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SENDING MEN TO PRISON: CONSTITUTIONAL ASPECTS OF THE BURDEN OF PROOF AND THE DOCTRINE OF THE LEAST DRASTIC ALTERNATIVE AS APPLIED TO SENTENCING DETERMINATIONS*

Richard G. Singert†

The present state of sentencing in this nation is appalling.¹ In virtually every jurisdiction, decisions concerning the liberty of human beings are made in a total vacuum, often in ignorance of the essential

* The views here expressed are those of the author alone, and do not necessarily reflect the views of the American Bar Association or its members, nor those of the Office of Economic Opportunity or the Ford Foundation, which fund the American Bar Association Resource Center on Correctional Law and Legal Services.

† Member of the Maryland Bar; Project Co-Director, ABA Resource Center on Correctional Law and Legal Services. B.A. 1963, Amherst College; J.D. 1966, University of Chicago; LL.M. 1971, Columbia University.

¹ The literature on sentencing is already enormous, and continues to grow. Almost all of it is critical of current practices. The leading works in the area include R. DAWSON, SENTENCING (1969); E. GREEN, JUDICIAL ATTITUDES IN SENTENCING (1961); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); D. THOMAS, PRINCIPLES OF SENTENCING (1970); Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEXAS L. REV. 1 (1968); Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972); Frankel, *The Sentencing Morass, and a Suggestion for Reform*, 3 CRIM. L. BULL. 365 (1967); George, *An Unsolved Problem: Comparative Sentencing Techniques*, 45 A.B.A.J. 250 (1959); Levin, *Toward a More Enlightened Sentencing Procedure*, in THE TASKS OF PENOLOGY 137 (H. Perlman & T. Allington eds. 1969); Mannheim, *Comparative Sentencing Practice*, 23 LAW & CONTEMP. PROB. 557 (1958); Pugh & Carver, *Due Process and Sentencing: From Mapp to Mempa to McGautha*, 49 TEXAS L. REV. 25 (1970); Rubin, *Allocation of Authority in the Sentencing-Correction Decision*, 45 TEXAS L. REV. 455 (1967); Sobeloff, *A Recommendation for Appellate Review of Criminal Sentences*, 21 BROOKLYN L. REV. 2 (1954); Turnbladh, *A Critique of the Model Penal Code Sentencing Proposals*, 23 LAW & CONTEMP. PROB. 544 (1958); Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465 (1961); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281 (1952); Note, *The Duty of the Prosecutor To Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960); Note, *Recidivist Procedures: Prejudice and Due Process*, 53 CORNELL L. REV. 337 (1968); Note, *The Presentence Report: An Empirical Study of Its Use in the Federal Criminal Process*, 58 GEO. L.J. 451 (1970); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968); Note, *Recidivist Procedures*, 40 N.Y.U.L. REV. 332 (1965); Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968 (1967).

The growth of sentencing institutes, sentencing councils, and other informational groups of this type also demonstrates this mushrooming concern. Numerous additional writers have directed their arrows at one specific aspect of the sentencing code, such as sexual psychopath statutes and habitual offender statutes. A list of these attacks would be exceptionally long and unnecessary at this point. Finally, the reports of major study groups, such as those cited in notes 12-15 *infra*, also evidence dissatisfaction with current sentencing processes.

facts about the defendant,² and often without much conception of the primary purpose of the sentencing decision.³ Moreover, although most states have sentencing hearings, there is currently no decision from the United States Supreme Court that requires such a hearing;⁴ theoretically it is possible to send a man to prison—perhaps even for life—without any face-to-face confrontation at all.

Even if the defendant is given a hearing, he may not fare particularly well, for the law surrounding sentencing procedures is ambiguous, uncertain, and in some instances contradictory. It is clear only that the defendant has a constitutional right to counsel.⁵ Beyond that the path becomes murky, although some general observations may be made concerning the rights of the defendant: (1) he is not entitled, as a matter of constitutional law, to have a presentence report done on him;⁶ (2) if one is done, he is not entitled, as a matter of constitutional law, to see

² A number of state statutes require presentence reports on convicted defendants. See, e.g., COLO. REV. STAT. ANN. § 39-16-2 (1963). Certain other state statutes leave presentence reports to the discretion of the court under some or all circumstances. See, e.g., CONN. GEN. STAT. § 54-109 (1968); N.C. GEN. STAT. § 15-198 (1965). In jurisdictions where such reports are not mandatory, their use varies greatly. For example, among all federal offenders in 1960, 87% received such reports, but there was nevertheless a range of 6% to virtually 100% usage among the districts of the Fifth Circuit. Sharp, *The Presentence Report*, 30 F.R.D. 242 (1962); see Note, *The Presentence Report: An Empirical Study of Its Use in the Federal Criminal Process*, 58 GEO. L.J. 451, 453 (1970). Other studies demonstrate that usage increases dramatically with the degree of urbanization. See Note, *Use of the Presentence Investigation in Missouri*, 1964 WASH. U.L.Q. 396.

³ Legislatures are unusually reticent about stating the purpose of sentencing or of the criminal law in general. While many state constitutions proclaim in lofty terms that the underlying purpose of all punishment is "reformation" or rehabilitation (see, e.g., N.C. CONST. art. 11, § 2; ORE. CONST. art. 1, § 15), this policy is generally ignored in the sentencing context. The difficult problem of translating the rehabilitative ethic into sentencing practice should be faced by legislatures directly, rather than ignored in the hope that the great disparity in dispositions of sentences will somehow disappear spontaneously.

