKINS: How?

MR. GIFIS: So I would disagree with the previous speakers, both John Cannel and Dave Gilman, to the extent they suggested that punishment is not a legitimate purpose of the criminal law.

ASSEMBLYMAN HAWKINS: How would they be punished, sir?

MR. GIFIS: The tax evader would be put in jail for an appropriate period of time, not for 10 or 20 years. The jailing provision together with the collateral consequences of the crime for him would be a powerful

deterrent for others.

ASSEMBLYMAN CODEY: Let me say if we put all the tax evaders in jail, there would be nobody walking the streets.

MR. GIFIS: You might have to have a revolving situation where you have fewer people in jail for other crimes and more people in jail for crimes that are of the calculating character.

ASSEMBLYMAN HAWKINS: May I ask you: Why would you throw the tax evader in jail?

MR. GIFIS: To punish the person for the violation of a penal statute, duly enacted by the Legislature.

ASSEMBLYMAN HAWKINS: In other words, purely for the purpose of punishment?

MR. GIFIS: If you read through the report - and this is an introduction to my remarks, I guess ---

ASSEMBLYMAN HAWKINS: What report?

MR. GIFIS: The Parole Report.

When trying to figure out what kind of paroling system New Jersey should have, you can't do that in a vacuum; you have to consider what kind of a penal system we have, what is the purpose for a prison term, because parole essentially cuts short that prison term. In doing that, I think it is to the Committee's credit that you have lumped together sentencing and parole because too long we have debated sentencing, penal provisions and parole provisions, all by themselves. It seems to me that someone is sent to prison fundamentally not to be rehabilitated, not to be redirected, but they are sent there as punishment and for community protection.

ASSEMBLYMAN HAWKINS: Who sends them there for punishment?

MR. GIFIS: A judge. Any judge sending an offender for armed robbery to Trenton State Prison doesn't say,

"I am hoping that you can be ---"

ASSEMBLYMAN HAWKINS: Let me say something to you, sir: What we are here today doing is making a determination why a person should be sent to prison. It is not just as simple as A, B, C that he is sent there just for punishment. I respectfully disagree that ---

MR. GIFIS: Let me elaborate on that because it is an important theme in the report.

ASSEMBLYMAN HAWKINS: But you never answered my question. Why should a tax evader be sent to jail for punishment?

MR. GIFIS: Well, we send him to jail, as I said, for punishment, but that encompasses a lot more. We hope to deter others from committing the offense.

ASSEMBLYMAN HAWKINS: Do you have any evidence that sending a tax evader to jail for punishment will deter others?

MR. GIFIS: The problem with asking questions of that kind is that we have not used imprisonment as a deterrent, in fact. In New York City, for example, the tax evader has about a one in ten chance of going to prison. In some mid-western states, he has a nine to ---

ASSEMBLYMAN CODEY: A convicted tax evader?

MR. GIFIS: That's right. A convicted tax evader.

ASSEMBLYMAN HAWKINS: Are you saying to me you have no evidence to show that punishment will do anything else but punish?

MR. GIFIS: I would say that is probably true.

ASSEMBLYMAN HAWKINS: Now that we have passed that hurdle, what you are saying then with respect to the tax evader is that we would put him in jail purely for punishment and that is it?

MR. GIFIS: No. The whole penal law is based on the theory of deterrence. That theory is not demonstrated or proved.

ASSEMBLYMAN HAWKINS: You said that there is no proof that putting people in jail will deter.

MR. GIFIS: Neither is there proof that if we had no law against tax evasion --- Suppose we had no penalty for tax evasion, but it was just a moral duty.

ASSEMBLYMAN HAWKINS: But, sir, you are throwing out all other possibilities of punishment other than putting him in jail.

MR. GIFIS: No, I am not.

ASSEMBLYMAN HAWKINS: You said, "Throw him in jail as punishment."

MR. GIFIS: That would be my general reaction to most tax evaders. There might be circumstances under which a tax evader would not go to jail. I am not talking about mandatory punishment.

ASSEMBLYMAN HAWKINS: Then you are not saying, "Throw all tax evaders in jail that are convicted"?

MR. GIFIS: What I am saying is that if you send a tax evader to jail, you do so for purposes of punishment, purely and simply, and hopefully to deter and to add credibility to the criminal system.

ASSEMBLYMAN HAWKINS: Why should we throw them in jail? That is what I am trying to find out.

MR. GIFIS: To give some sanction to the law's proscription.

ASSEMBLYMAN HAWKINS: Is there a possibility of another sanction?

MR. GIFIS: There might be, and you would want to encourage the development of lesser sanctions. I think that an 18-month prison term for a tax evader or an embezzler would be a more potent sanction in the deterrents' catalog of attempted deterrents.

ASSEMBLYMAN HAWKINS: Let me ask you this: Upon what facts do you base your opinion?

MR. GIFIS: You see the problem is that you ask:

Does the present system deter? And I say we have no real demonstration that it does. It doesn't answer the question if we eliminate the potential of imprisonment for tax evaders. Suppose we announced today that it is the legislative policy of New Jersey that non-dangerous offenders will not go to prison ever, and there are many business criminals who are non-dangerous. Certainly, we have no experience with such a penal philosophy. Even though we have no evidence that incarcerating the few tax evaders that go to jail now has an impact, it seems to me obvious that eliminating the penal sanction from non-dangerous crimes would have a remarkably deleterious impact on the broad range of crime; that is to say, that the threat of incarceration is, in fact, one of the elements of the status quo.

Too many people ask the question: Is there any proof that deterrents work? The question is also legitimately asked: Is there any proof that it doesn't?

ASSEMBLYMAN HAWKINS: At that point, since we don't know whether it works or whether it doesn't work, you are still back to punishment for punishment's sake. Is that correct?

MR. GIFIS: Well, if we use prisons, they are primarily used for the purpose of punishment.

ASSEMBLYMAN HAWKINS: Now, would you consider that a civilized way of thinking? In other words, you think possibly if someone pulls out someone else's eye, for punishment, pure punishment, we can pull his eye out?

MR. GIFIS: No, I didn't say that you have an eye-for-an-eye philosophy. But I do believe that if penal law is bottomed on a moral condemnation of the act ---

ASSEMBLYMAN HAWKINS: Sir, I understand that. But can you not condemn the act in other ways than throwing someone in jail? That is what I am trying to find out.

MR. GIFIS: You might be able to, yes.

ASSEMBLYMAN HAWKINS: --- and also condemn it in a way in which you can also rehabilitate.

MR. GIFIS: If a person is treatable, then I would encourage treatment. If the person is not treatable, then punishment is all we can do.

ASSEMBLYMAN HAWKINS: Do you think a tax evader in the general terms you have stated is treatable?

MR. GIFIS: I do not.

ASSEMBLYMAN HAWKINS: You think that all tax evaders, generally speaking, are not treatable and should be thrown in jail?

MR. GIFIS: As a class, they are generally not treatable.

ASSEMBLYMAN HAWKINS: Where do you get facts to bolster that?

MR. GIFIS: A tax evader, if you are talking about substantial sums of money -- how are you going to rehabilitate him? Are you going to teach him new jobs? No, he has a good job. He made money and he didn't pay taxes. Are you going to teach him moral duty?

ASSEMBLYMAN HAWKINS: Do you think that he will repeat his crime?

MR. GIFIS: That depends. If you impose a 10 percent tax and he has made a million dollars, I guess he will, because it is a surtax. If on the other hand, there is a sufficient level of condemnation, collateral consequences - a lawyer, for example, who evades and loses his professional license ---

ASSEMBLYMAN HAWKINS: That is very much punishment.

MR. GIFIS: (Continuing) -- that is very much punishment.

ASSEMBLYMAN HAWKINS: But need he be thrown in jail?

MR. GIFIS: He may not have to be thrown in jail then. My point - and perhaps we got off on the wrong

track here - is not that you should punish every calculating criminal necessarily, but that when you utilize prisons, and we will continue to utilize them for large numbers of offenders, then we should recognize square out that we do so for the purpose of punishment and possibly deterrence; we do so for the purpose of incapacitation. We don't send a person to Trenton State Prison to become a good person. I make this remark because it is central to an understanding of the paroling process that we ask why we use prisons. It wasn't so much that I am trying to say that we should or should not use prisons. What I am saying is that, to the extent we decide that sending a man to jail is the classic criminal sanction - if X embezzles, the community says, "If you are caught and convicted, you can go to jail" - and this is the classic criminal sanction --- to the extent that we decide to utilize it for any offenders, and we will for a variety, including some non-dangerous offenders, I don't think we should permit an offender, for example, to earn his way out of that prison environment, because we are not sending him there for the purpose of rehabilitation, honestly.

James Q. Wilson in that article said that the intellectuals have ---

ASSEMBLYMAN HAWKINS: Who do you mean?

MR. GIFIS: Society, all of us. If you take someone who kills his wife ---

ASSEMBLYMAN HAWKINS: Suppose we decide to send him to an institution for rehabilitation; is that allowable?

MR. GIFIS: I do not think it would be wise, not a maximum-security institution, because I don't think that is an effective use of public funds.

ASSEMBLYMAN HAWKINS: What about a minimum-security institution?

MR. GIFIS: If you are talking about a place where a man works in the community during the day, comes back and

sleeps at night, it is a smaller place, there is counselling, etc., you are not talking about a prison, not as we have understood the term for the past 200 years.

What I am talking about is if you send a man to a place where there are cages, small cells, regimentation, where life is kind of unpleasant, where there are opportunities for recreation, but mostly to pass time, that is a punishment environment and nothing we do, short of dramatic overhaul, is going to change that. That environment is necessary and desirable for some offenders.

Take your contract killer. Your contract killer, if he is not executed, should go off to a penal environment for at least a time. I use the tax evader as another classic example. There are embezzlers who have cheated or people, for example, who have sold stock fraudulently and made million and can't recover that money, but you can take away what every person has in common, and that is liberty.

To my mind, there is nothing regressive, unhumanitarian, evil or barbaric in the idea that a man pays with his liberty for an offense against the community, because in a very real sense we all have one precious commodity, liberty. We all have different wealth. We all have different circumstances. But if you take away one man's day, you are taking away something that he never can replace.

It seems to me as long as we don't have capital punishment, the Penal Code depends upon a prison environment as an available sanction for the calculating criminal, for the organized criminal, for the professional thief, and for the heinous offender. A frank recognition of that fact would guide us in deciding who should go to prison.

Take the violent rapist, who you think is maybe ill, but who is nevertheless a violent rapist and who is a danger to the community. You are not going to let him out by earning a G.Ed. degree or by learning a new skill, say, auto crafts. I would hate to live in a community in

which violent criminals were let out because they demonstrated to some parole board that they learned a new skill. That is not what, I think, the Penal Code is all about. That is not to say that a violent rapist who is genuinely ill should not be treated, if we can, before he gets into prison. But if I were a judge sitting in a Superior Court room, sending a man off for 12 to 15 years to Trenton, I would not have any pretext that my purpose was that he would be rehabilitated.

I think you will see when you study the reasons judges are giving for their sentences, which they must do now - and you should just go and sit in a courtroom for a morning at sentencing day --the judges are honestly saying to people who go off to prison, "The purpose of this sentence is punitive and deterrent." They don't say, because none of them believe it, "The purpose of a Trenton State sentence is rehabilitation."

That is not to say the system should not be dedicated to rehabilitation. It should for those who can be rehabilitated. First offenders should be diverted from the criminal system into PTI programs, Pre-Trial Intervention programs. Addicts - I used that example - should be treated. We have a moral and perhaps an ethical and legal duty to do that.

ASSEMBLYMAN HAWKINS: Wait a minute. If addicts break the law, why shouldn't they be punished?

MR. GIFIS: Because, if they are treatable, then the community doesn't have the same moral outrage.

ASSEMBLYMAN HAWKINS: Who makes the determination that they are treatable?

MR. GIFIS: A sentencing judge, on the basis of materials presented to him, would decide if he is treatable.

ASSEMBLYMAN HAWKINS: Speaking of the tax evader, may the sentencing judge make that same determination?

MR. GIFIS: Yes, he may. When I gave the tax evader example, it wasn't that it was a mandatory thing; it was

a classic example. I will use contract killer. Take a person who sells heroin to little kids. He is not addicted. That person, if not executed, and I don't pass on that question at this time, should go to prison and he should not go to a prison where he earns his way out on some contract system of parole. He should go to prison because the community in depriving him of liberty is saying forcefully to other would-be heroin pushers to kids that this is an act society condemns so severely that we take away 15 years of your freedom, or whatever. That's all we have. We can either shoot them, hang them or execute them by whatever method we use, or we can imprison them.

ASSEMBLYMAN HAWKINS: What about something less and in the middle, such as mayhem?

MR. GIFIS: I think mayhem is sufficiently serious ---

ASSEMBLYMAN HAWKINS: Why can't we just cut off their arm as punishment?

MR. GIFIS: I would not necessarily say that that is inappropriate.

In a civilized community, we can't, of course, go around cutting off people's hands.

ASSEMBLYMAN CODEY: You are way to the right of me.

MR. GIFIS: No. I say that not in terms that I am advancing that. What I am saying is this: Suppose we could take a person who is an armed robber and suppose that he had been recidivating for 20 years and he has cost the community X thousands of dollars. Suppose that through some operation, he could be made to be not an armed robber and be a totally ordinary citizen. I am not saying whether I would espouse that or not. But certainly the least drastic alternative philosophy that will be espoused this afternoon by Professor Singer might support the idea of drugs, methadone, lobotomy. I would, for example, say that a drug addict should be sentenced to a mandatory

methadone program rather than be put in prison, if the mandatory methadone program will work to curb his habit. I am not against coercion in the treatment philosophy if the method of coercion is one that is reasonably calculated to serve the public good. For example, I might tell an offender who has been in a bar fight and hurt somebody and who hasn't been working that as a condition of probation he must go out and get a job and keep it. I don't think that that is beyond the pale of the Penal Law to require there be some objective good that comes out of the sentence.

What I am saying is that, if we put a guy in prison, finally, we are doing so to punish him. And if I had a million dollars to spend on rehabilitation, I would not spend it by building a new wing on Trenton State Prison to teach people how to read or write or whatever. I would spend it in the community.

So, the proposal that is before you, in its most simple form, says that every penal sentence to a State Prison - and I am not talking about reformatory sentences or young offenders or the lesser sanctions we have; I am talking about the State Prison system because that is what the report is directed to, the 6,000 people that get sentenced to maximum-security institutions -- every prison sentence would by operation of law have a specific, punitive and correctional component. You would not attempt to do them together. So if a person got, for example, a nine-year sentence, the report recommends - and you might change the division - that one-third of that be punitive and two-thirds of that be correctional. The correctional portion is spent in the community under after-care parole supervision. The punitive portion is spent in a humane prison environment. The one-third/two-thirds division is based historically on the eligibility system we now have.

The report recognizes there might be some offenders

who doing that one-third period cause such havoc in the prison that we need a control mechanism for them. We, therefore, recommend that the Parole Board have the power not to decide whom to release, but to decide whom not to release. The Parole Board would hold hearings only in those cases where inmates by their institutional adjustment suggested an unfitness for release, and that means that during the one-third period, the Parole Board could hold hearings if, for example, an inmate had a certain number of rules violations or whatever. And, don't forget, any serious wrong-doing in prison can be punished by consecutive sentences in the criminal court.

The Parole Board would thus have the power to delay the release of inmates for a second third of their sentence. So the nine-year person I spoke of would spend three years in prison and six years in the community unless, by his prison adjustment, he demonstrated that he was worthy of being kept for an additional third.

Under this proposal, as under the Model Penal Code, all inmates would be released on parole after, in this case, two-thirds of their sentence maximum. The reason for this is that we feel very strongly that all inmates should require, if they have been serious enough to be sent to prison, a reintegration period under this community supervision.

Right now, parole works exactly upside down. A good risk, a person who has no prior record to speak of and has good institutional adjustment, with a nine-year sentence, will be paroled at first eligibility and he gets a long period of parole supervision. The bad risk, the guy who messes up in prison frequently, has a bad record, etc., is not a fit person for parole release. He spends the entire time in prison and maxes out. Today, as I think the report indicates, 20 percent of our inmates max out. Yes, about 20 percent max out. That means they get no parole supervision. They get \$50, enough to buy a gun, and out

they go. I regard this as upside down. It seems to me the better a person is as a parole risk, the shorter his parole supervision time should be; and the worse he is as a parole risk, the longer we should have parole time over him.

So, it seems to me that the Parole Board— and this is the real problem: Inmates, for example, are asking for a contract system of parole release. They are asking for it because the reasons they get from the Parole Board make them feel it is an arbitrary and capricious process and they would rather have more manipulative control over their release dates. So would we all. I mean, we, the people involved in penal work, talk about First Amendment rights of inmates, their right to religious freedom, and God knows what. What an inmate really wants to know is: How much time am I going to do? When am I going to get out? He is interested in liberty as we all would be. Therefore, they ask for a contract system because they feel it would be more predictable.

I suggest to you that if, in fact, we use prisons to punish people principally and we use community resources to rehabilitate them, as I feel we should, then to have a man earn his way out of a prison is fundamentally at odds. So we cannot embrace a contract system of release determination because I don't think that the rapist should have a role in saying when he gets out. I think we have to say for what period does the community require either his incapacitation or his detention.