⁴ The case most likely to be construed as requiring a hearing at sentencing is *Mempa v. Rhay*, 389 U.S. 128 (1967), which held that counsel was required at a sentencing hearing. Although the case did not state that due process necessitated a hearing in the first instance, the logical conclusion, enunciated by both Cohen, *supra* note 1, at 12, and Pugh & Carver, *supra* note 1, at 31, is that a hearing is necessitated. *Specht v. Patterson*, 386 U.S. 605 (1966), can easily be read as holding that a hearing is necessary, but the procedure there involved sentencing under a sexual offenders act, which was different from the statute under which the defendant was found guilty. *Goldberg v. Kelly*, 397 U.S. 254 (1970), a landmark case holding that due process requires a hearing whenever a "grievous loss" may be inflicted, even in civil situations, would again seem to argue for a due process hearing requirement, but the procedure there is also distinguishable from the sentencing process. Nevertheless, the likelihood is that no state would even attempt to justify taking a man's liberty without at least some pro forma attempt to afford him a hearing.

⁵ *Mempa v. Rhay*, 389 U.S. 128 (1967).

⁶ See, e.g., *United States v. Hazelrigg*, 430 F.2d 580 (8th Cir. 1970); *United States v. Williams*, 254 F.2d 253 (3d Cir. 1958); *State v. Patterson*, — Iowa —, 161 N.W.2d 736 (1968).

the report,⁷ even though it may have numerous misstatements and

⁷ See, e.g., *Powers v. United States*, 325 F.2d 666 (1st Cir. 1963); *United States v. Durham*, 181 F. Supp. 503 (D.D.C.), cert. denied, 364 U.S. 854 (1960); *State v. Moore*, 49 Del. 29, 108 A.2d 675 (Super. Ct. 1954); *People v. Riley*, 376 Ill. 364, 33 N.E.2d 872, cert. denied, 313 U.S. 586 (1941). Recently, the Fifth Circuit has reaffirmed its position that disclosure is not constitutionally required. *United States v. Bakewell*, 430 F.2d 721 (5th Cir.), cert. denied, 400 U.S. 964 (1970). In *Kent v. United States*, 383 U.S. 541 (1966), rev'g 343 F.2d 247 (D.C. Cir. 1964), the Supreme Court held that under the District of Columbia Code reports must be given to counsel for defendant juveniles:

We do not agree with the Court of Appeals' statement, attempting to justify denial of access to these records, that counsel's role is limited to presenting "to the court anything on behalf of the child which might help the court in arriving at a decision; it is not to denigrate the staff's submissions and recommendations." On the contrary, if the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to "denigrate" such matter. There is no irrebuttable presumption of accuracy attached to staff reports. . . . [T]he Juvenile Court judge may . . . not . . . receive and rely upon secret information, whether emanating from his staff or otherwise. The Juvenile Court is governed in this respect by the established principles which control courts and quasi-judicial agencies of the Government.

383 U.S. at 563, quoting 343 F.2d at 258. In *re Gault*, 387 U.S. 1 (1967), made clear that *Kent* was as much decided upon constitutional grounds as it was upon statutory interpretation. The Fourth Circuit rejected the argument that *Kent* is now constitutionally mandated, but it nevertheless held that "[t]he sentencing court should apprise [the defendant], orally from the bench, of at least such pivotal matters of public record as the conviction and charges of crime." *Baker v. United States*, 388 F.2d 931, 933 (4th Cir. 1968). See also *United States v. Dockery*, 447 F.2d 1178 (D.C. Cir.), cert. denied, 404 U.S. 950 (1971); *United States v. Carden*, 428 F.2d 1116 (8th Cir. 1970); *Roeth v. United States*, 380 F.2d 755 (5th Cir.), cert. denied, 390 U.S. 1015 (1967). Some states by judicial decision require complete disclosure (e.g., *State v. Kunz*, 55 N.J. 128, 295 A.2d 895 (1969); cf. *State v. Grady*, 89 Idaho 204, 404 P.2d 347 (1965)); other states make disclosure a matter of the trial court's discretion (e.g., *State v. Moore*, 49 Del. 29, 108 A.2d 675 (Super. Ct. 1954); *People v. Riley*, 376 Ill. 364, 33 N.E.2d 872, cert. denied, 313 U.S. 586 (1941); *Costello v. State*, 237 Md. 464, 206 A.2d 812 (1965); *People v. Malkowski*, 25 Mich. App. 195, 181 N.W.2d 6 (1970), aff'd, 385 Mich. 244, 188 N.W.2d 559 (1971). Disclosure is required in some states by statute. E.g., ALA. CODE tit. 42, § 23 (1959); CAL. PENAL CODE § 1203 (West 1970); VA. CODE ANN. § 53-278.1 (Supp. 1972). Disclosure has been mandatory in England since 1948. See English Criminal Justice Act 1948, 11 & 12 Geo. 6, c. 58, § 43.

Two recent federal decisions presage further inroads into discretionary disclosure. In *United States v. Janiec*, 464 F.2d 126 (3d Cir. 1972), the court held that, as a constitutional matter, at least the defendant's past criminal record as recorded in the presentence report must be disclosed unless the trial judge disclaims any reliance on it. The court thus left decision on the question of mandatory disclosure to future cases or to the Supreme Court. Approximately one month later, the First Circuit held, though not by constitutional compulsion, that disclosure was required with regard to all matters upon which the trial court relied, unless this disclosure would damage the defendant or endanger others. In that case, *United States v. Picard*, 464 F.2d 215 (1st Cir. 1972), the trial court had relied upon information that the defendant was deeply involved in crime. The defense attorney, but not the defendant, was allowed to see the report. This, the court of appeals said, was simply not enough—the defendant was entitled to see the parts of the report relied upon in sentencing.

Whether the contents of presentence reports should be revealed to defendant or his counsel is an issue that has split judges and criminologists for at least the last 25 years. Those opposing disclosure point to the possible "drying up" of sources from whom confi-

errors in it;⁸ and (3) he probably has no right to cross-examine those who do accuse him or those whose accusations are made to the probation officer.⁹

These failings in the current sentencing procedures employed in most jurisdictions have not escaped the attention—and condemnation—of recent studies of sentencing. Judges,¹⁰ legal scholars,¹¹ and eminent

dential information is supposedly often obtained, the possible "dragging out" of sentencing by an "acrimonious, often pointless," adversary proceeding, the undermining of the relationship between the defendant and his ultimate probation officer if the officer originally recommends some incarceration, and possible psychological damage to the defendant himself. See, e.g., Parsons, *The Presentence Investigation Report Must Be Preserved as a Confidential Document*, 28 FED. PROBATION 3, 4-6 (March 1964); Roche, *The Position for Confidentiality of the Presentence Investigation Report*, 29 ALBANY L. REV. 206, 217-24 (1965); Sharp, *The Confidential Nature of Presentence Reports*, 5 CATHOLIC U.L. REV. 127, 138 (1955).

Those favoring disclosure are equally adamant. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 145 (1967); Higgins, *Confidentiality of Presentence Reports*, 28 ALBANY L. REV. 12, 27 (1964); Katkin, *Presentence Reports: An Analysis of Uses, Limitations and Civil Liberties Issues*, 55 MINN. L. REV. 15, 30 (1970); Wyzanski, *supra* note 1, at 1291-92; Note, *Employment of Social Investigation Reports in Criminal and Juvenile Proceedings*, 58 COLUM. L. REV. 702, 705-07 (1958). Three institutional authors have recommended varying degrees of disclosure. The first edition of the *Model Sentencing Act* of the National Council on Crime and Delinquency made disclosure discretionary in the ordinary case, but mandatory where the sentence was for more than five years. MODEL SENTENCING ACT § 4 (1963). The soon-to-be published second edition, however, makes disclosure mandatory in all cases. MODEL SENTENCING ACT § 4 (2d ed. 1972). The American Law Institute's *Model Penal Code* provides only that the defense counsel be advised of pertinent facts in the report. MODEL PENAL CODE § 7.07(5) (1962). The American Bar Association strongly urges the disclosure of the bulk of the presentence report. AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES* § 4.4 (1967).

The relevant provision of the Federal Rules of Criminal Procedure (FED. R. CRIM. P. 32(c)(2)) provides that the judge "may disclose" the contents of the report.

⁸ There are many reported cases in which mistakes or misinformation in the presentence report have ultimately come to light. See, e.g., *Townsend v. Burke*, 334 U.S. 736 (1948); *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970); *United States ex rel. Brown v. Rundle*, 417 F.2d 282 (3d Cir. 1969); *State v. Pohlman*, 61 N.J. Super. 242, 160 A.2d 647 (App. Div. 1960); cf. *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); *United States ex rel. Jackson v. Myers*, 374 F.2d 707 (3d Cir. 1967); *State v. Killian*, 91 Ariz. 140, 370 P.2d 287 (1962).

⁹ See *Williams v. New York*, 337 U.S. 241 (1949).

¹⁰ Judges Marvin Frankel and Simon Sobeloff have been vociferous champions of change. See Frankel, *supra* note 1; Sobeloff, *supra* note 1. Other members of the judiciary have spoken of the need for revision and reconsideration, although perhaps not as strenuously. See, e.g., Doyle, *A Sentencing Council in Operation*, 25 FED. PROBATION 27 (Sept. 1961); Parsons, *Aids in Sentencing*, 35 F.R.D. 423 (1964); Parsons, *The Personal Factor in Sentencing*, 13 DEPAUL L. REV. 1 (1963); Zavatt, *Sentencing Procedure in the United States District Court for the Eastern District of New York*, 41 F.R.D. 469 (1966). General judicial comment can be found in the sentencing institutes which have proliferated since 1958, when they were first authorized by Congress. See 28 U.S.C. § 334 (1970). Reports of these

committees of the American Bar Association,¹² the American Law Institute,¹³ the National Council on Crime and Delinquency,¹⁴ and the President's Commission on Law Enforcement and the Administration of Justice¹⁵ have all criticized present techniques and recommended major improvements in the field as a matter of sound correctional policy.

One question almost never faced by the criminal law, penologists, judges, prosecutors, or defense counsel is: in a sentencing procedure, who carries the burden of proof concerning the justification for a particular sentence? The thesis of this paper—tentatively suggested—is that before the state (including the trial judge) may constitutionally sentence a man to prison, the record must conclusively demonstrate that all other “less drastic” alternatives have been considered and rejected as unsuitable for this particular offender; that in effect the state government bears the burden of demonstrating that the defendant cannot be allowed to remain in the community, even under partial supervision, but must be removed from the community to a penal institution.

I

THE LEAST DRASTIC ALTERNATIVE

A. *The Doctrine Articulated*

Briefly stated, the doctrine of the least drastic alternative requires that a state demonstrate a particular legislative course to be the least drastic method of achieving a desired end.¹⁶ The Supreme Court in

institutes can be found at 54 F.R.D. 285 (1972); 49 *id.* 347 (1970); 45 *id.* 149 (1969); 42 *id.* 175 (1968); 41 *id.* 467 (1967); 39 *id.* 523 (1966); 37 *id.* 111 (1965); 35 *id.* 381 (1964); 30 *id.* 401 (1962); 27 *id.* 293 (1961). State judicial institutes are reported at 46 *id.* 497 (1969); 40 *id.* 399 (1967); 45 Cal. Rptr. following 1028, Appendix (1965).