Therefore, we have been asking the Parole Board to perform a function which is really literally impossible. We have been asking them to parole people when they are ready to resume their rightful place in the community. I don't feel any Parole Board, no matter how well staffed or what kind of reports they utilize, which John Cannel spoke of, can ever make that judgment realistically or honestly.

All of the literature - and I have plenty of proof of this and it is in the report - suggests that our present ability to predict future human behavior is worse than bad. There is the operation Backstrum, which is reported here, where in New York they released a lot of mental patients because they had to comply with certain due process requirements that got adopted. They found that those released earlier than they would have been released under the operational procedures did much better, in fact, than those released later. I agree with John Cannel that the longer you keep a man in prison, the less likely he is not to recidivate.

The point is that our statute law says that a parole board— this is why Nick Heil resigned really and I sympathize with some of his view on this. He was asked to say when a particular man was ready for release. There is such tremendous pressure from overcrowding to empty out the prison that pressure was brought to bear on him and his office to release more people, even though in his judgment he could not say and sleep at night that they were fit for release.

ASSEMBLYMAN CODEY: Wasn't Mr. Heil's comment that he was getting pressure from the Commissioner's office and the Governor's office to release people who should not have been released?

MR. GIFIS: That's right. - "should not" in the sense that they will resume their rightful places in the community. He would not necessarily say "should not" in terms of "have they incurred enough punishment", for a limited period of time.

John Cannel said that parole should ideally let a man out when he is ready for release. By logical extension, your Committee should adopt zero to life sentences for all important crimes and a person should be released only when the authorities find he is ready for

release. I regard that myself as obnoxious. That is what they do in California. I regard it as obnoxious because it treats all offenders alike, regardless of what harm they have caused to the community.

I don't think anyone on the Committee - maybe I am wrong - would vote for a zip to life sentence for someone who is a purse-snatcher and who hasn't hurt anybody. Zip to life is zero, indeterminant to life. Yet if John Cannel's view is accepted, that person is likely to recidivate, likely to continue snatching purses or passing bad checks, whatever.

So, it isn't just that parole would operate with reference to a prediction as to law-abiding behavior; so should prison release.

Now, we do have civil commitment proceedings by which dangerous people can be put away. We don't use them, but we have them. It would seem to me that if your goal is to confine the dangerous, they should be confined by civil process if they are dangerous to themselves or others, and we have a system for that. If, on the other hand, your goal is to punish and deter and rehabilitate and the other functions of a penal system, then you can't speak solely to whether they are fit for release without reference to what harm they have caused, because that is what the penal law is about, measuring the harm against the sanction. You have done that in your classification system. You have graded them in that fashion.

Therefore, it seems to me that we can't trigger a parole-release decision based upon a potential for a good, law-abiding life. What we have to ask instead is a more simple question: How much time is warranted for what harms? And that is a legislative matter.

In addition to predicting future behavior, Nick Heil told me that his greatest pleasure was in taking a sentence that was unwarranted and through the paroling

process making it more equitable. I submit to you that if you permit parole to be utilized as a sentence correction mechanism, you will never find the reforms that are necessary in the sentencing structure. If a sentence of ten years is unwarranted, the courts should solve that problem and the courts should adjust their sentence. No parole board through the guise of deferred sentencing should amend an unfair sentence. I think that is a perversion of the paroling process and that it takes away.

I had a case where a fellow was a first offender. He was drunk and he hurt someone. He got a five- to seven-year sentence. I argued in the Appellate Court in New Jersey - and we have appellate review - that for a first offender, no previous record --I think he was 28 years old or 31 - no, he was 31, just too old to go to a reformatory --- for a first offender where there was a drunkenness situation with no prior record, not even public intoxication, that a sentence in the lower range, not necessarily probation, but a lower range, zero to seven, was warranted as a matter of law, and that no first offender who commits a crime under those circumstances should get a five- to seven-year period in terms of sentencing guidelines. The court asked, "How long has he been in?" By the time it came up, it was about two and one-third years. They asked, "Where is he?" I said, "Leesburg." "Well, Professor Gifis, if he is such a good risk for parole, he will be released on first eligibility. Won't that solve the problem?" In fact, he was released on first eligibility. But I say that an offender like that should not have received a five to seven with the hope that the parole board would straighten out the sentence, and that an offender who has no prior record and who has mitigating circumstances should get a lower than maximum sentence in the sanction ranks. I believe that to allow parole to serve that

function does disservice to both parole and to the sentencing structure.

The reports spells out in some detail the program. The program needn't result in shorter confinements. It is more predictable and rational, but it needn't result in emptying the jails. You are not saying, for example, gee, if you release people after a third, they are going to wind up only doing three years of a nine-year sentence. The average median time already served in prison is 26 months. You have to deal with the reality. Assemblyman Codey has spoken about true time. I agree with that and I think giving out 15-year sentences and letting people go after 2 is ridiculous. I don't know what his position on that is, but I would argue that the solution then lies in true time, as he puts it, but also in shortening the 15-year max. The community ought to know that what happens to an armed robber is that he gets five years in fact. And if they think that is too short or too long, they should talk about it. But they ought to know and have a legitimate role to play in the decision-making process. All these work credits, good-time credits, whatever --- I have talked to judges at judicial seminars and I have asked them what they thought about a guy that got a 12 to 15. They say, "Well, he would be eligible after one third of 15; that would be 5 years, right?" I say, no. The good time in work credits takes away fully 40 percent of his sentence. So a 12 to 15 is automatically converted into a sentence of 7 to 9. Then, of course, it gets further converted by the fact that after one-third of the 9, which is 3 years, a person is eligible for release. Then he earns maybe work credits and special credits for giving blood or whatever. So the sentence gets whittled down. And it can be said, honestly, - and this is not true only for New Jersey, but the whole country - that the American prison sentences are the

longest in the civilized world, but they are talking about imposed sentences, not actual time. The actual time is roughly median all over the country, about 24, 26 months, some have 30 months, some have 12 months. I think that is long enough to accomplish the legitimate purposes of a prison experience for most offenders.

Let me say beyond the parole remarks, which are more fully elaborated in the report, I wanted to express a word or two about extended terms, my own views. It is easy to criticize extended terms on the ground that the fourth-time, bad-check passer winds up with a life sentence. I wouldn't give a fourth-time, bad-check passer a life sentence and I hope that none of you would, because I don't think that the harm he poses to the community is serious enough to justify an extended term.

I believe, however, in extended terms. I believe in extended terms because I think that the development of sanction ranges historically has been geared by the Legislature to the worst case. Take armed robbery. How much time do you think a man should spend if he is punished for armed robbery? You wouldn't say 15 years for a robbery. Would you say 25 for armed robbery? That is the sanction range, zero to 25 - 15 years for the robbery feature, 10 years for the armed feature. You might say 5 to 7. You might say 7 to 9. You might say 3 to 7 or whatever. But you wouldn't say 25 years. We provide that 25-year range to reach the worst case of the persistent felony offender, the heinous guy, the guy who causes injury during the armed robbery, etc. And we leave to the wisdom of the sentencing judges the proper allocation of punishment within that broad range.

I think that everyone who studies sentencing procedure believes that the sanction ranges are too broad and discretion is too unchecked. I think, frankly,

it is a cop-out for the Legislature not to decide, based primarily on the crime, what maximum punishment is warranted for the typical offense. And, if you don't think 25 years is warranted for armed robbery, you shouldn't provide it by law for the average case, and then provide for the special case by an extended sentencing provision which provides for professional criminals, heinous criminals, the criminal who kills for profit, the persistent felony offender. I agree with the former speakers that the drafting of such a provision is difficult, that you must be careful not to trample on civil liberties in so doing. But I disagree that it is not possible to do it. I think, for example, you can say that a person who commits a third felony offense within a five-year period warrants extended sentencing. I think you can say that a person who has multiple victims in a homicide deserves extended sentencing. I think you can say that the person who kills for profit merits extended sentencing.

ASSEMBLYMAN HAWKINS: Wouldn't the multiple victims each be treated as a separate homicide?

MR. GIFIS: No, but the point is that people who kill six or eight people on the top of a gun tower or whatever cause such an outrage in the public mind that I think to put them away for a limited period like five years does a disservice to the ---

ASSEMBLYMAN HAWKINS: Under our present system, wouldn't each be entitled to a life sentence?

MR. GIFIS: Yes.

ASSEMBLYMAN HAWKINS: Would it make much difference if they got six life sentences?

MR. GIFIS: I think it would for this reason: I think that extended sentencing makes the judge focus on the question of long-term confinement. The six life sentences are not a good example of this. But take a

fellow who has four armed robberies. He might get 5 to 7 for each, consecutive. Then he gets 20 to 28. I would rather that the decision be made in a single proceeding that 20 to 28 is the proper amount of punishment or incapacitation or whatever. I would also hope that it would be armed with a variety of due process safeguards: a special sentencing hearing, limited evidentiary materials, appeal, maybe even a jury. Professor Singer will recommend a jury in that matter, that a jury should decide whether a person is a persistent felony offender and warrants long-term confinement. I don't know if I agree with that or not, but it is an idea.

My point is that for too long we have taken crime, imagined the worst case, created a sanction range and then hoped the judges would honestly and conscientiously not utilize it for inappropriate cases. We have 400 some judges in the State who all have individualized philosophies about what crimes turn them on. I have been before a judge and I have been told, "He's hard on pushers - he's hard on this - he's hard on that. He's hard on organized criminals or whatever." And the sentence turns not so much on what you did or who you are, but on by whom you are sentenced. It seems to me that by restricting the sanction ranges as the Code recommends and by creating a set of extended sentencing provisions geared in to the particularly dangerous offenders, we would do much better.

By way of conclusion, let me just emphasize the report that I wanted to speak to that calls for automatic parole release is a fallback, some of said, to the "just desert" theory: if you commit a crime, you get punished and do your time. It is also a fallback, some say, to determinate sentencing. In some respects, it is. I will quote you a sentence from the report by way of conclusion here: "In our view the underlying premise for any rational

release system must rest on the recognition that prisons are resorted to primarily as punishment by confinement as a means of incapacitating the offender and, hopefully, as a deterrent to others." Now, I am not saying that we ought to increase our utilization of prisons, and perhaps I was misunderstood in the beginning. What I am saying is that to the extent you utilize prisons at all, you do so for punitive purposes essentially. And if we could divorce the correctional aspects from the punitive aspect, we would have a much more rational system.

So I urge you not to adopt a system where inmates are eligible immediately for release because it does a disservice to the crime for which they have been convicted, neither a system whereby they earn their release, but rather a system where a person does a certain amount of time in prison as a punishment and does a certain amount of time in the community for the rehabilitation it offers.

ASSEMBLYMAN HAWKINS: Thank you very much, sir.

(Report of the Special Study Committee on Parole Reform of the New Jersey Association on Correction, submitted by Professor Gifis, is on file with the Committee.)

ASSEMBLYMAN CODEY: Mr. Gifis, what is your position at Rutgers' Law School?

MR. GIFIS: I am a Professor of Law at Rutgers' Law School and have been teaching there for the last six years, specializing in the area of criminal corrections.

ASSEMBLYMAN HAWKINS: Mr. Philip Showell, an associate of Mr. Gifis, New Jersey Association on Correction.

P H I L I P S H O W E L L: Although you have copies of the statement, I do want to run through it briefly.

Mr. Chairman and members of the Committee, I guess I feel obliged to lay a bit of historical perspective,

and that is always somewhat painful. The version that you have before you of a new Penal Code for New Jersey actually began more than 20 years ago in the American Law Institute in the development of their Model Penal Code, and specifically the sentencing and parole provisions, I think, were in draft form, exactly the point we are getting to here, in the fall of 1955. The New Jersey Criminal Law Revision Commission completed its work in October of 1971 and here we are in 1975.

There is one common thread that has gone through the major effort that has been undertaken to date in developing a Model Penal Code for this State and it is that in each instance, both with the ALI and with the New Jersey Criminal Law Commission, commission members and staffs spent a very substantial majority of their time in the substantive criminal law. As their self-imposed deadlines for completion of work arrived, they kind of rushed through the sentencing and parole provisions. I am somewhat distressed that we seem to be in the same posture here today. Of course, there is a time when everything undertaken is or should be completed, and certainly we do not depart from the commitment of the Chairman and the Governor to see a new Penal Code enacted, if at all possible, this year.

On the other hand, I think the nature of this morning's debate and a multiplicity of somewhat late-arriving proposals that are coming before you recently or to be made today really moves me to argue for some delay. By that, I don't mean to raise the spectre of something that will go on for two or three months. And I have talked to John Tumulty and I understand the difficulties.

ASSEMBLYMAN HAWKINS: How much time delay are you suggesting?

MR. SHOWELL: You want to pin me to a specific time.

ASSEMBLYMAN HAWKINS: Why would we need the delay?

MR. SHOWELL: I think from what I know-- and I have not read the consensus draft from the Governor's Office that embodies the thought of the Public Defender and Institutions and Agencies inputs. I am aware of our own proposal; I am aware of that proposal. I am aware of the proposal embodying the American Correctional Association's mutual agreement plan. There are a couple of proposed draft bills from inmate groups which the Committee may have already considered. And there are issues in addition with regard to sentencing that have been raised by both the speaker for the NCCD and I know that you will be asked to consider seriously, and hope you do, some proposals you will hear this afternoon from Richard Singer of the Prison Law Clinic at Rutgers.

When I consider those proposals which are new to the Committee or have been recently brought to its attention, some clear distinctions are there. I think some valuable research effort has gone into each of these proposals. I think they fully deserve and require careful consideration of the Committee. I am aware that you have put in some long hours and I know that you are prepared to begin doing that again today.

I guess what I would suggest is a couple of weeks, no more than that.

ASSEMBLYMAN HAWKINS: Why do we need a couple of weeks?

MR. SHOWELL: I think that the matters that are addressed in these various proposals that I have identified are significantly enough different and embody critical questions of philosophy and thrust of the whole Code, both substantive and procedural, that I just really think that they deserve something more nearly approaching equal time.

ASSEMBLYMAN HAWKINS: You don't think that we

Could handle it in the next 48 hours?

MR. SHOWELL: I think that you could; I am afraid that you would.

ASSEMBLYMAN HAWKINS: Don't let me interrupt you. I'm sorry.

MR. SHOWELL: All right. So much for that. I think I would note too as I did in the letter, and it has been brought to your attention - George Bohlinger, the Reviser of Statutes drew the Committee's attention to a couple of studies that are underway. I do not know, and haven't been able to check, as to the real availability to you in written form particularly of the evaluation of sentencing practice under Model Code enactments in New York and California that are quite similar to those that are before you from the New Jersey Commission. But I think there again this is valuable data. People keep making studies and at some point I know you have to say, "Hey, that's it. We have to get on."

If, indeed, the schedule that you propose in the next 48 hours seems to be one that you have to live with -- and I did consult with the Governor's Office about the intensity of pressure they might have you under. I was told on Friday that really there would be no dissatisfaction in that office.

ASSEMBLYMAN HAWKINS: May I suggest something?

MR. SHOWELL: Yes.

ASSEMBLYMAN HAWKINS: I appreciate that. But it is not only the Governor's Office that wants this --

MR. SHOWELL: It is you.

ASSEMBLYMAN HAWKINS: (Continuing) -- but it is the sponsor of the bill that wants it as soon as possible.

MR. SHOWELL: I understand.

ASSEMBLYMAN HAWKINS: I am well aware politically what happens when we delay. And, politically, I don't wish this State to have a delayed Penal Code.

MR. SHOWELL: I agree with that.

Okay. In the event then that some further delay in deliberation is impossible, we would like, at least at this point, to second the recommendation made by Dave Gilman of NCCD that the Code include a provision to mandate creation of a standing Penal Law Revision Commission so that we have some continuing monitoring of implementation and we can respond in the State of New Jersey to any difficulties that despite our best efforts may arise through implementation, and also to deal with some questions that I think we can see will either recur or have been specifically set aside. Here I am talking specifically about the exception that the Code takes to the Controlled Dangerous Substance Act, which again may come to us in a different form once the work of the Menza Commission is fully reported and presented.

You have heard some of the comments that Professor Gifis made about our Parole Report. I really don't want to go into that. However, I did want to note some points of emphasis that do go to the sentencing side of things, which is dealt with relatively superficially in that report on parole release. We do endorse the proposed Code and other proposals that argue for reduction of sentences generally across the board. And we don't think that the draft of the Commission really goes far enough in this regard. And you have had some other schedules brought to your attention today and earlier. We would favor as an alternative any of those.

The reason for that is really very simple. I think maybe the same study was referred to earlier. In all our research in my office and in connection with the Parole Report, we just haven't been able to find a competent research study that argues with the conclusion that was drawn in 1968 by the California Assembly Committee on Criminal Procedure. Very simply stated, it was that the

longer the sentence, the more likely the offender is to recidivate regardless of the treatment program you may put him through during the course of his incarceration. There just isn't anything there to suggest to the contrary.

Again, with regard to sentencing, I think we are concerned to see that the Code do whatever it reasonably can to provide effective sentencing guidelines to the trial court and, beyond that, to provide for effective diversion, where appropriate, and review of sentences imposed even with the guidelines.

Number one, we would like to see the Code specifically require the judges state not only their reasons for the sentences imposed, but also their reasons for not having chosen what you will later have identified to you as the less drastic alternative. That concept is embodied in the proposal of Rutgers' Prison Law Clinic, which will be brought to your attention later.

We would also like to see the Code mandate creation of an administrative sentencing review mechanism, which is now to my knowledge under study and development by the Administrative Office of the Courts. Nonetheless, we would like to see that mandated in the Code.

We would also like to see mandated statewide implementation of pretrial intervention programs. That also is now being undertaken under the auspices of AOC, but again we would also like to see that specifically mandated in the Code.

The Attorney General's Office in an earlier submission to the Committee recommended that this mandate for pretrial intervention services really be substituted for the specified presumption against imprisonment embodied in the New Jersey Commission draft. We don't agree at all there. We think, however, it should be mandated in reenforcement of that concept, but certainly

not as a substitute for it.

We would also like to draw the Committee's attention to the possibility of mandating for crimes against property by non-dangerous offenders restitution, not to a fund, not to a compensation board, but directly to the victim of the crime. Beyond that, we would like to see the Code mandate development by AOC of an actuarial schedule of payments - restitution, if you will - to victims of crimes of violence as well, those compensations to be paid during the period of parole supervision or, if appropriate, under work release circumstances, and such compensation be fully satisfied by the completion of the term.

Here again, I think we really just strongly feel that while the Code goes a great distance, the proposed Code, even if nothing further were done to it, it certainly constitutes an improvement over our present collection of criminal laws. The victim of crime has indeed been left out of the balance of justice and we feel that while restitution has been kicked around for a long, long while by scholars and others, precious little has been done to make it an effective, daily-living part of the criminal justice system for the victims of crime.

ASSEMBLYMAN CODEY: Mr. Showell, let me interrupt you just for a second. I would like to know your views on what I have spoken about earlier this morning on true sentencing.

MR. SHOWELL: We agree with that. It may not be as clear as we would have hoped in our parole proposal, but indeed I think our parole proposal is predicated on an assumption of true time. When we are talking about a division between what we call descriptively at least and, hopefully, functionally, a punitive and community adjustment portion of the sentence - the present draft of

this Code, as I understand it, provides for the judge to set a specific parole term - it is less clear, although you have set specific ranges for the various categories, 1, 2, 3, and 4 . We were hopeful that that will get pinned down.

Yes, we approve of definite, true-time terms, with one exception - and I think here as John Cannel mentioned earlier we may have some obligation collectively, legislators and all people in the system interested in helping making it work, to educate the public. Here is one difference. We think that it should be a true sentence that the community would understand, but would also allow for purposes of making a prison a manageable place, and that is a problem, that we would still provide for some definition of good time and work time credits, so that they could be presumptively computed by the sentencing judge in arriving at his definite term. I think if you talk to prison administrators and staff and consider some of their problems for a minute, to have nothing to offer anyone in a confinement situation by way of recompense for good behavior or, at least, not disruptive behavior that goes to good order, is really pretty untenable. They do need some "carrot and stick" equipment.

So we feel, yes, we would like to have it be a true term. We think there is a great deal of confusion in the courts now. Some judges definitely understand that and put that through their computer when they give a sentence. They know, but do not advertise, what the actual time served will be. It is a problem, I think, however we go about it. If we were to just cut it flat and say, okay, armed robbery is 4 years no matter what, and you put the guy in the joint ---

ASSEMBLYMAN CODEY: A four-year minimum?

MR. SHOWELL: Yes, or just sentence ---

ASSEMBLYMAN CODEY: You still have the effect that

with good time he doesn't serve the eight, but he serves the four.

MR. SHOWELL: Yes. But I would rather see it work the other way where the actual good time and work time credits were computed at the point of sentencing and that would be taken into account and the sentence established on that basis. Because if those good credits aren't earned, then that is going to be in itself a range, an added range to the sentence.

The difficulty - and I believe John Cannel identified it correctly - is giving the community accurate information. And, at the same time, yes, we think the sentences should be shorter, they should be definite, and the community should know and the inmate should know. None of those things are presently true.

Also there are a couple of important standards that I don't know that are specified in the way that I would like to see them, at least --

ASSEMBLYMAN HAWKINS: About how much more time do you need to end your statement?

MR. SHOWELL: I am just about done.

I would like to draw your attention to Standard 5.9 of the National Advisory Commission on Criminal Justice Standards and Goals Report on Corrections, and that is the one that provides specifically for continuing jurisdiction of sentencing courts over sentenced offenders to insure that the written purpose for which they imposed the sentence and wrote it down is actually taking place or, at least, that the period of incarceration is consistent with that purpose. It also allows that same sentencing court to modify the sentence for any sentenced offender during any period of incarceration imposed.

In closing, again while the philosophy may not be clearly present in the Code, maybe we were wishful thinkers in looking to the Code and seeing in it the prospect, at least, of definite, but shorter terms, and only for those who require it.

We think the adoption of these recommendations, kind of sharpening the focus and setting the guidelines, if added to consideration of the dangerous/non-dangerous categories suggested by NCCD and some of the extended sentencing criteria that will be discussed with you later, would go a long way to really give the whole Code, both substantive and procedural, some real force and meaning.

ASSEMBLYMAN CODEY: Mr. Showell, what is your feeling about the death penalty?

MR. SHOWELL: My Association hasn't taken a position on this in this context because, I guess, quite frankly, we had hoped it wouldn't come up.

ASSEMBLYMAN CODEY: You sound like a politician.

MR. SHOWELL: Well, in the best sense of the word, I hope.

I think it is a sanction that is very troublesome and I am not prepared to cite the huge variety of arguments that have been made both for and against it. I understand your specific proposal would go pretty specifically to instances where policemen or law enforcement officers in line of duty were killed. I think I can feel - and I mean "feel" - where that is coming from. At the same time, I have a great deal of difficulty in looking at a society that has decided to impose the maximum, irreversible sanction for a crime against a police officer when at the same moment somewhere in this State, it is equally conceivable that a burglar fleeing an armed robbery of a liquor store or some other facility may take a wild shot at a cop pursuing him and kill an innocent child, and yet not be subject to that same penalty. By making that distinction, I am not arguing that, therefore, the leap of logic should take you to encompass all homicides.

I guess I have to state this personally and say I

have a great deal of sympathy, particularly these days, for law enforcement officers who do confront increased hazards in combatting real violent street crime. By the same token, I stop short of using even that excuse -- not excuse - I don't mean to use that word -- that reason to launch into what I think is very troublesome social policy. Having made a separate categorical distinction for that particular kind of homicide now, I think legislative history suggests that you move to add categories (b), (c), (d), (e) and (f) fairly rapidly thereafter. And I am not sure that you would really want to do that. I am not sure that we collectively as a society should do it.

ASSEMBLYMAN HAWKINS: Any other questions?  
Hearing none, thank you very much. We will now adjourn until two o'clock.

(Recess for Lunch)

AFTERNOON SESSION

ASSEMBLYMAN HAWKINS: Our first witness this afternoon will be Martin Barrett of the Policemen's Benevolent Association.

M A R T I N     B A R R E T T: Our primary concern is for the people of this State. We believe that the Legislature has an obligation to return capital punishment to the State of New Jersey. We believe that, since it has been withdrawn, crime has flourished. People have laughed at policemen and at the laws we have. We have no deterrents at all. This new code will actually eliminate punishment to a great degree, and it will make the policeman's job harder. You will definitely be placing the lives of the citizens of the State in severe jeopardy, which we believe at this time cannot be afforded. We realize that there has been conflicting testimony on capital punishment. There has been some feeling that it hurts minority groups, but in the past, we feel that the State of New Jersey has not utilized capital punishment in any way at all to injure minorities.

If we take a look at the 74 executions in the State in the 40-year period between 1930 and 1970, we find that 47 of these parties were White, 25 were Negro, one was an American Indian, and one was a Filipino. Certainly, these statistics reveal that minority groups were not made the primary sufferers of this punishment. The age factor was 33.1 years, which shows that our courts were legitimate enough not to serve this on the younger element in our society.

I don't have too much to say other than what I have said about the capital punishment issue. I really wish the Legislature would consider this. I won't suggest to what degree it should be taken - whether it

should include just shooting a police officer or killing eight people at one time - but I believe it definitely has to be inserted into our penal code. Otherwise, it will not be effective.

ASSEMBLYMAN HAWKINS: Sir, do you consider the death penalty as being the maximum, or most heinous, thing the State could do to a person if he commits a murder?

MR. BARRETT: I believe that would be the worst in a person's mind, the worst he would fear.

ASSEMBLYMAN HAWKINS: Let me put it to you this way: Do you think that the death penalty would prevent that person from doing that crime again?

MR. BARRETT: Certainly, if he's been executed, he cannot do it again.

ASSEMBLYMAN HAWKINS: Would it be possible to cut off his arms and accomplish the same purpose?

MR. BARRETT: We're not looking for punishment in the sense of perhaps burning a person to death. It's not pain we seek; it's to eliminate this person from going out on the street again.

ASSEMBLYMAN HAWKINS: How about cutting off his legs and his arms?

MR. BARRETT: That would not be serving the purpose.

ASSEMBLYMAN HAWKINS: Wait a second. If he cannot commit the crime again, would the purpose not be served if he had no arms or legs but still had his life?

MR. BARRETT: Hypothetically, yes. It is not my belief that that is the way to do it.

ASSEMBLYMAN HAWKINS: Why not?

MR. BARRETT: What is served by having a man without arms and legs existing in society for no purpose at all?

ASSEMBLYMAN HAWKINS: What would be the purpose of taking his life?

MR. BARRETT: He wouldn't be around anymore. You must show deterrents. We are talking now about habitual criminals. I'm not talking about a first offender. Seventy-seven per cent of the crimes in this State are committed by repeaters. These people are being treated as first offenders in our system, and they cannot be allowed to continually go out on the street to commit the same crimes over and over again.

ASSEMBLYMAN HAWKINS: This is only my personal belief. I have difficulty in my mind justifying what right we as humans have to take another human's life. I cannot say that, because we are the State, we are justified. We say to those individuals who are not the State, "If you do such an act, you are a bad boy, and we will punish you, but, if we do the act, we are just meting out punishment." I cannot, in my mind, see how that is justified. Therefore, I am trying to find something less than taking a life. I am trying to find out from people who think that taking a life is alright what would be acceptable to them less than taking that life.

MR. BARRETT: I certainly cannot condone cutting off arms and legs.

ASSEMBLYMAN HAWKINS: But you would condone taking a life?

MR. BARRETT: Definitely, if it's going to help the people of the State.

ASSEMBLYMAN HAWKINS: In other words, do you think cutting off arms and legs is worse than taking a life?

MR. BARRETT: I believe so.

ASSEMBLYMAN HAWKINS: You think so?

MR. BARRETT: Some people would rather be dead than---

ASSEMBLYMAN HAWKINS: So, you think that we have a right to take a life but not to take off arms and legs?

MR. BARRETT: You would be forcing a person to suffer for the rest of his life, and that's punishment. We are not looking for punishment; we are looking to stop these people from committing crimes.

ASSEMBLYMAN HAWKINS: Let me ask you something, sir: If it could be shown to you that a person who commits murder would never do it again, would you necessarily feel that his life has to be sacrificed?

MR. BARRETT: Definitely not, if it could be proved, but our system has proved in the past that murderers are continually going out and doing it again.

ASSEMBLYMAN HAWKINS: Where did you get those facts?

MR. BARRETT: I have facts. I submitted a---

ASSEMBLYMAN HAWKINS: May I suggest, to the contrary, that the facts and evidence that most people familiar with penology know show that the person who does not commit the crime again is the murderer, mainly because the source of the person's irritation is no longer around.

MR. BARRETT: In regard to that, there was a person at the Governor's mansion, in the work detail---

ASSEMBLYMAN HAWKINS: Are you going to give me an isolated instance?

MR. BARRETT: You asked if I had any knowledge of a murderer committing the the crime again, and I was going to bring this to your attention.

ASSEMBLYMAN HAWKINS: I didn't want one particular instance.

ASSEMBLYMAN CODEY: We heard about isolated instances this morning. There is no reason why we should not hear this one.

ASSEMBLYMAN HAWKINS: Alright.

MR. BARRETT: A convict out on his first weekend pass from the Jones State Prison Farm was arrested for the hatchet murder of a 66 year old man. This convict had been originally sentenced to a five to seven year term for a 1969 manslaughter. This same prisoner had been part of the Governor's Morven mansion work detail. At the time he worked at the Governor's mansion, he wrote a Trenton newspaper defending programs of work release for prisoners. He stated, "If the Governor isn't worried about having a murderer working in his household and around his family, do you feel there is much for the public to be concerned about?" He went on to say, "The chances of most murderers repeating the offense are quite low."

ASSEMBLYMAN HAWKINS: Who said that?

MR. BARRETT: This murderer.

ASSEMBLYMAN HAWKINS: The murderer said that?

MR. BARRETT: The murderer said that, and he proved his own statistics to be wrong on his first weekend pass. This is my own opinion - and I'm not a lawyer so I really cannot get into it - but I see that it is going to place a reliance on parole. Our parole system in this State is less than suitable, in my opinion. Every time we're on the street, we see those who come out. It's not that everyone in the State is a criminal. It's the same ones. One day they'll pass you and wave at you, and the next day you'll read that they've broken into a building or something. It's the same people.

Of course, I believe first offenders should be treated, not with kid gloves, but, much more gently

than the repeaters. We are not getting at the repeaters. The police are arresting more people today than they ever did before. They are placing a greater burden on the courts. When it is finally realized that it is going to be less punishment than we have now---

ASSEMBLYMAN HAWKINS: Sir, do you believe then that taking a person's life is more to punish him or to act as a deterrent to others?

MR. BARRETT: It is for the public's safety, not a punishment.

ASSEMBLYMAN HAWKINS: And as a preventative measure so that he individually will not do it again?

MR. BARRETT: And I am sure that when some of his friends realize that they will have to pay the ultimate consequence for their actions, they will think twice.

ASSEMBLYMAN HAWKINS: So you are saying that you also want it as a deterrent, is that correct? Others won't want to do it because they've heard that someone who commits a murder will get the death penalty, is that correct?

MR. BARRETT: That's correct.

ASSEMBLYMAN HAWKINS: What would you think about public executions?

MR. BARRETT: I don't think we have to go to that extreme.

ASSEMBLYMAN HAWKINS: Well, if people could see it, they really wouldn't want to do it after that.

MR. BARRETT: We don't want to bring the citizens in on this to make a mockery of it. If that was the consequence he had to pay, it would get around.

ASSEMBLYMAN HAWKINS: How would it get around? You know, the prosecutions of most people who commit homicide, unless they're well-known, are not publicized.

Wouldn't it be better, for example, to publicize executions to really make the deterrent effective?

MR. BARRETT: I am sure the newspapers of the State will offer sufficient space for any executions.

ASSEMBLYMAN HAWKINS: What about decapitating someone and carrying his head around on a pole?

MR. BARRETT: That's too much of a punishment.

ASSEMBLYMAN HAWKINS: Are there any other questions?

ASSEMBLYMAN BATE: Mr. Barrett, you indicated that since *Furman v. Georgia*, about three years ago, crime has really flourished. Do you have any statistics to indicate that there was a skyrocketing increase over the prior three years?

MR. BARRETT: I don't have any with me. I am sure that I would have no problem obtaining them. The FBI reports would show you, I believe, that there was a 12.2 per cent increase in crime in New Jersey.

ASSEMBLYMAN BATE: Over what period of time?

ASSEMBLYMAN CODEY: Excuse me. Assemblyman Bate, from 1968 homicides in the United States have risen 42 per cent.

ASSEMBLYMAN BATE: Four of those years were prior to the decision.

ASSEMBLYMAN CODEY: When was the decision?

ASSEMBLYMAN BATE: 1972.

MR. BARRETT: The last execution in the country was in 1967, so we should really use that date.

ASSEMBLYMAN BATE: You acknowledge the fact that the decision which affected the 50 States occurred in 1972?

MR. BARRETT: I'm not familiar with the date.

ASSEMBLYMAN BATE: Up until that time, there were an awful lot of people on death row. The chairman

indicated that he has a problem as far as the taking of a life is concerned, and I do too. Do you have any figures to establish that this has been an effective deterrent over the years?

MR. BARRETT: Statistics can be played with. I can say that the people who advocated abolishment cannot show that it has served its purpose since 1972. If the taking of one life saves another life, in my opinion, that's statistic enough. I am sure that if you inquire into the statistics of increased murders, you will find that it is, as Mr. Codey said, 42 per cent.

ASSEMBLYMAN BATE: Would you agree that, as legislators, we have a responsibility to pass laws, at least general laws, that will apply to everyone equally?

MR. BARRETT: Yes.

ASSEMBLYMAN BATE: You made some reference to the fact that in the 40-year period from 1930 to 1970, there were 74 persons executed, approximately two-thirds of whom were White and one-third Black. Am I to conclude from that that you think there has been an equal application on the part of our system with respect to capital punishment in New Jersey?