¹¹ See note 1 *supra*.

¹² The American Bar Association conducted a massive study of sentencing in 1967. AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (1967). The ABA followed this with its report on appellate review of sentences. AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968). Both works strongly criticized present sentencing structures.

¹³ MODEL PENAL CODE (1962).

¹⁴ MODEL SENTENCING ACT (1963); *id.* (2d ed. 1972).

¹⁵ The work of the Crime Commission is well-known. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 7. Its most thorough analysis of sentencing is found in chapter five on the role of the courts. *Id.* at 141-46.

¹⁶ See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969); Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV.

expressing this principle has spoken of using "less drastic means"¹⁷ or methods that are "necessary"¹⁸ to effectuate the state's purpose, but the import of these various formulations is the same—the state must demonstrate that the infringement upon human liberties which occurs is *unavoidable* if the purpose of the state is to be achieved. Some examples may clarify the point. If the purpose of a one-year residency requirement for welfare is to avoid welfare fraud, that waiting period is too drastic and must be invalidated since the state may achieve its interest by telephoning the city from which the applicant came.¹⁹ If the purpose of a similar requirement for voting is to assure that the voter has an interest in the outcome, that requirement too must fail since the state may simply ask the voter to affirm that he is a bona fide resident of the community.²⁰ If the state wishes to determine the competence of its teachers, it cannot require them to list all the organizations to which they belong, since an investigation of their competence in the classroom would be a more direct method of reaching the same end.²¹

The doctrine is not new. Indeed, Professors Francis Wormuth and Harris Mirkin have suggested that virtually all first amendment cases decided on the basis of vagueness or overbreadth can be interpreted in the language of this doctrine.²² For example, if a statute is struck down for overbreadth, the analysis under the doctrine is clear: the language of the statute, the method used for protecting the state's interest, is too broad and thus too "drastic." The state's interest can be served by the "least broad" language that effectuates the purpose of the exercise of police power while affording notice to the offender.²³

In the past few years, the overbreadth test has generally been

254 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969). The doctrine is of course predicated upon establishing a sufficient interest in the area to justify legislating at all.

¹⁷ *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969).

¹⁸ *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972).

¹⁹ See *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969).

²⁰ See *Dunn v. Blumstein*, 405 U.S. 330, 352 (1972).

²¹ Cf. *Shelton v. Tucker*, 364 U.S. 479 (1960).

²² Wormuth & Mirkin, *supra* note 16, at 267-93. See also Note, *supra* note 16, at 464.

²³ See *United States v. Robel*, 389 U.S. 258, 268 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

Similarly, vague statutes may be overbroad depending upon the interpretation given them by local officials. One of the classic cases in this mold is *Kunz v. New York*, 340 U.S. 290 (1951), finding an ordinance unconstitutionally vague because it left unfettered discretion in the hands of administrative officials. *Accord*, *Schneider v. Irvington*, 308 U.S. 147 (1939); see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). For recent examples of the vagueness doctrine in action, see *Rabe v. Washington*, 405 U.S. 313 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

coupled with the requirement that the state demonstrate a "compelling" interest in regulating the activity at all.²⁴ The latter standard was a major breakthrough by the Warren Court in its waning years. Like the "least drastic" test, it shifts to the state the burden of justifying legislative restrictions on constitutional liberties. The reception given this requirement by the new appointees to the Court has been cool at best, and at times has been openly hostile.²⁵ The compelling state interest doctrine has thus far been limited by the courts, both high and low, to instances where "fundamental human liberties" are involved.²⁶

The compelling state interest test must be contrasted with the other basic test by which courts judge legislation: that the interest served be a legitimate one to which the challenged legislation bears some "reasonable" or "rational" relation.²⁷ Clearly, the two tests take radically different approaches to the enforcement of legislative enactments. The latter will uphold legislation if any justification, however feeble, may be suggested; indeed, the Court has sometimes said that if any reasonably conceivable state of facts could arise which would justify the legislation, it would be the Court's duty to uphold the legislative power.²⁸ The former standard takes precisely the opposite view: where funda-

²⁴ Two of the principal cases applying this test are *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Dunn v. Blumstein*, 405 U.S. 330 (1972). Other voting rights cases utilizing the same approach include *Evans v. Cornman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969). A thorough examination of the trend toward the use of the new doctrine can be found in Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-131 (1969).

²⁵ In his dissent in *Dunn*, Chief Justice Warren Burger severely criticized the doctrine, saying that it presented an "insurmountable standard." 405 U.S. at 363-64. For an examination of this view, see notes 111-13 and accompanying text *infra*.

²⁶ See, e.g., *James v. Valtierra*, 402 U.S. 137 (1971), in which the Court refused to find a denial of the equal protection of the laws to individuals eligible for low-rent housing in a California constitutional provision requiring approval by a majority of those voting in a community referendum for the development of any low-rent housing project. The decision was apparently premised upon the reasoning that classifications based on wealth—at least of the kind under consideration—do not infringe upon "fundamental human liberties."

Precisely what constitutes a "fundamental human liberty" remains unclear. In recent cases, the right to wear one's hair the length one wishes (*Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971)), the right to have an abortion (*Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *prob. juris. postponed*, 402 U.S. 941 (1971), *restored for reargument*, 408 U.S. 919 (1972)), and the right to education (*Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971)) have all been deemed fundamental human liberties. See Houle, *Compelling State Interest v. Mere Rational Classification: The Practitioner's Equal Protection Dilemma*, 3 URBAN LAW 375 (1971).