MR. BARRETT: You hear it said by some people that minority groups would be the most to suffer. I think that we can work a fair, legitimate system where they will not be the ones to constantly suffer. I know there are a lot of other things that have to be taken into consideration that are causing crime. We have to stop it now; we cannot let it go any further than it has.

ASSEMBLYMAN BATE: You don't think that historically juries have discriminated on the basis of race?

MR. BARRETT: Not in this State. Those

statistics were for the State of New Jersey. Possibly, if you went to Alabama or Mississippi, maybe statistics would reveal that there were discriminatory sentences there. I feel that, in New Jersey, we have never done it in that particular way.

ASSEMBLYMAN BATE: Do you think that juries have discriminated on the basis of sex?

MR. BARRETT: In New Jersey, there hasn't been a woman executed.

ASSEMBLYMAN BATE: The figure nationally is that, for every 120 men who have died, there was one woman.

MR. BARRETT: If I may, I would to insert some "increase in crime" statistics. There were 870 law enforcement officers killed since 1964 in this nation. Since 1960, murders have increased 116 per cent; forcible rape, 199 per cent; robbery, 256 per cent; burglary, 181 per cent; auto theft, 183 per cent; total crimes of violence, 204 per cent. Of the 870 law enforcement officers killed in the last ten years, 77 per cent of their murderers had been previously arrested. To me that shows that the repeaters are the ones that are doing it, and any action by the Legislature must definitely bear down on these persons.

ASSEMBLYMAN BATE: Would you attribute the increase since 1960 to many socio-economic factors?

MR. BARRETT: Partly, yes, but I still believe that they are getting away with things, and they know that they are getting away with them. You'll have people arrested who'll want to fingerprint themselves; they'll want to tell you your rights. I've seen it. They know more about it than the policeman on the street. Definitely, by going to jail, they are learning better how to commit crime. I'm not saying that jail is the answer. Our correctional institutions are not correcting.

Until we can have a system in this State that does correct and rehabilitate, you will be placing too much of a burden on the people, and they are going to suffer.

ASSEMBLYMAN BATE: If we are not talking about murder, what is your suggestion as far as incarceration - that we have shorter periods and better programs?

MR. BARRETT: Well, concerning pre-trial detention, it's a problem. Our Constitution may not allow it, but California, which has a similar constitutional provision on excessive bail, has had upheld by their Supreme Court that decision. In the material that I submitted to the committee, I included a recommendation on that.

ASSEMBLYMAN HAWKINS: Are there any other questions?

(No questions.)

MR. BARRETT: Could I make one other comment?

ASSEMBLYMAN HAWKINS: Surely.

MR. BARRETT: Concerning capital punishment, I realize that there is going to be a lot of dissension, but I believe that the people of the State do want it. I ask that, if you find that you do not want to vote to accept it, you put it on a referendum and let the people of the State decide.

ASSEMBLYMAN HAWKINS: I have a feeling that Mr. Codey will make sure that the General Assembly of New Jersey will have an opportunity to consider the matter. I believe Assemblywoman Berman has a question.

ASSEMBLYWOMAN BERMAN: Earlier, when you were talking about the abolishment of capital punishment, which Assemblyman Bate said took place in 1972, you said that the abolishment had not served its purpose. What did that particular comment mean?

MR. BARRETT: It meant that, in my opinion, the statistics of the people who advocated it cannot

show that it's done any good for the people of this country.

ASSEMBLYWOMAN BERMAN: How would you assess that good?

MR. BARRETT: Well, whether it's statistics or just in your own mind when you walk the streets, during the last few years, I'm sure you've had much more fear of being attacked than you had 10 or 15 years ago.

ASSEMBLYWOMAN BERMAN: And you would closely relate that to the absence of capital punishment?

MR. BARRETT: I definitely have to. It's not that every person is going to be executed. We're not going to execute the innocent. The person is entitled to his full constitutional rights, but after he has been afforded that, there is no other answer in my opinion.

ASSEMBLYWOMAN BERMAN: In other words, you are saying that taking away capital punishment changed the whole climate in the State?

MR. BARRETT: In this State and other parts of the country too. Pennsylvania and New York went back to capital punishment. I work in Englewood Cliffs. I'm a stone's throw across the George Washington Bridge. We consistently have violators coming across the bridge and going back. Very possibly, they could be committing crimes in this State with the knowledge that there is no capital punishment here. If they had committed the same violations in their State, they would have to pay the consequences.

ASSEMBLYMANWOMAN BERMAN: What crimes would come under the sanctions of capital punishment?

MR. BARRETT: I would leave that up to you. Of course, I don't believe that anyone should be allowed to shoot a police officer, but I might be biased about

that. I also don't like it when I see innocent women and children killed, and, in my opinion, people should be punished for it.

ASSEMBLYWOMAN BERMAN: You also mentioned that you don't believe that the penal system is discriminatory. I was wondering if you might want to comment on the make-up of the prison population in this State and how that make-up came to be.

MR. BARRETT: I really should not because I'm not fully prepared for that. If there is any discrimination against any minority group or any one person, then it's for you to investigate.

ASSEMBLYWOMAN BERMAN: But certainly the prison population is disproportionate to the rest of the population which would mean that something has gone astray.

MR. BARRETT: That may bear on social and other problems.

ASSEMBLYWOMAN BERMAN: And not on the way the criminal justice system operates?

MR. BARRETT: Definitely not. I know very few policemen who pick on a person because of his age, color, or anything else. If you see something that needs to be done, it's your job to do it.

ASSEMBLYWOMAN BERMAN: And you would also be willing to say on the basis of your experience that what happens to a person after a policeman arrests him would be fairly similar for any part of the total population?

MR. BARRETT: I'm sorry; I missed what you said.

ASSEMBLYWOMAN BERMAN: It's your contention - and I'm not questioning that - that the policemen who are involved in dealing with crime use the law without discrimination?

MR. BARRETT: Yes.

ASSEMBLYWOMAN BERMAN: Since the population in the prisons is disproportionate to the general population, I was wondering whether you felt that the other parts of the process, that go on beyond the rest, gave equal treatment?

MR. BARRETT: Beyond the rest?

ASSEMBLYWOMAN BERMAN: Right.

MR. BARRETT: I shouldn't and I can't comment on what goes on beyond the rest. I certainly hope that there isn't any discrimination under any circumstances. If there is, I kind of hope that the people in prison deserve to be in there - and I am sure that the great majority of them do. I feel there is a good majority of people on the street that should be in prison.

If we are going to allow people to walk around with guns-- You see more guns around today than anything else. I had the unfortunate experience, two years ago, of being shot by a person that was just asking for directions. I asked him to stay in his car and I just walked out of my car towards him and he started firing. I am lucky, I am here. He ran into the woods and he had five more guns in the car. It was a stolen car. Nobody cares. It is very bad for police morale when you see people like this who have no care for anybody else, not even themselves sometimes. Heroin is a great problem today and it is going to get worse if we don't correct that.

ASSEMBLYWOMAN BERMAN: You are not saying that policemen are not prepared to deal with the kinds of things that you are talking about, are you - the possession of weapons and the use of weapons?

MR. BARRETT: Prepared to deal with them?

ASSEMBLYWOMAN BERMAN: Yes.

MR. BARRETT: What do you mean by deal with them?

ASSEMBLYWOMAN BERMAN: In terms of apprehending

those who--

MR. BARRETT: Policemen are making more arrests today than they ever have. You have better and better policemen and it is an overburden on the corrections system. They all work together - the three systems - and if they can't smoothly run, then there is trouble. I can see why people are being let out; maybe there is no room in the prisons. Possibly that could be an answer. Maybe you need more prisons.

ASSEMBLYWOMAN BERMAN: Then what you are really saying is that the presence of weapons and the use of weapons can be directly attributed to the lack of capital punishment in our system and perhaps something else - I didn't get the earlier part of your statement.

MR. BARRETT: Directly? Possibly directly, because in the past, capital punishment has only been imposed in this State for murder. Now, if a person goes out and holds someone up and realizes that person can be a witness against him, why shouldn't he just kill him and eliminate him because there is going to be the same penalty imposed - life imprisonment, 14 years, etc. In seven years he will be out on the street. Maybe in two years he will be walking the street and this person won't be around to tell on him.

If he knows he is going to die, that would be an additional punishment he would have to face and he is certainly going to question just killing someone randomly. Maybe I didn't explain that properly but--

ASSEMBLYMAN HAWKINS: Have juries ever made mistakes?

MR. BARRETT: I would believe so.

ASSEMBLYMAN HAWKINS: Take an example most people are familiar with - the Artis and Carter trial. There is a big dispute whether or not they have been

rightfully found guilty of murder and right now they are litigating it in the courts, after all these years. If, very possibly, they had been found guilty -as they were - when there was a death penalty, suppose their sentence was death and suppose they were executed and suppose, years after they were executed it comes out that someone lied on the stand, don't you think that that's a great mistake that the State shouldn't even have on its conscience?

MR. BARRETT: You can't bring back the dead if you had executed them.

I understand your point, there is no question about that but what about the poor people that are killed every day on the street? There is no bringing them back either. For the one minute mistake that you could bring out - and it still only a possibility in that situation - it is worth the risk.

ASSEMBLYMAN HAWKINS: You are saying then that the State should still have the right to set itself up as God and make the determination as to who should die and who should live?

MR. BARRETT: There must be proper guidelines set.

ASSEMBLYMAN HAWKINS: In other words, the State can set its own guidelines and then make a determination as to who shall live and who shall die, even though we admit that the State can make a mistake?

MR. BARRETT: Anyone can make a mistake.

ASSEMBLYMAN HAWKINS: But God, very possibly. I have no further questions.

ASSEMBLYMAN CODEY: I'd just like to make a comment on what my colleague said. I don't think - I am certainly not prepared to vote for a death penalty on a murder that wasn't premeditated and I don't think too many members of this House would, to be quite honest.

May I ask you something, officer Barrett? With regard to your shooting - when you were shot - do you think that if we had the death penalty in the State of New Jersey that the person who shot you when you merely walked up to his car would have thought twice before he took a shot at you?

ASSEMBLYMAN HAWKINS: If you were in a court of law that would be objectionable because he wouldn't know what a person would think.

ASSEMBLYMAN CODEY: I asked the question.

MR. BARRETT: I certainly believe that would have been the situation. His penalty would definitely have been more severe if he had been apprehended.

ASSEMBLYMAN CODEY: In other words, I am saying he might have thought twice before he took a shot at you if he realized that if the shot was fatal, he, quite possibly, would be executed?

MR. BARRETT: Yes, in my opinion he definitely would have thought twice.

ASSEMBLYMAN CODEY: That was my question.

You mentioned another thing about New York having the death penalty reinstated. Then, from what you said, I gather that it is quite possible that - I would say only in the case of hired killers, and I am sure this does exist - somebody would, if he were going to kill someone, take him to New Jersey and kill him, acting on the assumption that if he is caught and convicted that he is only, possibly, going to serve 14 years and get out, as opposed to killing the person in New York, where he could be executed.

MR. BARRETT: Yes. That would be good, common sense to do it that way, certainly.

ASSEMBLYMAN CODEY: Thank you.

ASSEMBLYMAN HAWKINS: Hearing no further questions, I wish to thank you very much, Mr. Barrett.

MR. BARRETT: Thank you. (Material submitted by Mr. Barrett on file with the Committee.)

ASSEMBLYMAN HAWKINS: Mr. Richard Singer, Rutgers University School of Law. I take it, sir, you are on associate of a previous speaker, Steven Gifis?

R I C H A R D S I N G E R: I am, sir, but I am not here in that capacity.

Mr. Chairman, my name is Richard Singer and I teach at Rutgers University Law School. I am here today primarily in my capacity as a teacher in the field of criminal law and penology, specifically as someone who has taught a course called "The Prison Law Clinic." Indeed, much of what you have before you, which I just brought in, is due to rather heavy work by students in that clinic.

I assume today that we are going to discuss both sentencing and parole and that is basically what the documents that you have before you are about.

Let me explain, very briefly, what the documents are. One part of the document is a proposed revision of the sentencing and parole provisions as they are now, and they are specific statutory provisions which would replace Chapters 43, 44, and 47 of the Code.

The second document is a commentary to the sentencing and parole law. This is a commentary to the proposed code changes.

The third document is a comment on Illinois legislation, written by the Illinois Law Enforcement Commission. (The three documents are on file with the Committee.)

ASSEMBLYMAN HAWKINS: Excuse me one second, sir. Mike, do you have a copy of these documents?

(negative response)

That's the Governor's Counsel. He is a very bright young man. He has been giving us great assistance. I'm sure he would like to see a copy of that.

MR. SINGER: I will make sure he gets a copy.

In connection with this Illinois legislation, let

me start off there, I suppose, by saying that this is simply a summary of legislation which has just been introduced in the Illinois Legislature by the Governor, which basically does two things. Both of those things are things I want to talk about today, if I may.

One, is the introduction of determinant-term, true-term sentencing and the other is the abolition of the parole board and of the parole system.

ASSEMBLYMAN HAWKINS: Would you happen to remember the name of the individual who introduced this legislation?

MR. SINGER: I do not, Chairman Hawkins. I am sorry. I got this material directly from the Commission and I don't know who it was that actually introduced the bill.

ASSEMBLYMAN HAWKINS: Sounds like a friend of mine.

MR. SINGER: I think it is quite clear that over the last 100 years the concept of indeterminate sentencing, and with it the concomitant of parole, has rather dominated our entire concept of corrections. It seems to me, and I hope that the commentary will at least suggest why I feel this way, that that concept is now bankrupt. It leads to arbitrary, discriminatory, irrational, totally unjustified decisions, both at the level of sentencing and at the level of parole decision-making.

Judge Frankel, from the Southern District, New York, has called it "lawlessness in sentencing" and said there is no more lawless area in the country than when a judge sits down to try and determine what sentence he is going to impose.

We know from experience and from everything that prisoners and others tell us that the disparity in sentencing, which is so wide-ranging, is probably one of the major causes of prison unrest and prison dissension throughout the

entire country.

We know, in addition, that the second aspect of that is parole decision-making, because it is just as unstructured, just as unguided, just as unstandardized, as, indeed, the sentencing decision is.

We started in the indeterminate concept, the medical model of parole in sentencing, in the hope - two hopes, I suppose - one, that we could try to individualize sentences - and each of us would like to do that - and secondly, that we could predict the future behavior of persons, either in front of the judge or in front of the parole board. We know now that the second cannot be done and there are many studies that demonstrate this. We put upon the parole board, or upon the judge, an impossible task and then say to him, "now we are going to criticize you if you don't do it correctly."

Secondly, we end up with incredible inequality throughout the sentencing structure.

Thus, the provisions that we have put forward here today would basically bring into existence a determinate sentencing scheme - legislatively-set determinate sentences. That is, when a judge determines a person shall be imprisoned for, let's say, a second degree crime, the Legislature says, that crime carries with it "X" years - and that is the sentence. No discretion on the part of the judge could vary the sentence at all, thereby eliminating the disparity in terms of the duration of the sentence with has permeated, I think, most of the sentencing in the last 100 years.

We think it should be legislatively set, rather than judicially set, as the proposed code now would have, because we believe that the key concept in sentencing should be that punishment should fit the crime and not the criminal, once a decision of imprisonment has been made.

Now, let me turn for a brief moment to the question of duration because I think that is at the heart of this. This is an eleventh minute-- Indeed, my entrance was an eleventh hour entrance. But, let me say, without being incongruous, it seems to me that there is a great deal more study and concern that needs to be done, in light of the code, particularly with regard to the terms of sentencing. There is nothing in the commentary to the code, as proposed, that indicates that there was much study, although there is some reference to the ABA standards on sentencing alternatives and procedure.

There is no way that the commentary to the code could have reflected the National Advisory Commission on Criminal Justice Standards and Goals because that report came out after the code came out.

Both of those bodies, and one could hardly call them "radical" in any sense of the word, suggested what we recommend here and we have taken it clearly from them, and that is a maximum period of incarceration - maximum period - for virtually all offenses, except first degree offenses, of five years. That is proposed by the ABA. It is proposed by NCCD and it is proposed by the National Advisory Council. It is not an unrealistic limitation when you talk about having equality in sentencing disposition. If you have a stretch of time from one to twenty, in which the judge must make the decision, it may make sense to have long terms because supposedly the judge is individualizing. But he can't do that and what happens is that the person who wasn't intended to be caught up in the long sentence - the 20 year sentence - gets it. He doesn't know how to manipulate the system so he spends a lot of time inside the prison.

We know that in New Jersey, right now, the average time served by all offenders is 26 months. So,

a five year maximum for second-degree offenses is not, we think, inconsistent with what is now the practice in New Jersey. What we would do by passing a legislatively-set maximum of that length is, eliminate the possibility of catching some people up in that system who really weren't intended to be caught up in it.

Now, in addition that that, the proposal adopts the approach of virtually every sentencing study of the last 20 years and that is, the extended term. That is also in the proposed code now. We suggest rather lengthy terms - double the length - for extended-term persons whom we have tried to define.