²⁷ See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

²⁸ See, e.g., *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

mental interests are concerned, the statute loses its presumption of constitutionality; it may even be said that on occasion the statute is presumed to be unconstitutional.²⁹

In short, the dividing line between instances where one test or the other is employed is said to be that when "fundamental interests" or "fundamental human liberties" are involved, the Court brandishes the compelling state interest test; when the regulation affects only "economic" interests, the legislation is measured by the more lenient standards of "legitimate state interest" and "rational relation."³⁰

Because each recent Supreme Court case using the "least drastic alternative" approach has also applied the "compelling state interest" test, there is some danger that the two will be viewed as inseparable. That, however, is not a necessary conclusion. It would be possible for the Court to state the standard in terms of whether a legitimate state interest was being served in the least drastic way or, conversely, whether the method used by the state had any rational relation to the achievement of a compelling and critical state interest. Indeed, Chief Justice Burger has on occasion indicated that he would be more comfortable with the legitimate interest-necessary test where "fundamental freedoms" are involved.³¹ Taken in its usual sense, "necessary" implies that the means chosen must be not merely "sufficient" to achieve the end sought by the state, but essential, *i.e.*, that there is no less severe way to achieve the result. Thus, Burger's position appears to hold that a rational, not compelling, state interest is sufficient to justify intrusion into a constitutionally protected area, but that the state must then meet the doctrine of the "necessary" or "least drastic" remedy.

The combination of the compelling state interest test and the least drastic alternative test may be, as the present Chief Justice has indi-

²⁹ See *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964) (concurring opinion). This has also been said with regard to statutes which establish a system of prior restraint on first amendment freedoms. See, *e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

³⁰ There is much to be said for the argument that no distinction really exists, since the right to control one's own property—for example, economic control of a business—could be seen as a "fundamental" interest of every person. However, the degree to which the courts recognize a distinction seems sufficient, at least for the moment, to allow us to speak of these two categories of cases. The Court's recent decision in *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972), holding that for jurisdictional purposes there is no distinction between personal liberties and proprietary rights, may have some impact here as well. Although *Lynch* rests on an interpretation of statutes defining the scope of federal court jurisdiction, the majority opinion acknowledges a "fundamental interdependence" between personal and property rights. *Id.* at 552.

³¹ The Chief Justice's opinion in *Bullock v. Carter*, 405 U.S. 134 (1972), suggesting a "close scrutiny" to determine whether the statute was "necessary" to achieve a legitimate state purpose (*id.* at 144), comes close to proposing this combination. So, also, does the Chief Justice's dissent in *Dunn*, if only by implication. See 405 U.S. at 363-64.

cated, an "insurmountable" standard for states to meet.³² A state must currently demonstrate not only that it should be legislating but also that there is no better alternative. This places the onus of proving a negative upon the state. It would, as the Chief Justice implies, be highly unlikely that an adversary would not be able to suggest some other method which could achieve the interest, but which would impinge "just a little" less on the "fundamental interest" involved.³³

Great controversy might well arise in many contexts over what method is the "least drastic." A good example might come from the voting area. One could argue that if the state makes fraudulent voting criminal and punishes it with x number of years in prison, then it should not put up any pre-voting barriers at all. The entire process of registration could be opposed on the basic premise that the state deters fraudulent voters by penalizing them criminally, and that any other strictures would only "chill" legitimate voters by, for example, making them register at a distant election board.³⁴ Others might argue, however, that imprisonment is a severe—drastic—remedy, and that registration procedures should be made even more cumbersome to deter all fraud in balloting, which would serve to eliminate the need for the severe sanction of incarceration.

To date, the arguments have not been carried this far; the Court has generally avoided discussion of the possibilities of friction and of speculation in determining whether there is a "less drastic" method. But the far-reaching implications of the doctrine and the difficulties in determining its limits suggest that careful scrutiny should be employed before it is expanded to encompass new areas. Several recent decisions by the District of Columbia Circuit have begun to crystallize the application of the concept.

B. *Lake, Covington, and Dixon: Willows in a Constitutional Windstorm?*

In *Lake v. Cameron*³⁵ a senile woman was civilly committed to a mental institution, having been judged "of unsound mind" after a policeman found her wandering about the city. Upon her petition for habeas corpus, the lower court denied relief after conducting a hearing

³² *Dunn v. Blumstein*, 405 U.S. 330, 364 (1972) (dissenting opinion); see note 25 and accompanying text *supra*.

³³ 405 U.S. at 363-64.

³⁴ See Note, *Constitutional Standards Applicable to Voter Registration Closing Dates*, 5 J.L. REFORM 304, 314 (1972).

³⁵ 364 F.2d 657 (D.C. Cir. 1966). Burger, then Circuit Judge, dissented in *Lake*, an ominous sign for those who seek to apply its logic elsewhere.

on the issue,³⁶ but noted that she could make further application "in the event that [she] is in a position to show that there would be some facilities available for her provision."³⁷ Relying on a newly-enacted District of Columbia law that shifted the burden of proof in this type of case,³⁸ the court of appeals, per Judge Bazelon, reversed, holding that the burden was on the state to demonstrate that incarceration in a secure hospital was the only alternative through which the community could be protected.³⁹

The *Lake* case made clear that in a civil commitment proceeding the burden is upon the state to demonstrate that institutionalization is necessary to achieve the objective of treatment and care of persons committed. Nonetheless, *Lake* was ambiguous, since its focus on the availability of alternatives was arguably mandated by the statute, which required the court to determine that no less secure alternatives would suffice.⁴⁰

*Covington v. Harris*⁴¹ was more direct. Covington had been civilly committed to the same hospital involved in the *Lake* case. But the commitment was only technically civil, since it followed a determination by the hospital that he was incompetent to stand trial for murder and would probably remain that way. There was, therefore, a criminal "tinge" to the incarceration. Upon his arrival, Covington had been placed in the maximum security ward. Thereafter, however, he had been kept under heavy sedation, after which he was far less violent, leading his supervising physician to recommend his transfer to a less secure division of the hospital. When the recommendation was denied, Covington brought a habeas corpus action. While that suit was pending, he was accused of stealing within the institution. Primarily on that basis, the district court denied the habeas corpus petition.⁴²

³⁶ The district court originally denied the petition without a hearing, but the court of appeals remanded, ordering a hearing. *Lake v. Cameron*, 331 F.2d 771 (D.C. Cir. 1964), cert. denied, 382 U.S. 863 (1965). The substantive decision is the appeal from the district court's unreported action on that remand.

³⁷ Quoted in 364 F.2d at 659.

³⁸ D.C. CODE ANN. §§ 21-501 to -591 (1967).

³⁹ The court specifically mentioned public health nursing care, community mental health and day care services, foster care, home health aid services, and welfare payments as alternatives. 364 F.2d at 661. The scope of these alternatives and of the many other possibilities they suggest is part of the importance of *Lake*. On final remand, the district court found that commitment in the hospital with closed wards was fully warranted in light of the evidence and the lack of any other facility within the district capable of treating petitioner. 267 F. Supp. 155 (D.D.C. 1967).

⁴⁰ D.C. CODE ANN. § 21-545(b) (1967).

⁴¹ 419 F.2d 617 (D.C. Cir. 1969).

⁴² The lower court decision is unreported. For a more expansive treatment of the facts leading to that proceeding, see *id.* at 619-20.

The court of appeals, again per Judge Bazelon, reversed the dismissal, requiring the state to demonstrate that less severe confinement was not justified.⁴³ Citing *Lake*, the court expressly declared that the result in *Covington*, and even in *Lake*, was not dependent solely on the presence of legislation requiring consideration of alternatives:

The principle of the least restrictive alternative is equally applicable to alternate dispositions *within* a mental hospital. It makes little sense to guard zealously against the possibility of unwarranted deprivations prior to hospitalization, only to abandon the watch once the patient disappears behind hospital doors. The range of possible dispositions of a mentally ill person within a hospital, from maximum security to out-patient status, is almost as wide as that of dispositions without. The commitment statute no more authorizes unnecessary restrictions within the former range than it does within the latter.

. . . .

. . . [B]efore a court can determine that the hospital's decision to confine a patient in a maximum security ward is, within its broad discretion, "permissible and reasonable . . . in view of the relevant information," it must be able to conclude that the hospital has considered and found inadequate all relevant alternative dispositions within the hospital.⁴⁴

Though *Lake* was clearly a civil commitment, and *Covington* was arguably civil, there can be no question of the criminal character of the confinement in *Dixon v. Jacob*.⁴⁵ That case involved a St. Elizabeth's Hospital inmate incarcerated after being found innocent, only on grounds of insanity, of murder and assault with intent to commit carnal knowledge. As Judge Leventhal, concurring, made clear, "Plainly the acquittal by reason of insanity reflects a jury determination, beyond a reasonable doubt, that except for the defense of insanity, defendant did do the act"⁴⁶ This, then, was the status closest to a "criminal" commitment; if any case speaks to the application of the least drastic alternative doctrine to the criminal field, it would be, thus far, the *Dixon* case.

The difficulty with this analysis is that *Dixon* said nothing—or virtually nothing—about a less drastic alternative. Only in a passing reference to *Covington* did Judge Bazelon, again the author of the

⁴³ *Id.* at 624-25.

⁴⁴ *Id.* at 623-24 (emphasis in original) (footnote omitted), quoting *Tribby v. Cameron*, 379 F.2d 104, 105 (D.C. Cir. 1967).

⁴⁵ 427 F.2d 539 (D.C. Cir. 1970).

⁴⁶ *Id.* at 601 (concurring opinion).

majority opinion, indicate that the doctrine might apply to this inmate.⁴⁷ The holding was much narrower, based on an issue of exhaustion of remedies.⁴⁸ Furthermore, as if in anticipation that *Dixon* might be thought to apply in the criminal field, Judge Bazelon would appear to have discouraged that interpretation:

Confinement of the mentally ill rests upon a basis substantially different from that which supports confinement of those convicted of crime Confinement of the mentally ill . . . depends not only upon the validity of the initial commitment but also the continuing status of the patient.⁴⁹

Judge Bazelon's statement seems directed more at making clear that, in contrast to civil commitment, continual review of a criminal incarceration, absent at least a provision for parole, is not statutorily or constitutionally mandated. However, in his intimation elsewhere that to the mentally ill individual, criminal and civil commitment are essentially indistinguishable,⁵⁰ Judge Bazelon may have provided an argument for moving the law of criminal commitment closer to the law of civil commitment, rather than delineating a boundary between them.⁵¹

These three opinions may launch the doctrine of the least drastic alternative to application in other contexts where its use is arguably appropriate.⁵² It is surely not too much, on the face of the matter, to

⁴⁷ *Id.* at 597.

⁴⁸ In response to *Dixon's* petition for a writ of habeas corpus, the hospital averred, *inter alia*, that petitioner had not exhausted available administrative remedies. The court of appeals reversed the district court's dismissal of the petition without a hearing on the ground that there was no showing by the government that administrative remedies had not been exhausted sufficient to dismiss the petition summarily. *Id.* at 600.

⁴⁹ *Id.* at 595 (footnote omitted).