Finally, and perhaps the most difficult of all issues - and, obviously, I hope we are going to be able to discuss this but I am just trying to sketch this out now - is the question of parole. Here again, the arbitrariness, the lack of standards, the lack of guidelines, etc. -- I know that the New Jersey Association on Corrections has spoken to this, as has the NCCD and others. We do not believe that the parole system can be "cosmeticized" into being a fair system. We think it must be virtually abolished and be replaced with an automatic date of parole release, set, again, not by a judge but by the Legislature and we have proposed specific parole-release times for each category of offender, based, primarily - although not exclusively - on studies which have demonstrated when recidivism is least likely to occur for a given group of offenders. There are studies on this and what they basically show is what I like to call the "recidivism troth" -- if you release people between a year and one-half and two and one-half years, their chances of recidivism are much less than if you keep them in for more than three, until you get up to a level of about 10. It begins to level off between three and ten and then stays

there and then begins to drop down again.

The calls for the abolition of parole, again, are becoming nationwide. There are calls for the abolition of the indeterminate sentence as well. Richard McGee, who is one of the outstanding corrections people in the country - he was Corrections Director in California for many years - has now called for the abolition of parole.

ASSEMBLYMAN HAWKINS: Are you talking about true sentencing - true time?

MR. SINGER: I am talking about -- He is calling first, for true time and no parole, that is correct.

ASSEMBLYMAN HAWKINS: Is that what you are referring to?

MR. SINGER: Well, it depends upon what you mean by true time. If you mean true time and no community reintegration process--

ASSEMBLYMAN HAWKINS: When you say five years, do you mean the person is to serve five years?

MR. SINGER: No. We do not mean that. What we, and the NAC and ABA, etc., all envision is some kind of process for community reintegration.

ASSEMBLYMAN HAWKINS: Now when you say that you do not want parole, what would you want if the person is not to serve the five years?

MR. SINGER: We suggest a release date, mandatorily set by statute. That would leave a year or two - and it varies with the degree of crime - during which the now ex-prisoner, but still in the custody of the Corrections Department, would be under an obligation to do only one thing and that is to obey the law.

If, during that time, he violated the law, as opposed to violating one of the thousands of technical conditions of parole that he now has, he would be resentenced by the judge who would, by statute, be required to add to

the term any remaining time of community reintegration of that person. So, the remaining time on the sentence would be a deterrent for further criminal activity.

We would not envision the possibility - and I am sure you are familiar with this - of returning somebody to jail for failure to walk across the street properly, for spitting on the sidewalk, or for failure to see his parole office once a week, or those kinds of conditions which are just totally futile, among other things.

ASSEMBLYMAN CODEY: Mr. Singer, the proposal that I have in front of me very simply says, you are sentenced to two to four, you serve the minimum and if you have served good time you get out in the minimum of two and if you don't you get out in four. Is that what you are talking about?

MR. SINGER: It is basically that although - and this is not part of the statute - it seems to me that the elimination of good time is another aspect of true and determinate sentences. The ability of a disciplinary board, or parole board, or any other kind of board, less than a court of law, to affect liberty and revoke periods of grace, if you will - or whatever you want to call it - in a very direct sense, it seems to me, should be removed from the penal code. No agency of any type should have the ability to extend or lessen the duration of sentence except a court of law. We would say that is the only way in which revocation, in effect, could occur.

It seems to us that some period of community reintegration is useful. It helps the offender find his way back to society after he has been removed from that society for some period of time. They don't give you any kind of help at all and I think he is going to fall back. In fact, we know that the first six months after release are always the most dangerous and the most touchy.

We would suggest a community supervision or a community reintegration agency - what the NAC calls a "community resource manager" - that would help the offender but would not have law enforcement powers which, we think, is the crux of the difficulty with the parole system now, because every parole officer is both a helper and a cop, and he can't do both well. If he tries to do one job one day and one job the next day, it results in the supervision and surveillance overtaking the helping, so that the helping is not very effective and he is not doing the job that he was supposed to be doing.

We suggest removal of law enforcement powers from the community reintegration agents, as we would call them. This, I think, is in accord with the National Advisory Commission and others.

That is a very brief sketch. We have tried, in the commentary, to find the studies and cite the materials which are, we think, important here but I think it is more important to note that legislatures around the country, right now, are considering this problem of sentencing and parole very seriously and they are looking at it in a totally new way.

Illinois was the first State, I think - as I recall - to adopt the model penal code. The model penal code is basically what you have in front of you now, in the two brown volumes. Illinois is getting rid of its model penal code in sentencing and parole provisions, or at least the Governor is suggesting that it should be removed.

We think that this whole question of what happens to somebody after conviction is too important to be dealt with in the short time that we have. We suggest that the substantive criminal law provisions of the code be passed out and put on the floor so that the sentencing and parole provisions could at least be retained by the committee for

some period of time pending some opportunity for further comment and discussion.

ASSEMBLYMAN HAWKINS: You know, I am beginning now to understand why a lot of people have been asking us to hold off. Is it your belief that we are about to enact a full model penal code's guidelines on parole and sentencing?

MR. SINGER: Well, certainly, it is my understanding that although some of the terms are somewhat different from the model penal code, basically what you have in front of you on sentencing and parole is the model penal code. As I understand it, that is what the committee is considering.

ASSEMBLYMAN HAWKINS: May I suggest that is a fear that the people need not have because we haven't, as yet, made any determination as to what is to be the sentencing and parole provision of the code. That just happened to be a part of a printed piece of material that we were looking at. But we haven't adopted it and it may or may not have any part of it adopted.

So, I think I now understand why a lot of people have been fearful, because they didn't particularly like that specific provision of the proposed code. But, that need not be what we are going to be enacting, whatsoever.

MR. SINGER: I think I understand what you are saying but I only know what I read in the papers. I understood that there was to be at least some action by the committee tonight or tomorrow.

ASSEMBLYMAN HAWKINS: It will be drafted. This is one reason why we wanted to hear all of the experts because we intend to draft a proposed sentencing and parole part of the code and we are going to be looking at what has been presented.

MR. SINGER: I see.

ASSEMBLYMAN HAWKINS: It need not, necessarily, be the same thing that is in those two brown volumes.

MR. SINGER: Well, that, I think, has certainly been the focus of my comments at least and I think those of many of the groups because we think that when they were written they might have been nice - fifteen or twenty years ago - but they are wrong now.

ASSEMBLYMAN HAWKINS: I think that quite a few people that have been working with us have shown a little bit of disenchantment with the proposed penal code provisions, so I don't think you really have too much to fear.

MR. SINGER: I'm glad to hear that because I have, and I think most of us do, great difficulty with the code.

I could really do a run-down on this but I don't think there is any need to do that now. But, if there are any questions, I will be happy to try and answer them.

ASSEMBLYWOMAN BERMAN: Just so I understand you completely, Mr. Singer, you are saying that in the process of sentencing and setting up sentencing, there should not be variables that determine that length, it should be completely related to whatever crime a person has been indicted for?

MR. SINGER: That's correct. Let me qualify that. You are right in terms of duration and I think I limited my comments to duration.

We would clearly see the judge as still having the power. We could talk about a judge or some sort of council. We used a judge and we suggested one judge per county. The judge would have the discretion to determine between non-imprisonment, in which there would be a whole list of less restrictive alternatives - which the code does not have now - and imprisonment. But once the decision is made for imprisonment, then the sentence would be legislatively set and the judge could not say,

"Well, it is between four and five, I will give him four years and three months" or "I will give him three years and seven months." It would be three years or five years, or whatever the degree of crime would be, without any discretion on the judge's part to alter the duration of the sentence.

ASSEMBLYWOMAN BERMAN: Then your comment means that alternatives might be within the jurisdiction of the judge in terms of the type of sentence?

MR. SINGER: Yes, and we adopt the code's approach, as I think everyone has in the last fifteen years or so, that there be a presumption against imprisonment and that there be a whole series of criteria, which I listed in our draft proposal. There are a whole series of alternatives that have not really been used very much by judges. For instance, one of the interesting instances in our commentary is where a woman had an abandoned refrigerator on her property and a child went into the refrigerator and died by closing the door. The sentence was what we would call "conditional release" in our proposal - go out and find ten more refrigerators and remove the doors. Now, that, it seems to me, is good innovation and an ingenious kind of sentencing that has a social purpose and a social value to it. But that decision was a non-imprisonment decision.

If he had decided that imprisonment was necessary, under the facts of the case, then the sentence would be set by the Legislature, not by the judge.

ASSEMBLYMAN CODEY: In an article in the New York Times Magazine yesterday - and I am not a great believer in studies or commissions - one study was done by a professor in City College of New York which concluded that given the present level of police efficiency and making some assumptions about how many crimes each offender commits per year, at the rate of serious crime, it would only be one-third of what it is today if every person convicted of a serious offense were imprisoned for a

minimum of three years. Would you agree with that?

MR. SINGER: Well, I saw the same article and I think, as I recall, the following paragraph had a lot of caveats in it. No, I would not agree with that. I do not believe that crime is so clearly related to recidivism that we would reduce the crime rate that severely simply by incarcerating everybody who committed a serious offense. I mean, there are just too many people that we never catch.

Now, I know the article suggested that we do catch all of them at some point during the year. I have not seen any studies that so indicate except that article and there were no cites in that article to any of the studies. That bothered me a great deal about that particular piece by Mr. Wilson from the school.

I think we can reduce it somewhat but we are not going to reduce the crime rate a great deal even if we lock everybody up forever.

ASSEMBLYMAN CODEY: Yes but there has to be some correlation.

MR. SINGER: Obviously there was some, but I believe he was exaggerating very much in that article as to how much we would affect the crime rate.

I think we would affect the crime rate more if we didn't send the vast majority of people to prison that we do because they learn how to be better criminals in the prison system and they come out more embittered than ever and they have no skills. They then turn right around and commit some sort of offense. That we do know. The effect on the crime rate is speculative the other way.

ASSEMBLYMAN HAWKINS: Hearing no further questions, I'd like to thank you very much, sir.

MR. SINGER: Thank you. I was glad to be able to get here.

ASSEMBLYMAN HAWKINS: It is our pleasure to have

you.

Our next witness on the list is the Honorable Anthony Carrino, North Ward Councilman, City of Newark. Welcome Councilman.

A N T H O N Y C A R R I N O: Mr. Chairman, I'd like to thank you for the opportunity to speak here today.

My main purpose for being here is to plead with you to reinstitute the death penalty in the State of New Jersey. My stand is that we expand it beyond the killing of a police officer to the killing of any person during the commission of a serious crime.

Before I get into what I would like to say, I'd like to answer some of the questions that I think the police officer was unable to answer right off hand when several of you asked him the questions.

As far as isolated instances are concerned, I have three newspaper articles here for the year 1974 - all during the year.

One is titled, "Killer who did 18 years guilty in slaying of wife." Another says, "Paroled killer charged in drama student's death." There is one about a man accused of killing a girl after spending 6 years in jail for the murder of another young girl.

I don't think these are isolated instances, I think this is something which seems to be the order of the day. (The newspaper articles are on file with the Committee.)

With regard to why you think the prisons might be overwhelmingly black in the State of New Jersey, I think there is a reason for that, other than discrimination in the courts. I think most of the crimes committed in the State of New Jersey are committed in the cities, such as Newark, where the population is predominantly black - they are made up of minority populations. So, the people incarcerated throughout the State of New Jersey would more than likely be people of a minority class. I am sure there

is no other city in the State of New Jersey that has the crime rate Newark has. As you know, we have 65% to 70% black population.

However, what no one else seemed to get at is, the majority of the victims in these cases are black people and minority people too. Eighty percent of the people killed in the City of Newark last year were minority people. So, I don't think the death penalty has anything to do with a racial situation. I think we are talking about some type of deterrent, some way in which we could eliminate this wanton killing that we have been facing throughout the United States. I am just talking about the City of Newark right now.

In answer to you, Assemblyman Hawkins, about the State being God, no, I don't think you are God but I think you are mandated by the people to maintain law and order for the decent people in the State of New Jersey. I think it is incumbent upon the State to protect the rights and to protect the lives of people who are doing nothing but everyday transactions in their home towns and in their homes, such as going to business, such as going to work, such as enjoying recreation. I think that these are the people that the State is mandated to protect, not the criminals.

As far as Mr. Singer is concerned, I have to disagree with him because I think that recidivism has a lot to do with our crime rate. Again, I go back to the City of Newark because that's where most of my experience is. We have situations there where people are arrested--

ASSEMBLYMAN CODEY: Excuse me. You are also a police officer as well as a Councilman?

MR. CARRINO: I am on leave of absence from the Police Department, yes.

We have situations where people have been arrested eight, nine or ten times for armed robberies, rape, breaking

and entering, etc., so those statistics do go upwards because, actually, you are talking about the same person, statistically, committing eight or nine crimes. That does upgrade the percentage in the amount of crimes committed in the City.

Getting to what I'd like to talk about now, I don't think that the death penalty is a humane thing. I don't think taking someone's head and parading it around the main streets of the city is what we are looking to do.

Commissioner Klein, when she was an Assemblywoman, stated that she thought the death penalty should be held in Rutgers Stadium so that all the people could see how grotesque execution is. Well, I submit to her then, they should show pictures and have the bodies of victims hacked to death with an ax, or slashed to death, or decapitated, or what have you, also shown in public, or in the newspaper.

ASSEMBLYMAN HAWKINS: What would be the purpose of that?

MR. CARRINO: The same purpose that she feels would be served by having a man executed in the Stadium.

ASSEMBLYMAN HAWKINS: What was the purpose of having a person executed in a stadium?

MR. CARRINO: Her purpose was to show the citizens how grotesque it is.

ASSEMBLYMAN HAWKINS: What is?

MR. CARRINO: Electrocution, and the death penalty.

ASSEMBLYMAN HAWKINS: In other words, if I understand correctly, as a deterrent effect so someone else wouldn't commit the heinous offense that you mentioned.

MR. CARRINO: I don't think that was her purpose. I think her purpose was to show that the death penalty is inhumane and shouldn't be put into the State law.

However, I submit to her, had the family of Patrolman Byrne been sitting in the stands - Patrolman Byrne was recently killed during a hold-up - I am sure

they wouldn't have felt it was so grotesque that the person who killed their father and husband was being electrocuted. To have a head hanging around the city, or going around making a public spectacle of an electrocution, I don't think, is preferred by anybody. No one is talking about anything like that.

As far as the killing of people is concerned, I would say, from my experience, in the City of Newark three-quarters of the murders in that City were crimes of passion. I do not advocate that people be put to death, or given the death penalty, because of an argument between a boyfriend and girlfriend where someone gets killed, or because of some other extraneous circumstance, where people are killed.

I believe that people who kill with premeditation-- If someone goes into a bank to hold up a bank with a gun, he knows if he is interrupted by a policeman, or if something goes wrong, he is going to use that gun to try to get out. I submit to you that last week the newspapers had a big article about condemning the sale and use of hand guns. Although I believe there are too many hand guns in the State of New Jersey right now, I submit that hand guns do not kill people; people kill people.

To say we have to stop hand guns from coming into the State of New Jersey is fine but you are going to have to enforce it and you are going to have to spend money to enforce it. That is not the basic root of killing.

Governor Byrne is thinking of signing into law test-firing of all hand guns that are bought so a ballistic record is on file for all such guns. I don't know of any situation - and I haven't been involved in anything in my experience as a police officer - where a person buys a gun, legitimately, for the purpose of keeping it in his home or for the purpose of hunting and it has been used in a crime. The guns used for murder and for crime are those

found in the South and brought up to New Jersey. So, no one is going to ever have the chance to test fire them for ballistics to begin with. So, I think that is a waste of time.

I think we are not getting down to the root of the problem by trying to stop guns from coming in, or by testing guns to see if they are the guns used for murders. I think we have to come up with a deterrent.

I have a statistic here - and I hate to be cold and hard about money when we are talking about peoples' lives - and according to the Department of Institutions and Agencies it costs between \$400 thousand and \$800 thousand to support a prisoner who serves a lifetime sentence in jail in the State of New Jersey, for murder. That's a heck of a burden and a heck of a drain and, please, don't think I am trying to equate money with a human life. The only thing I am trying to get across here is that when you sentence someone to 20 years for killing someone, it is costing the State better than one-half million dollars during the course of that sentence.

ASSEMBLYMAN HAWKINS: Would you suggest a shorter life sentence?

MR. CARRINO: I believe, and this goes right back to what I believe in - the death penalty. I believe to sentence a man to 20 years for killing his girlfriend during the course of an argument is a waste of justice. I would imagine that, possibly, if he went out after that killing, in a short period of time, that he probably would not kill that person again. Those are not the people I am trying to target in on. There have been times when I have gotten my wife so mad that there was a possibility that could happen.

I am talking about the hardened criminal. I am talking about the criminal who would go into a bank. I am talking about the man who would take another's life

during the commission of a hold-up. This is what you should think about. We have gotten many, many letters to the effect that the death penalty should be reinstated in the State of New Jersey, especially in light of the fact that New York and Pennsylvania have now done the same thing.

I don't say anybody is going to take someone into New Jersey to kill them, I think that is a little far fetched. But the point is, whether or not we can prove statistically that the death penalty is a deterrent, it will, number one, preclude anyone who is given the death penalty from going out and doing it again - as happened in these three articles I have here - that we can be assured of.