⁵⁰ See Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 748-49, 752-53 (1969).

⁵¹ Cf. Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87, 99 (1967), positing that the difference between civil commitment and imprisonment for a crime is basically the stigma which attaches to the criminal. Whether there is a constitutionally recognizable difference between criminal and civil commitment, either in terms of procedure or substantive justification for incarceration, is an issue that has been reinvigorated by the recent decisions of the Supreme Court in *Humphrey, Jackson*, and *McNeil*, discussed in note 147 *infra*. The import of this set of cases may well be to erase totally the line between civil and criminal commitment.

⁵² The impact of the decisions in the areas of right to treatment, judicial review of institutional decisions, and general mental health law is obvious. See, e.g., *Jones v. Robinson*, 440 F.2d 249 (D.C. Cir. 1971); *Williams v. Robinson*, 432 F.2d 637 (D.C. Cir. 1970); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966). Judge Bazelon has almost single-handedly established a place for the law in the field of mental health. Consider his remarks in *Covington v. Harris*, 419 F.2d 617, 621-22 (D.C. Cir. 1969), concerning the proper scope of judicial review in the system of checks and balances in this country:

ask state officials to justify severe restrictions upon individuals. This is what the doctrine employed by Judge Bazelon has done for over a quarter of a century—with one important difference. In other cases in which the doctrine has been applied, the challenge was to the constitutionality of a statute or regulation by an individual, or group of individuals. Thus, for example, the challenge in *Shelton v. Tucker*⁵³ was directed at an Arkansas statute which required that all teachers in the state schools file an annual affidavit listing their membership in organizations. *Communist Party v. Subversive Activities Control Board*⁵⁴ involved section 2 of the Subversive Activities Control Act of 1950,⁵⁵ and *McGowan v. Maryland*⁵⁶ challenged state blue laws. The breadth of the challenge stems from the doctrine that a party attacking a statute on first amendment grounds may argue any invalidity of the statute at all, even if the invalidity might not otherwise apply to him.⁵⁷ If the challenger is successful, the remedy is not merely applicable to him. The entire statute falls, and the state must urge its legislature to take up the cudgel once more to try to define more narrowly and precisely the interest at hand.

In *Lake, Covington, and Dixon*, however, the plaintiffs did not allege, at least in the part pertinent to our consideration here, that the concept of incarceration of the mentally ill is per se violative of substantive due process. Nor did they argue that the particular statutes involved were unduly broad. Their challenge was much more limited: that the authorities in dealing with *them* had not sought out the least restrictive method of dealing with their individual needs and problems. In no instance was an allegation of a pattern of discriminatory application made; nor was an attempt to include or define a class even

Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized mistrust of any . . . unchecked and unbalanced power over essential liberties. That mistrust does not depend on an assumption of inveterate venality or incompetence on the part of men in power, be they Presidents, legislators, administrators, judges, or doctors. It is not doctors' nature, but human nature, which benefits from the prospect and the fact of supervision. Indeed, the limited scope of judicial review of hospital decisions necessarily assumes the good faith and professional expertise of the hospital staff. Judicial review is only a safety catch against the fallibility of the best of men; and not the least of its services is to spur them to double-check their own performance and provide them with a checklist by which they may readily do so.

⁵³ 364 U.S. 479 (1960).

⁵⁴ 367 U.S. 1 (1961).

⁵⁵ 50 U.S.C. § 781 (1970).

⁵⁶ 366 U.S. 420 (1961).

⁵⁷ See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Thornhill v. Alabama*, 310 U.S. 88 (1940); cf. *School Dist. v. Schempp*, 374 U.S. 203 (1963). See generally Sedler, *Standing To Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).

suggested. Likewise, the remedies sought and provided were individual only.

Furthermore, in none of the cases was any attempt made to say that the state's general powers did not extend to the particular kind of restrictions placed upon the petitioner. Plaintiff Lake did not suggest, for example, that the state could not, in a proper case, put one in a mental hospital rather than in a community treatment center, nor did Covington suggest that no person could be put in maximum security. Both petitioners were alleging that as applied to them, and them only, the restrictions imposed were unwarranted.

Thus viewed, the three cases border closely upon another doctrine emerging in a related field—the requirement of proportionality and nonexcessiveness in criminal penalties.⁵⁸ Like the doctrine of the least drastic alternative as applied to individuals, the doctrine of proportionality arguably deals not with the legitimacy of the sanction per se⁵⁹ but with the propriety of the sanction's use in light of the particular facts of a case. However, one important difference between the two doctrines is of significance in evaluating their comparative strengths and limitations. The least drastic alternative places the burden of justification upon the state, whereas the nascent proportionality doctrine requires the challenging party to demonstrate the invalidity of the state action.

II

THE REQUIREMENT OF PROPORTIONALITY

The classic case of *Weems v. United States*⁶⁰ served as a precursor to the requirement of proportionality in criminal sentences. The crime alleged in *Weems* was falsification of a government ledger; the sentence, which was explicitly spelled out in the governing Philippine statute, provided for imprisonment from twelve to twenty years at hard labor and severe civil disabilities after release. In a masterful opinion, Justice McKenna found in the broad language of the Philippine bill of rights⁶¹

⁵⁸ See generally Singer, *Bringing the Constitution to Prison: Substantive Due Process and the Eighth Amendment*, 39 U. CIN. L. REV. 650, 655-57 (1970).

⁵⁹ See notes 66-70 and accompanying text *infra* for the argument that the doctrine invalidates only statutes, and not specific penalties under those statutes. *But cf.* notes 74-81 and accompanying text *infra*.

⁶⁰ 217 U.S. 349 (1910).