As far as it being a deterrent for other people, yes. I don't think it is a coincidence that murders in Newark have increased; armed robberies have increased; the bombing of buildings - involving six people in New York - have increased; kidnappings have increased; skyjacking, etc. We never heard of skyjacking five years ago. These are all wanton crimes. These are crimes where peoples' lives may be at stake. These are crimes where people use premeditation. A life may be taken during the commission of these crimes.

I think this is what we have to deter and I think something like this could do it.

ASSEMBLYMAN HAWKINS: Councilman, hearing what you have to say, I get the impression that you value human life.

MR. CARRINO: Yes, I do.

ASSEMBLYMAN HAWKINS: I also hear you when you say you think the State should have the right to take that valuable human life and I'd like to ask your opinion of the possibility of the State making a mistake. Do you think - knowing the possibility that the State could prosecute an innocent person, find that person guilty and cause that person to lose his or her life - we should prosecute that person, convict him or her, and take his or her life?

MR. CARRINO: Well, during the course of a trial for first degree murder you usually have to go through two or three trials, between appeals and everything else.

ASSEMBLYMAN HAWKINS: Let me change that. Let me give you the specific example I gave earlier. You are probably aware of the Carter and Artis homicide situation?

MR. CARRINO: Right.

ASSEMBLYMAN HAWKINS: If we were to have had the death penalty at the time they were sentenced, and if the death penalty were never wiped out, and if they were sentenced to death and all the time had elapsed, as it did, and all their appeals ran out, they would have been sentenced by now. All of a sudden someone comes up and says, "I lied. I told an untruth. The State made a mistake in believing what I had to say - that these men did it." They are in special proceedings now in the courts. If we had taken their lives, and if, indeed, we had made a mistake, they would not even have the opportunity to go through the courts right now; we just made a mistake.

MR. CARRINO: Right.

ASSEMBLYMAN HAWKINS: Do you think we should have that right to make a mistake and take someone's life?

MR. CARRINO: Well, number one, we still don't know if we made a mistake or not in that case.

ASSEMBLYMAN HAWKINS: But do you think, if we did make a mistake, we should have that right?

MR. CARRINO: I think that that's more isolated than these three things. I agree that sometimes, during the course of sentencing in something like this, there is a possibility that there would be a mistake made.

ASSEMBLYMAN HAWKINS: In other words, it is all right with you then to keep the death penalty to get at circumstances, such as those you have demonstrated, and if, by chance, we kill someone that is innocent it is all right, is that what you are saying?

MR. CARRINO: I am certainly not saying that but you are bringing up a case that happened seven or eight years ago. We are talking about one case. I am showing you three instances in one year, where three people would have been saved.

ASSEMBLYMAN CODEY: That wasn't a premeditated murder, right, Mr. Carrino?

MR. CARRINO: Pardon me?

ASSEMBLYMAN CODEY: That was not a premeditated thing?

MR. CARRINO: No, it was during the course of a hold up though. Again, I will go back to that same case, we still don't know whether that was a mistake.

ASSEMBLYMAN HAWKINS: I know, but I am saying if, indeed, it was a mistake, do you think we should have that right, as a State, to take someone's life, knowing that we are fallible, that we can make mistakes?

MR. CARRINO: Yes.

ASSEMBLYMAN HAWKINS: We still have that right?

MR. CARRINO: Yes, I think we still have an obligation to 7 million people.

ASSEMBLYMAN HAWKINS: And to make mistakes with their lives too?

MR. CARRINO: You are saying, "make mistakes with their lives." You are talking about one isolated instance in seven years.

ASSEMBLYMAN HAWKINS: Sir, may I suggest to you that we do not know how many incidents have been mistakes. I don't think there is any way we can compile statistics to show that someone's life has been taken by mistake. There is no way we would ever know. This is the point I am trying to make.

If there is no way we would ever know, are we to set ourselves up as God and say, "we know" - since there is no way we would ever know - and take a life?

MR. CARRINO: But you are using as an example an intangible - not knowing something as opposed to something we do know. We do know what happens to people who are sent back to the streets after committing a murder. These are people who have committed two murders. This is not first degree murder, or not a 20-year sentence we are talking about. These are people who have committed two murders. There are three people here who should be alive. What about that mistake? What about the mistake of letting these people back onto the streets?

ASSEMBLYMAN HAWKINS: If, in fact, those people committed murders, I don't think they did it unintentionally; they did it with intention.

MR. CARRINO: Whatever the case, Assemblyman, they did kill two people each. I submit to you that during the course of a trial, especially for first degree murder, any possibility of a mistake, especially where someone's life is on the line, I think, is going to have to be proved beyond - "beyond" - a reasonable doubt, before someone should sentence another person to death.

ASSEMBLYMAN HAWKINS: That's the standard of proof - beyond a reasonable doubt.

MR. CARRINO: I say "beyond" that.

ASSEMBLYMAN HAWKINS: But mistakes are still made.

ASSEMBLYMAN CODEY: And on the other hand, at the other extreme, I am sure we have acquitted murderers who later went out and killed someone.

ASSEMBLYMAN HAWKINS: Are there any other questions from the committee?

ASSEMBLYWOMAN BERMAN: You raised an interesting point. Your testimony almost seemed to indicate that instead of being a tool for deterring people who have committed homicides, it might work in the opposite way in that it carries a death penalty for premeditated murder, therefore juries and judges might be reluctant to call it that way.

MR. CARRINO: I believe so. I believe the judge is not going to just say, "Okay, it is first degree murder," especially in light of the fact that the death penalty is the end result of that.

My whole feeling, as far as a deterrent is concerned, is, if a man goes into a bank to hold it up, right now he is going to serve the same amount of time for the holdup as he is going to serve for killing somebody. If there is a death penalty involved and a police officer, or someone, interferes with him while he is committing that crime, there is a possibility - and just a remote possibility - that this man will not turn around and fire the gun but will drop the gun and give up because it is a lot better to serve 7 years than it is to be put to death.

Right now he is going to get the same penalty for murder that he would get for armed robbery, in many instances. So, I believe in a situation like that you are talking about a deterrent. The death penalty is more of a deterrent than 7 years for armed robbery. And there is a good possibility that man would drop the gun and give himself up instead of shooting it out with a police officer, or taking a hostage.

I'd like to go back to the rehabilitation process. I think any criminal can be rehabilitated, up to a point. I don't believe anyone could rehabilitate a person who could wantonly go up to another person with a gun and shoot his head off, or blow him apart, or hit him ten times with an ax. I think that person could go right back out into the street and do the same thing again.

To rehabilitate a dope addict, or a car thief, or someone who would break and enter into a house, I think, is possible and I think there are great strides being made in that direction. I do not think a convicted, first degree, premeditated murderer who is capable of killing someone in that fashion could ever be rehabilitated. And there are statistics to prove that.

ASSEMBLYMAN HAWKINS: Where are those statistics?

MR. CARRINO: I have them right here.

ASSEMBLYMAN HAWKINS: Oh, you mean those three people?

MR. CARRINO: Right. This in all in one year.

I might add that I think the time has come that if the State can't act on this, it be put to a referendum. I think you have an obligation to your constituents. Although some of you, personally, might feel one way or another, you still don't know the pulse of what your constituents might want. I think if you feel that you cannot make that decision yourself, because of the heavy load or the heavy burden it carries, then I think you should put it to the people and let the people of the State of New Jersey decide if it is inhumane, or if it is something that they feel is correct.

ASSEMBLYMAN HAWKINS: I wouldn't even have any objection to what you just suggested.

Councilman, I wish to thank you very much for coming before us.

MR. CARRINO: Thank you very much for spending some time with me.

ASSEMBLYMAN HAWKINS: The next witness on the list is a Mr. Peter Van Schaick, New Jersey PIRG.

P E T E R V A N S C H A I C K: I am Peter Van Schaick. I live at 432 Sumner Avenue in Newark and I am a law student at Rutgers School of Law. I have a Masters Degree in Criminal Justice from the State University of New York, in Albany, and I am here today as a board member on behalf of the New Jersey Public Interest Research Group to deliver these brief comments.

In summary, we propose that you delay several months before considering the sentencing and parole chapters of the Penal Code which deal with the disposition sections - that would be Chapters 43, 44, 45 and 46.

ASSEMBLYMAN HAWKINS: Are you talking about the proposal, as read in those two brown volumes?

MR. VAN SCHAICK: Yes.

ASSEMBLYMAN HAWKINS: I made this statement before and I will make it again. I think people may be unduly fearful that we are going to enact those particular chapters.

MR. VAN SCHIACK: Okay.

ASSEMBLYMAN HAWKINS: What we are here for today is to find out what we should do and I don't really believe it is going to be the enactment of those particular chapters, per se.

MR. VAN SCHIACK: Okay. Well, I was going to start out by saying that in that brown book they suggest themselves that those chapters are inadequate.

ASSEMBLYMAN HAWKINS: With that in mind, do you still think we need to wait?

MR. VAN SCHIACK: Yes. I am not familiar with all that has gone on today. I am not sure of the scope of the information that you have.

ASSEMBLYMAN HAWKINS: Why do you think we have to wait?

MR. VAN SCHIACK: Well, there is a debate going on over notions of individualization of sentences; there is a tremendous amount of sentencing disparity in parole release decisions and in sentencing decisions. I don't know what kind of information you have already but--

ASSEMBLYMAN HAWKINS: We have heard a lot of experts today. We have received their information and we intend to digest it and act upon it in the next 48 hours or so.

MR. VAN SCHIACK: My assumption was that you were going by the brown book and that you were not going to make a substantial departure from that.

ASSEMBLYMAN HAWKINS: We have other proposals, sir, that we have been considering, one of which was submitted to us by the Department of Institutions and Agencies.

MR. VAN SCHAICK: Right.

ASSEMBLYMAN HAWKINS: Another one was presented by the National Counsel on Crime and Delinquency. We have had these before today. We have had three or four proposals presented to us before today. So, we have had time to look at several proposals.

MR. VAN SCHAICK: I see. Well, I'd like to make just a couple of comments on what I know about the debate about disparity, in particular about parole board release decisions.

There are folks like O'Leary and Newman who have written that all you have to do is decrease the case load of the hearing officers and add legal safeguards to parole decisions and that this is a basically valid concept.

There is also some talk about structuring the discretion of the parole board by implementing some kind of guideline. A short book has been written about this. Some of this has been implemented in the revision of the Federal Parole Board. They have implemented some guidelines for parole release decisions which, I think, are in and of themselves an inadequate response to the problem of sentencing and parole disparity.

I think that one of the basic choices you have is, how many centers of discretion do you want to have? Do you want to have discretion of the parole board and the judges? Do you want to have discretion just of the judges. Or, do you want to remove sentence length determinations from the judges?

A quick description of this system is given in the Federal Probation issue of December 1974. There, Peter Hoffman, who has done work with NCCB, describes, briefly, the use of those guidelines. I think they are

limited in four ways. They are expensive. As pointed out in the New Jersey Association on Correction's report, there is considerable question about the ability of the system to adequately assess the parole prognosis, which is one of their information units for making the release decisions.

The guidelines, then, make no reference at all to the length of sentence imposed by the judge, which I think is really important. There is a judge in the U.S. District Court in Connecticut who has been dealing with this system and who says that by not including sentence length as a variable in the guidelines, the board runs the risk of averaging time spent in prison for particular offenses, without regard to the factors that led sentencing judges to impose terms of different length.

The guidelines don't use any information about the prisoner's rehabilitation in prison, they merely describe sociological factors about the person when they make this decision. This kind of shows that the notion that parole release is a decision to be based on cure after a certain amount of rehabilitation is not really an adequate concept.

Finally, if you just structured the discretion of parole releases, you aren't going to deal at all with sentencing disparity in other parts of the system, which, if you were to enact a system similar to that with judges, then you would be able to effect decisions affecting incarceration, as opposed to being out on the street on some kind of probation program, or other parts of a judge's sentencing discretion.

Since you have already had a lot of information that I am not aware of, from what I know about the field I can't be responsible to what you think you are going to be able to deal with in the next couple of days. The only

thing I can suggest is, there are a lot of really heavy critical choices that have to be made that are going to have impact on the sentencing system for quite a while. So, I would really strongly suggest that you have some kind of interim report, perhaps, and then solicit more comments on that interim report, or somehow set up a system where you can get information that is going to mean you have a result that is really up-to-date, as opposed to the brown book which is considerably out-of-date. Are there any questions?

ASSEMBLYMAN HAWKINS: We have been working with a thing that has even passed the brown book. So, that which you have read in the brown book is very much outdated. That which is in what we have been working with need not necessarily be what is going to be accepted either.

MR. VAN SCHIACK: Are you going to have interim comments, or are you going to reach some kind of a final decision?

ASSEMBLYMAN HAWKINS: It is our intention to have the bill finalized tomorrow sometime, after we finish going through everything. We have been meeting for the past year.

MR. VAN SCHIACK: You don't want to put it up - the final version up - for scrutiny - for a public hearing - before you decide to introduce it?

ASSEMBLYMAN HAWKINS: Well, this is a public hearing and I would suggest to you, what we will be doing after today, when we leave here, is continue what will also be an open meeting, wherein the committee will be sitting down, along with representatives of the Public Defender's office, the Attorney General's office and the Governor's office - as we have been meeting with them - and anyone else who wishes to be with us. Our door is always open and we have been accepting comments that come to us.

MR. VAN SCHIACK: So, tell me more about the meetings. Are they going to be held here tonight?

ASSEMBLYMAN HAWKINS: They are in room 219, immediately after we finish here.

MR. VAN SCHIACK: I see. And they will be in room 219 tomorrow?

ASSEMBLYMAN HAWKINS: In room 219 tomorrow, yes.

MR. VAN SCHIACK: How are you going to arrange to meet? Can you tell me a little about how it is going to be arranged?

ASSEMBLYMAN HAWKINS: Well, we are going to be starting as soon as we finish here.

MR. VAN SCHIACK: Right.

ASSEMBLYMAN HAWKINS: I don't know what progress will be made by the time we meet tomorrow morning because we will be working the rest of the afternoon and on into the evening and when we get tired we will stop and go to sleep. Then when we wake up we will start anew.

MR. VAN SCHIACK: Okay. Thank you. (statement p. 12 X)

ASSEMBLYMAN HAWKINS: I thank you. Anyone here is welcome to attend the meetings.

Our next witness on the agenda is the Very Honorable Reverend Philip Kunz, New Jersey Council of Churches.

Is there anyone else here who is not listed and wants to give testimony?

(response from audience)

Mrs. Canright, you are welcome to say three minutes worth.

Proceed Reverend.

R E V E R E N D P H I L I P K U N Z: For the record, I am Philip E. Kunz, the Director of Social Concerns, New Jersey Council of Churches. With the Chairman's permission, I will not read the written testimony for several reasons,

including the lateness of the hour, but I will merely skim through it and underscore, as it were, some of the material herein.

As you good folk of the committee can see, we started out as many of the people testifying today did. In the first paragraph of our testimony we request that there be a delay of two weeks, in total, for further deliberation on your part on Chapter 44, which has to do with sentences.

I would like to say parenthetically, that we were aware, as you were, that once upon a time there was a request that this entire deliberation be put off for a longer period than that and that recommendation was looked at and laid aside. We think that a two week period of time, notwithstanding all of the urgency that is pressing you is not awfully unreasonable considering the momentous nature of this sentencing.

ASSEMBLYMAN HAWKINS: What do you think we can accomplish by adjourning it for two weeks?

REVEREND KUNZ: That's a good question. It is not adjourning, by the way, we would say you should stretch out your deliberation rather than bringing your sleeping bag down here tonight so that you can go through--

ASSEMBLYMAN HAWKINS: May I suggest, we have been deliberating, in essence, for a year.

REVEREND KUNZ: Right. I hear you.

ASSEMBLYMAN HAWKINS: We who have been deliberating are not entirely unfamiliar with penology and sentencing, etc. I am sure we all have our own ideas anyway.

But, aside from that, we have heard testimony and I have heard much testimony before, at other hearings - not even with this Legislature - on sentencing.

We have been asked to move this with all deliberate speed and I am in agreement with the person who asked.

To continue to meet once or twice a week, ad infinitum, may not accomplish anything. If we can do it by meeting 48 straight hours, say, at a clip, it may do a little bit more, rather than meeting three or four hours twice a week. So, hopefully, we can move right through it. There shouldn't be any more delay.

REVEREND KUNZ: Well, naturally we can hear you and the reality of the situation is that there is only one set of people in this universe who have this discretion and there you are - on the panel of the committee. So, we will see what we will see.

I am sure that you understand that this was a request of ours made in good judgment. We felt that we had to put it as a pleading before you people.

ASSEMBLYMAN HAWKINS: I can tell you, in all good faith, that if we see that there is a problem and we cannot have a good product after tomorrow's deliberation - I can promise you we will not put out garbage - we will have further deliberation on it.

This is just a deadline that I have set for myself and for the committee. I believe we can meet it in good faith.

REVEREND KUNZ: Well, we are listening very closely to what you are saying, Mr. Chairman. Thank you very much.

Let me just go on very quickly to the highlighting of the different paragraphs in this testimony. We have indicated here that we are taking some exception to one of the pieces that was written to the committee some time back - the Boylan Report, as I characterize it - which had an article appended to it and which, in our view, tended to imply that sentencing in the future ought to be more responsive to crimes, rather than to the individuals found guilty. We take quite a bit of exception to that.

The next thing that we want to point out is - and I think I will just take the liberty of reading this, if I may - no two crimes are alike. We think reasonable persons should stipulate now that (A) imprisonment is punishment; (B) far too little is yet known concerning effective rehabilitation; (c) deterrence from many of the most frightening crimes is an unproven quality. With these three problems in mind, NJCC argues that our sentencing should strive for better response to the individual situation, rather than throwing up hands and opting for gross repression.

In speaking of punishment, New Jersey Council of Churches does not suggest that punishment has been empirically proven to be an effective ending of crime. Nor can we avoid the Biblical fact that the Wrath belongs to the Lord, not to human kind. We merely take cognizance of the present reality: incarceration is punitive, whether it also marks a period of rehabilitation or not.

I would like now to just skip a little bit further into the testimony here. Since the door has been torn open by previous witnesses, so to speak, regarding the death penalty, I must say we had some anticipation that that very well could take place. It is, by a long shot, not the entire consideration of the committee on sentences. Indeed, it should be a very small fraction of your consideration, if I can suggest that.

We find that the difficulty with considering death penalties is that it is more of a political than a rational or scientific situation in this society. The overwhelming burden of proof beyond a reasonable doubt remains on the death advocates. I think I should really like to have that underlined in your minds and in the record as you go on to your deliberations this evening and tomorrow and, indeed, for everybody in public office who has to grapple with this very charged question. We

concede, of course, that people come to it with differing viewpoints and they are, for the most part, well-meaning.

But to be well-meaning does not necessarily mean that your argument ought to carry the day. So, that is why we are underlining that when witnesses come before you, as they have in the past, and they speak of deterrence with feeling; that feeling and deterrence just don't necessarily connect. We have been waiting for almost 300 years in this society for overwhelming proof that deterrence does, in fact, exist by instituting a death penalty. And, yet, with all of that fond wishing and searching and studying, we have yet to see this large corpus of evidence making that proof.

If it were there, I would not dare to testify as I do, because I would be flying in the face of established fact and that fact has not been established.

So, the New Jersey Council of Churches remains steadfastly opposed to any death penalties based on empirical, Biblical, and political grounds, as signified in the last instance by the positions of its fourteen Church judicatories.

May I just add, parenthetically, that there is nothing more premeditated then when state officials do somebody in. There is nothing more premeditated, no matter how orderly, no matter how correct, no matter how true - with a capital T - that process may be. We want to worry about premeditation in connection with death penalties for whatever sort of offender, however disasterous, however a cause celebre. Premeditation is greater in that instance than any other one that we could locate, in our view.

Now, I didn't want to get hung up on the death penalty situation because I think that's a large discussion that will have many other arenas in the future.

The article cited in the National Observer in the Boylan Report made reference to one instance where an offender was incarcerated in California for sixteen years

under therapy and he would have been there for four years if he had just done a straight-time sentence. Obviously, that is a travesty - anyone of those instances.

But, what we want to call your attention to in our testimony is that when those things occur anywhere, and particularly in our State, the way to remedy any such future mistakes is only to put a maximum term provision in the code, regardless of the manner in which that term is supposed to be served, whether you call it therapy, cold storage, or whatever you call it.

Now, there is a basic problem in the sentencing provision, which other witnesses have pointed to. I am not going to elaborate on that. We were mentioning here, again, that it is based, originally, on 1955 thinking and we have heard the feedback from the Chairman and the rest of you on the committee about how you have gone on from some of those models and we will look with great interest to your final drafting.

Another change we seek is for crimes by corporations. The draft does not adequately change the existing situation wherein a billion dollar multinational corporation may endure less difficulty from the judgment than a youthful offender convicted of unarmed break-in to a residence in the daytime. I am thinking of the Vasco case and a number of others.

After the recent revelations of gross crime by corporations, political operatives, and even officers of the State in the cases of the CIA and the FBI, the New Jersey Council of Churches believes that the penalties for corporate crime must be written in sterner terms.

The eleven grounds for the Court's withholding imprisonment in the draft are helpful. They should be wrapped in provisions which will ensure good pre-sentence procedures. And I think that whole thing is going to really

in time, when our successors come, come about, hanging judges, liberal judges, or somewhere in between. If we have good, mandatory pre-sentence procedure with mandatory reporting and we have some kinds of standards, then we will be moving somewhat down the road towards having a uniform and understandable kind of system that the victim of a crime, the attorneys, the reporters of the media, the offender himself, or herself, can grapple with. This will be a way out of the jungle and this is what is being placed in your hands. We have high hopes that you are going to be able to use these 11 grounds and reinforce them with mandatory pre-sentence and reporting kinds of provisions written into the code which you will prepare and submit.

One other thing here, if I may, very quickly: Another problem we have in this draft is the casual reference on page 121 to the sentences of less than one year being served in "the common jail." Even a slight investigation by the committee will reveal that such jails are the worst institutions in our State, with the exception, perhaps, parenthetically, of some back wards of the mental hospitals which are up for some very serious review in the courts and elsewhere right now.

So, if one hopes to deter crime by punishment, the jail will be avoided because of its inhuman nature and its school for crime character. Rehabilitation is hardly a word from the same language as jail. The jails ought to be useful only in pre-trial situations and then their population should be drastically reduced by bail and other proceedings.

That is the gist of the testimony, in core, and let me just say thank you to the three of you for all of your thinking of this through.

ASSEMBLYMAN HAWKINS: Are there any questions?

(no questions)

Thank you very much, Reverend.

(full testimony on page 18 X)

Ms. Canright.

W I N I F R E D C A N R I G H T: My name is Winifred Canright. I came to be enlightened and to learn things but when I heard the speaker on capital punishment there were a few things that he said that I felt, for the record, ought to be refuted.

My claim of expertise on this is, probably I am close friends with more "lifers" than any other woman in New Jersey. Mr. Hawkins suggested the case of Hurricane Carter and the speaker for capital punishment assumed that was an isolated case. I want to tell you it is not an isolated case. I know many men who are serving life sentences and about whom there is grave doubt as to the justice of their sentences.

For instance - and I won't go into all of them because I promised I would talk for only three minutes - in Rahway Prison there is a tall, handsome artist named Ben Thompson who spent several years on death row when, fortunately, the Supreme Court decision freed him. Ben was indicted and convicted of murder. There was one eye-witness who testified that she had seen the murderer. He was a white man, five feet eight inches tall, weighing about 130 lbs.

Ben is six feet four inches tall, weighing over 200 lbs. and black. The rumor is that the proper man couldn't be found and the prosecutor needed a victim - not a victim in the ordinary sense of the word - and Ben was sent to death row. I think there will be an appeal that finally will save him.

ASSEMBLYMAN HAWKINS: What was the evidence against him?

MR. CANRIGHT: I don't know why they picked him

up. I don't think there was any evidence against him except that the evidence of the eye-witness was changed by the prosecutor, as I understand it. This I cannot verify but I know that he was one man on death row that every other man on death row felt was innocent.

Also, I know a man and a woman who were convicted of the murder of a policeman in a mob scene of the Plainfield riot. At least I attended that trial for three months, every day, and have been at some of the appeals. There were at least 50 people engaged in that killing. Two people bear the total burden of conviction on this and, I believe, wrongly.

You can't kill 50 people for the murder of one man. We are a little too civilized for that. But we can pick out two and make them--

ASSEMBLYMAN HAWKINS: Don't be so sure of that.

MS. CANRIGHT: Well, maybe I am not sure.

ASSEMBLYMAN HAWKINS: If we were to enact the death penalty, and if 50 people conspired to kill one individual, they would all, equally, be subject to the death penalty.

MS. CANRIGHT: That's correct.

ASSEMBLYMAN HAWKINS: If we did enact the death penalty this State, in its great sense of justice, would allow for the taking of 50 lives to deter, possibly, another killing by any one of these 50 people. So, they would punish those 50 people for the killing of that one person.

MS. CANRIGHT: Particularly if they were dark skinned. I believe you are right.

The other thing that I wanted to say was this: The man mentioned that murderers cannot be rehabilitated. I have done a great deal of studying of the penal literature. Not expecting to speak, I didn't bring statistics with me. But the bulk of penologists all say that if there is one group

of people most likely to be rehabilitated when they finish their prison terms and are released into society it is the murderers. It is very seldom, in spite of his three clippings, that a convicted murderer goes out and murders again.

Also, men who spent time on death row and have life sentences are among the men in Trenton prison who are the most constructive in their influence among the other prisoners and who carry the strongest burden of keeping the peace and working for progress in the prison.

If you question that, ask Bill Fauver, the Director of Prisons or Mr. Seidl and you will find that that's borne out. Thank you.

ASSEMBLYMAN HAWKINS: Do you want to say any more? I don't want to rush you.

MS. CANRIGHT: I think that's enough, thank you.

ASSEMBLYMAN HAWKINS: All right. Thank you, Ms. Canright.

I think that brings to an end our hearing on sentencing. I would like to say that the code that we are trying to enact is not necessarily the solution, or the cure-all for the problem that we have in the State regarding crime. It is only one step. Specifically, I think that the citizens of this State bear the greater burden of seeing to it that the conditions that force the crime are done away with. I am talking about poverty. I am talking about prejudice. I am talking about your not allowing an individual, because of his race, color, creed, or national origin, to have employment with which he could support his family and keep them off of welfare. I am talking about an individual who, because of his race, color, creed, or national origin, is not entitled to live in the same place as someone else is living. I am talking about an individual who may be discriminated against for whatever reason and, basically, it is because of his impoverished status that he cannot reach

out to get the things that other people have.

Because of that, sometimes they resort to crime and then when they go in the institutions and come out of the institutions, we in society don't accept them because they are then an ex-con and we don't give them jobs. We don't, again, allow them to live where we live. We discriminate against them in any way we can possibly discriminate against them and, again, they have no alternative but to resort to crime.

So, what we do here in the next month or so may not be the cure-all, but it is going to be a step.

I wish to thank everyone who has testified here today. Again, I wish to reassure everyone that we are going to make an attempt - a very serious attempt - to finish the entire code by tomorrow. Everyone, as I stated before, is welcome to pitch in and continue to give testimony, although it won't be as such, it will simply be a matter of a round-table discussion in trying to get what is best for the State.

If we do not finish it tomorrow - and I hope that we can - we will, obviously, have to continue to a later date. But I am hoping that with the materials we have received today and with the materials we have received prior to today, we can work tonight and tomorrow and come up with something workable and that the State can be proud of.

So, thank you - all of you - very much. This hearing is adjourned.

(HEARING CONCLUDED)

STATEMENT OF THE NATIONAL COUNCIL ON CRIME AND  
DELINQUENCY ON THE PROPOSED NEW JERSEY PENAL CODE

By David Gilman

The National Council on Crime and Delinquency, organized in 1907, incorporated in 1921, has long had an interest in improving sentencing and the quality of our penal systems. Through surveys and consultation, it has worked in many states, studying existing systems, and recommending improved methods. It has published a number of model acts, those most relevant to the present Proposed Code being the Model Sentencing Act, Second Edition 1972, authored by the Council of Judges of the National Council on Crime and Delinquency, and the Standard Probation and Parole Act 1955 Revision Reprinted 1964.

In this statement we deal with provisions of the proposed New Jersey Penal Code that affect imprisonment and parole.

We start with Chapter 43, Authorized Disposition of Offenders, since the character of a penal system is determined principally by the proportion of commitments to dispositions allowing a person to remain in the community, length of terms, flexibility of release, as well as other factors. Unless one takes pride in a swollen, expensive, wasteful, prison system, Chapter 43 requires change.

There are a number of provisions proposed in this chapter that would very likely decisively worsen the terms of prisons and release in the State of New Jersey. Terms would be needlessly lengthened, release procedures would be made more complicated. The net effect would be to substantially increase the prison population, already grossly swollen as compared with what might be expected of a prison system. These ingredients are:

- (a) Long ordinary maximum terms;
- (b) Long extended maximum terms;
- (c) Parole terms.

Maximum Terms: Section 2C:43-6 provides for ordinary maximum terms for felonies at twenty years for first degree, ten years for second degree, five years for third degree, and eighteen months for fourth degree.

Section 2C:43-7 authorizes extended maximum terms for felonies at life for first degree, twenty years for second degree, and ten years for third degree. These long extended prison terms can be applied based upon the following criteria:

- A: The defendant has been previously convicted of two or more crimes of any kind, dangerous or not.

The Model sentencing Act rejects the notion that a repeated offender should be subjected to substantially longer

terms than a defendant convicted for the first time, if the crime he commits is not a dangerous one. The repetition of offense may have little bearing on dangerousness. The increased penalty for a nondangerous offender is really an increased term for a nuisance offender. Studies of the habitual offender statutes reveal that they are enforced without any guiding principle, and that most defendants, who might be subject to the statutes, are not made subject to them, that their principal use is as a bargaining element for a negotiated plea, that they do not serve the goals of either rehabilitation or public protection.

- (B) One who commits a felony and circumstances show that he has devoted himself to criminal activity which constitutes a major source of his income or his income cannot be explained to have come from sources other than criminal activity.

This criteria allows for an extended sentence to be imposed upon a first offender conviction. There is no requirement of a prior criminal conviction record. It can be applied to an offender whose crimes involve solely property offenses. Nor does it require any showing that the defendant is part of, directly or indirectly, organized criminal activity. To label such a defendant a professional criminal, whose extended commitment is necessary for the public's protection is to exaggerate. The Model Sentencing Act would limit any term of over five years to dangerous offenders defined as those who

commit serious assaultive crimes, not a property offender under any circumstances, unless committed as a member of organized crime.

Crime is a very serious menace but if the maximum ordinary terms are five, ten and twenty years for felonies, certainly the twenty year term is adequately long, without calling for lengthening every grade of offense through extended terms.

- (C) A felony offender--any degree- whose mental condition is abnormal and whose criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior.

This subsection is vague enough to apply to almost any offender, violent and nonviolent alike. Again, if a defendant is not a seriously assaultive person, and his crimes are property crimes only, a long term of imprisonment serves no rehabilitative or deterrent purpose, and only clutters up the prisons with people who are likely to become worse after a period of time.

Subdivision (E) again reflects a proper concern that an offender who uses a firearm or destructive device is dangerous, but we repeat that the ordinary maximum term structure is long enough without increasing those terms by proposing extended terms.

In brief, the ordinary maximum terms are long enough in duration to protect the public and punish the offender. We

recommend that all property offenses be restricted to a third degree felony or less, thus imposing a maximum ordinary sentence of five years.

Section 2C:43-8 provides for a maximum term of six months for disorderly conduct and thirty days for a petty disorderly person's offense.

We recommend abolishment of any incarceration for such minor and nondangerous crimes. Simply put, the punishment is disproportionate to the harm. In case of disorderly conduct, the behavior is more akin to a social nuisance than a reflection of serious criminal intentions.

We urge that only dangerous offenders, those whose crimes involve serious physical violence, would be sentenced for terms exceeding five years.

We urge that a judge would have to determine first if the defendant's behavior fits into the "dangerous" category before sentencing to the maximum term of twenty years for first degree or for ten years for second degree felonies. The criteria for "dangerous" would include one or more of the following grounds:

(a) Prior felony convictions involving the infliction, or attempted or threatened infliction of serious bodily harm on another and for which the offender has been imprisoned.

(b) The defendant is being sentenced for a felony committed as part of a continuing criminal activity in concert with five or more persons, the defendant having been in a management or supervision position or having given legal, accounting, or other managerial counsel or, as a public servant, having unlawfully done or omitted to do anything in order to promote the criminal activity.

(c) A particular heinous offense involving the threat of infliction of serious bodily harm.

(d) An offender whose criminal conduct is found by the court to be characterized by a pattern of repetitive violent acts which pose a serious physical threat to the safety of others.

Under the Model Sentencing Act provision is made for lengthy prison terms to be imposed upon dangerous offenders. We recommend that criteria encompassing the concept of "dangerous" be drawn and applied to only those crimes involving serious violence or threats of violence against others. For crimes against property we urge the Model Sentencing Act's outside limit of a commitment to prison for a maximum of five years, including parole. We, therefore, urge the elimination of the provisions for extended terms of imprisonment. We suggest that criteria for ascertaining "dangerous" be drawn, and that the ordinary terms be applied to them as first and second degree felonies. The extended terms are simply too long and the criteria too vague and subject to wide misinterpretation

as to legislative intent. To provide as Section 2C-43-7 does, that even for a third degree felony, an extended maximum term of ten years, will have the effect, if enacted, of substantially increasing prison terms where the need for it is surely not established for these offenders.

We oppose any provision that authorizes a second degree felony sentence except for seriously assaultive crimes. We oppose such long terms for mere property offenses. Scanning the various crimes, we find such a crime in Section 21-1 (b) 1, forgery, or Section 21-19a usury, made a second degree felony. We recommend that it be stated in the code as a general principle governing sentences that any offenses not involving a seriously assaultive act or threatening serious bodily harm shall not be classified as more severe than a third degree felony with no extended term applicable.

#### Parole and Parole Terms

Parole as a selective system of releasing persons from correctional institutions has come under considerable attack from many sources. Prison inmates complain that parole decisions are more based on whim and personal prejudices of board members than on specified criteria that measures their readiness and suitability for release. Inmates complain there is no way for them to know what they must do to earn their release, and the mere provision that they may be eligible for

parole consideration at an earlier time will not significantly affect their opportunity to actually be released. This, they claim, will only serve to put forth false hopes which, when not realized, will promote inmate unrest, possibly riots.

Parole officers have expressed the fear that a reduced time for parole eligibility will swell their caseloads and make it impossible to provide adequate parole supervision services.

Another concern is that without early parole eligibility, prisons will become overcrowded and prisoners will be held in confinement well beyond their optimum rehabilitation, thus causing more distrust of the system and accelerating alienation from free society.

It has been said that early parole eligibility and broad discretionary powers given to the parole board will engender a practice of releasing dangerous criminals just for the sake of alleviating a crowded prison.

It is unclear as to the impact of the proposed code provisions for early parole eligibility. It is, in our opinion, an improvement on the present system which requires a prisoner to serve one-third of his term before even being eligible for parole consideration. At least, with a six month eligibility period as provided for first and second degree crimes, the prisoner has the opportunity of having parole denied much earlier, and hopefully, he might expect more favorable consideration when he does reach the one-third mark in his sen-

tence.

The major problem, as we see it, with the early eligibility provision is the sentencing provision that mandates the courts to set a term at not less than a specified number of years for the various degrees of crime. The effect of this is to convey to the parole board that the legislative intent is that a man sentenced for a specific degree of crime should not serve less than the minimum term. In that event the parole board conceivably would be reluctant to grant a parole much in advance of that statutory minimum sentence, even though the Code provides for parole eligibility immediately or within six months of confinement.

Unless some equitable system of nondiscretionary release procedure is devised, the NCCD believes that the statute should not prescribe any minimum sentence that can be given for any offense. Only a maximum beyond which the court may not sentence. And further, that there be no minimum time required to be served before a prisoner is eligible for parole release.

As to the "parole term" provisions of the proposed Code, the NCCD believes such a specified term of parole is neither necessary nor desirable. The unexpired portion of the prison sentence at the time of parole should be the maximum period of time a person could be continued in the custody of the state on parole or recommitment. At the same time,

however, the code provision allowing for early discharge from parole after satisfactory service of two years on parole should be reduced to one year, or eliminated entirely so that discharge could be effected at any appropriate time. Discharge from parole, either at the expiration of the original sentence or earlier, should be deemed as termination of any further obligation to the state on that particular sentence.

The proposed Code provides for the revocation of parole and return to prison on the basis of non-criminal violations of parole conditions. We urge the elimination of such procedures for any violation less than conviction of a new criminal offense. Such an arrangement should strengthen the positive relations between parole officer and the parolee and make for a more helping type of service to assist the released prisoner to make a satisfactory readjustment to free society. At the same time, the safety of the public remains protected as it is against any person not a parolee who commits crime. The mere possibility of further criminal behavior, is not sufficient grounds to reincarcerate a parolee.

In summary, we express the fear that the sentencing structure and the parole term will increase the number of prisoners in the New Jersey system. Will the sentencing system proposed in this draft continue to increase long term imprisonment? If our analysis is correct, it will. We may

be wrong; we may be right. We suggest that a continuing revision commission be activated to assess the implementation and effect of any new code adopted and to make recommendations for change in the code as the need arises.

We further urge that, in view of the enormous problems presented by the proposed penal Code, the Committee give serious consideration to delaying the introduction of this Code until the problems can be adequately addressed.

3/7/75

STATEMENT SUBMITTED BY PETER VAN SCHAICK

Testimony of Peter van Schaick, of 432 Summer Ave, Newark, to the Assembly Judiciary Committee on March 10, 1975, concerning the necessity for delay of adoption of the sentencing and parole chapters of the proposed criminal code to allow complete consideration of the issues involved.

The New Jersey Public Interest Research Group proposes that you delay several months before adopting these chapters of the proposed penal code which deal with dispositions after conviction: chapters 43, 44, 45, 46 and the amendments to the statutes relating to parole. We suggest you pass the main body of the code and thus fulfill the governor's mandate. Then set a short, say three month, timetable for more lengthy consideration of the few remaining issues. The results of this extension might even be enacted with an effective date the same as that of the main body of the code. If the effective date of the main body of the code is January 1, 1976, the sentencing and parole chapters could be drafted and enacted upon much later than now and still be signed by the governor before the end of the year.

We suggest this delay for several reasons. The first of these obviously must be the inadequacy of the present proposed sections themselves. The final report of the New Jersey Criminal Law Revision Commission itself states this. The report prefaces the proposed penal code and states that its weakest area was in corrections:

The scope of our mandate imposed two important limitations upon our work. One of these has already been mentioned, the area of corrections. As noted earlier, we made only those limited recommendations in the area of corrections necessary to implement our recommendations in the code, particularly

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with regard to sentencing. ... We agree that change in that area is drastically needed.

The report also indicated that its corrections law section was a stopgap measure: "We do believe, however, the need for a new penal code to be so demanding that it should not await either the work or the funding necessary for correctional law reform." (At page xv.) We agree with that Commission's self-assessment, but would extend it to all post conviction law as well.

Moreover, that statement was written at least three years ago. A lot of important developments in sentencing and parole law have happened since then. These changes should be briefed to the committee before decision.

We fear that if the code is passed as is, subsequent modifications, which everyone might agree were needed, will be much more difficult to enact for many years. The Commission's suggestion to the contrary is politically unrealistic. Reinteresting the legislature in sentencing law soon after passage of a major bill as this will be difficult. And it would be unfair to personnel in the criminal justice system, after a year or so of adjusting to the new penal code, to change the law on them again. Such a troublesome imposition on judges, prosecutors, and parole officers should only be made for a very good reason.

The main problem which has to be solved is the consensus that there is too much unjustifiable disparity in sentencing and parole. Traditionally, the decision-makers in each of these areas have been given broad discretion. The primary rationale was that the discretion was necessary to allow "individualization" of terms. But few standards for using that discretion have evolved in over fifty years of experience with that concept. A way to see the comparative breadth of discretion in a parole board member, for

example, is to contrast his<sup>or her</sup> discretion with that of a bureaucrat regulating some commercial problem. Is it conceivable that a regional tax examiner for the Internal Revenue Service would be given the discretion to individualize the percentage oil depletion allowance according to his<sup>or her</sup> subjective valuation of fairness in particular cases? The discretion given personnel in the criminal justice system is unusually broad.

Another questioned concept close to that of individualization is rehabilitation, especially when used to justify these discretionary decisions. Under this principle, a judge might send one to prison for "treatment" and the parole board would release him<sup>or her</sup> when "cured." But this idea assumes that there is enough money for prison programs, which there isn't, and that even if there were rehabilitative programs in prisons, that it would be possible to tell when someone is cured, which is clearly not the case. Many now think instead that rehabilitation is good if it happens, but that it cannot be a primary purpose of imprisonment, not can it justify indeterminate sentences. The current debate over individualization and rehabilitation should be considered by this committee before enacting the sentencing and parole chapters.

I'm going to conclude by quickly describing some parole board reforms, and pointing out some further issues for consideration by the committee.

Some of the current critics of the disparity in parole board release decisions conclude that given certain changes, parole decisions could operate fairly and effectively. Others have determined that parole is oppressive and arbitrary and is a corrupting influence within the penal system.

Those who assume the conceptual validity of parole suggest

costly solutions such as reducing caseloads of hearing officers, providing better information for decisions, improving legal safeguards, and so forth. Criticism of the unstructured nature of the parole board's discretion has led to the current reorganization of the federal parole board, and the mutual agreement program.

Under the mutual agreement program, or MAP, when a prisoner arrives at prison, he<sup>she</sup> negotiates a contract with the authorities articulating a personal program of performance which is then rewarded with release at a certain date. Those selected for the program, however, may be more concerned about how soon they can be released rather than being sincerely involved in pursuing the goals of the contract. Is this any better than having determinate sentences, which also give certain release dates, and which also allow the programs to remain voluntary? It's going to cost money to administer. Is it worth it? Contract parole is another issue to be considered before deciding on sentencing and parole law. The early returns on the evaluations of this concept don't show any objective improvement in the prisoners after release.

The reform of the federal parole board is summarized in the December 1974 issue of Federal Probation. Researchers first analyzed patterns of release decisions, and after discussion essentially codified those past practices into a set of guidelines. Briefly, the guidelines are in the form of a chart plotting the severity of the offense against the parole prognosis. A decision-maker reads the chart cell which corresponds with the characteristics of the individual, and reads out a suggested range of release dates. Within that range, the releaser can freely exercise his<sup>her</sup> discretion; outside the range, a specific explanation must be given.

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This model parole decision system has at least four limitations. It's costly for one. Expensive research and administrative costs, in addition to the cost of court review of its decisions, require careful balancing against any possible benefits. Second, as discussed on page two of The New Jersey Association On Corrections Report, the ability of the system to adequately assess the parole prognosis is questionable.

Third, the guidelines make no reference to the length of sentence imposed by the judge. J. Newman, the U.S. District Court Judge who has decided most of the cases brought under this system, recently commented on this problem: "By not including sentence length as a variable on the guidelines table, the Board runs the risk of averaging time spent in prison for particular offenses, without regard to the factors that led sentencing judges to impose terms of different length." Lup v. Norton, 371 F. Supp. 156, 163 (D. Conn. 1974). In addition, the guidelines don't use any information about the prisoner's rehabilitation in prison when making its routine assessments. That is, they recognize that parole boards predict behavior on release no better after five years than after five weeks in prison.

Fourth, this system is incomplete. It only deals with the disparity of a small class of sentences: those of persons incarcerated in state facilities, a small percentage of those sentenced throughout the state. There will still be a need to control the judges' discretion in sentencing. Wouldn't it be better to simply include length of sentence guidelines in addition to the other necessary guidelines for judges, rather than to have a separate, redundant parole release system?

Are there any reasons why parole boards should continue to make release decisions? The federal parole guidelines don't use information about prison behavior when routinely deciding to release.

They do make exceptions, but such rarities could be handled by 16 X

executive clemency, rather than by maintaining this expensive system.

Consideration of the case for abolition of parole is only one issue which this committee should consider before reporting on the dispositions section of the law. Other issues include:

- How should judges' sentencing discretion be guided?
- Is mere provision for appellate review going to be a sufficient basis for developing a rational sentencing system?
- Should judges have any discretion in varying the length of sentences?
- Should post-prison community supervision be any different from probation?
- What changes should be considered in the revocation power of parole officers?
- Should revocations be <sup>made</sup> ~~done~~ only by the original sentencing judge upon commission of new crimes?

There are so many critical choices to be made that I can't see how you can completely consider them in less than a period of months, let alone a couple of days. This request to delay will clearly test this committee's ability to stand political heat in the short run, in return for a penal code which is not conceptually outmoded when enacted, but ~~one~~ which reflects the state-of-the-art.

I repeat, you should delay consideration of these sections.

Thank you.

## THE NEW JERSEY COUNCIL OF CHURCHES

Testimony to the Assembly Judiciary Committee  
in re: Subtitle Three, Chapter 44, proposed  
N.J. Criminal Code, sentencing  
Philip E. Kunz  
Director, Social Concerns  
March 10, 1975

The New Jersey Council of Churches, a fifty year old ecumenical organization composed of fourteen major denominations in the Garden State, welcomes this opportunity to testify on a portion of the proposed Criminal Code. In general comment on the draft Chapter 44, Authority of the Court in Sentencing, we must plead with the Judiciary Committee to take adequate time to further review this momentous area of concern. The reported intentions of the Committee to complete deliberation on this section in the next few days is distressing. While NJCC wants to see introduction and action on the proposed code this year, we cannot support hasty consideration on sentencing. We respectfully request a period of at least two weeks from today to properly gather evidence in this sensitive topic and to better think through the final language.

We must also take exception to much of the thrust of the Legislative Services Agency commentary, Report No. 20, insofar as it rests in large part on a faulty article appended from the National Observer of January 5, 1975. This article is far from comprehensive, or even journalistically logical. We expressly challenge its implications that future sentencing ought to rigidly fit certain crimes rather than take into any account the individuals found guilty of crimes.

No two crimes are alike. We think reasonable persons should stipulate now that (A) imprisonment is punishment; (B) far too little is yet known concerning effective rehabilitation; (C) deterrence from many of the most frightening crimes is an unproven quality. With these three problems in mind, NJCC argues that our sentencing should strive for better response to the individual situation rather than throwing up hands and opting for gross repression.

In speaking of punishment, NJCC does not suggest that punishment has been empirically proven to be an effective ending of crime. Nor can we avoid the Biblical fact that the Wrath belongs to the Lord, not to human kind. We merely take cognizance of present reality: incarceration is punitive whether it also marks a period of rehabilitation or not.

The Judiciary Committee's task in working on a change in sentencing is to build for a response to the conviction in an optimum number of cases which will return the person to society in as speedy a period as possible with new behaviour patterns which will not again violate the criminal code. The suggestion by some that uniform harsh penalties are effective is not proven in the corrections studies. Nor does it take into account the dreadful realities we now see in this Century's second depression. For example, the unemployment rate in San Diego California is showing sad correlation currently with the increased crime rate against property among persons never before involved in crime. This preliminary conclusion is that of the San Diego Police. It means, in fact, that fathers and mothers suddenly thrown out of work due to circumstances beyond their control have gotten involved in shop-lifting and other crimes. Should they be sentence to three years in State's Prison on the same basis as a member of a shop-lifting ring, or a repeater with a record in a dis-similar crime? Of course not. But the "one penalty for all school" which has some political adherents would have it so. The Judiciary Committee shall have to combat such "know-nothingism."

A related difficulty with political more than rational or scientific basis is the occasional clamour for some death penalty. The overwhelming burden of proof beyond a reasonable doubt remains on the death advocates. There is no magnum corpus of evidence indicating the deterrent benefit of death penalties.

Consider that the proposal for death in the killing of a corrections officer is more dramatic than the penalty for the wrongful death of a three year old accidentally injured at the checkout line during a supermarket holdup. Is the corrections officer more valuable than the child? Is there evidence that disorders, or scuffles in prisons are deterred by "death for cop-killer" laws? Of course not. It is only the fond wish of some persons that deterrence can be won by death penalties.

NJCC remains steadfastly opposed to any death penalties based on empirical, Biblical, and political grounds as signified in the last instance by the positions of its fourteen Church judicatories.

Still another factor in the punishment for the situation view that NJCC endorses is improvement of the New Jersey system in dealing with offenders remanded for therapy. The article cited in National Observer makes much of a California case where an offender had 16 years of incarcerated therapy for a four year straight sentence crime. Obviously such instances are a travesty. The way to remedy any such future mistakes is only to put a maximum term provision in the code regardless of the manner in which the term is served; therapy, cold storage, or what have you.

There is a basic problem with the sentencing provisions in the proposed code: they are based on 1955 thinking. The concept of degrees of severity is helpful. But the basic length of sentences is out of date. It does not take into account knowledge hard won ~~since~~ since the model code was written. We urge the Committee to study the data and reduce much of the sentence length provisions in this New Jersey document.

Another change we seek is for crimes by corporations. The draft does not adequately change the existing situation wherein a billion dollar multinational corporation may endure less difficulty from the judgement than a youthful offender convicted of unarmed breakin to a residence in the daytime. After the recent revelations of gross crime by corporations, political operatives, and even officers of the State in the cases of the CIA and FBI, NJCC beleives that the penalties for corporate crime must be written in sterner terms.

The eleven grounds for the Court's withholding imprisonment in the draft are helpful. They should be wrapped in provisions which will ensure good pre-sentence procedures and a report of rationale by the Court in each instance, rather than leaving such process up to the Court. Why? is the question society deserves to hear an answer to in sentencing. We certainly have found in sad experience that sentencing does not cure crime ex operor operatum.

Another problem we have in this draft is the casual reference (pg. 121) to sentences of less than one year being served in "the common jail." Even slight investigation by the Committee will reveal that such jails are the worst institutions in our State. So if one hopes to deter crime by punishment, the jail will be avoided because of its inhuman nature and its "school for crime" character. Rehabilitation is hardly a word from the same language as jail. The jails ought to be useful only in pretrial situations, and then their population should be drastically reduced by bail and other proceedings.

Because NJCC beleives the Judiciary Committee regards Criminal Code revision with sincerity and prudence, we will stay our impulse to submit many pages of study citations. Rather, we again plead that far more deliberative thought be given to the sentencing aspect than has been thus far possible. We believe the Administration will understand some further study and time expenditure.

We are sympathetic with the pressures on the Committee in this grave task of Code revision. It is a noble task if pursued with the idea of improving the performance of our corrections system by humanization of treatment and concurrent reduction in the return to crime. This is one of the three most difficult issues in our Republic. It also enjoys some of the least sensible evidence. But we commend the Assembly Judiciary Committee for its work, and ask incorporation of our recommendations in the final Code bill.

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