⁶¹ The basis for the opinion was no different from the eighth amendment problems facing the Court today. Certain principles "were deemed 'essential to the rule of law and the maintenance of individual freedom.' . . . Among these rules was that which prohibited

a policy that "punishment for crime should be graduated and proportioned to [the] offense."⁶² Rejecting the limitation suggested by Justice White in dissent⁶³ that the eighth amendment outlawed only the Stuart horrors⁶⁴ of quartering and the rack, the Court spoke in no uncertain terms about the severity of the punishment and the ignominy with which the petitioner was saddled:

[The law's] minimum degree [of punishment] is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrists of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day.⁶⁵

Despite the exhortation by the Court that a comparison with punishments for other crimes "condemns the *sentence in this case* as cruel and unusual,"⁶⁶ it is reasonably certain that the decision rested upon the finding that the entire statute was so disproportionate that it all fell at one stroke.⁶⁷ However, *Weems* left unanswered one critical

the infliction of cruel and unusual punishment." *Id.* at 367-68, quoting *Kepner v. United States*, 195 U.S. 100, 122 (1904) (instructions of the President to the Philippine Commission).

⁶² 217 U.S. at 367.

⁶³ *Id.* at 409-10 (dissenting opinion).

⁶⁴ For an enlightening discussion of what the prohibition of the English Bill of Rights of 1689, from which the eighth amendment was copied, was originally intended to mean, see Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

⁶⁵ 217 U.S. at 366.

⁶⁶ *Id.* at 381 (emphasis added).

⁶⁷ Two reasons appear to solidify this interpretation. First, the Court in its concluding paragraph observed: "It follows from these views that, even if the minimum penalty . . . had been imposed, it would have been repugnant to the bill of rights. In other words,

question: if the statutory sentence had been *one* to twenty years, and the judge had set the sentence at twelve years, would the Court have determined the case the same way?⁶⁸

The Court has never resolved that question.⁶⁹ But for the last

the fault is in the law" *Id.* at 382. Second, the Court throughout its opinion discussed the severity of the minimum sentence, *i.e.*, 12 years. *See* text accompanying note 65 *supra*. The sentence actually imposed was 15 years. *See* 217 U.S. at 358. Had the Court intended to ground its decision upon the gravity of the particular sentence involved, it would have discussed the latter figure.

⁶⁸ This determination is relevant to the proportionality doctrine. If a statute is struck down in its entirety because the minimum is simply too harsh for any enumerated crime, the legislature has merely to amend the statute. If, however, it is the sentence which is disproportionate, then reviewing courts must examine the facts of each case to determine whether the punishment fits the crime and the criminal.

⁶⁹ One commentator on the *Weems* case and its subsequent lack of clarification places the blame on the Supreme Court itself:

Seven years after the *Weems* decision the Supreme Court rejected by implication its comparative criteria for excessiveness. The case was *Badders v. United States* [240 U.S. 391 (1916)]. There the defendant argued that by making the deposit of each letter a separate offense of using the mail for fraud, the government had violated the Eighth Amendment. He was sentenced on seven counts to thirty-five years in prison and seven thousand dollars in fines. Writing for a unanimous Court, Justice Holmes . . . said that the punishment was not in violation of the Eighth Amendment. However, he cited *Howard v. Fleming* [191 U.S. 126 (1903)], a case which had repudiated the comparative approach by ruling that punishments given for more serious crimes were not relevant on the question of excessiveness. Thus, while the *Weems* doctrine has not been specifically overruled by the Supreme Court, the method for its implementation has been implicitly rejected.

Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145, 148 (1967). Turkington's reading of the two cases is, however, suspect. In *Badders*, the Court dismissed the appellant's contention that seriatim sentences on five counts of mail fraud for mailing five separate letters was cruel and unusual punishment by a simple citation to the *Fleming* decision without further discussion. *Badders v. United States*, 240 U.S. 391, 394 (1917). *Fleming*, however, is clearly distinguishable from both *Badders* and *Weems*, and it is poor authority both for the *Badders* decision and for any suggestion that *Weems* had been overruled. In *Fleming*, North Carolina defendants argued that their sentences were violative of equal protection because others convicted of "worse" crimes had received "less severe" sentences. The Court dismissed this contention, noting simply that a state could determine that some crimes were more troublesome to that state and, hence, hand out harsher penalties. *Howard v. Fleming*, 191 U.S. 126, 135-36 (1903). On its face, *Fleming* may appear to be inconsistent with *Weems*, but two distinctions can be made. First, the challenge was based on equal protection, not on cruel and unusual punishment, undoubtedly because at that time the eighth amendment had not been held applicable to the states. Indeed, in *O'Neil v. Vermont*, 144 U.S. 323 (1892), the Court had affirmed its inapplicability, and it was not until 1962 that the amendment was finally held applicable to the states in *Robinson v. California*, 370 U.S. 660 (1962). Second, the challenge did not mention the doctrine of proportionality. The argument was not even hinted at, and no cases were cited either by appellants in their brief or by the Court in its opinion to support the proposition that sentences be consonant with the gravity of the crime. To say, therefore, that *Badders*,

fifty years virtually every lower court deciding the question, both federal and state, has followed the narrow import of *Weems*, considering the minimum sentence allowable under the statute as the decisive factor; any sentence within the legislatively set maximum has been upheld where the parameters of the statute meet eighth amendment criteria.⁷⁰ Recently, however, there have been instances in which courts have expressed willingness to break from that rigid pattern. In *Watson v. United States*,⁷¹ a panel of the District of Columbia Court of Appeals invalidated a ten-year statutory minimum sentence for selling narcotics as applied to narcotics addicts. However, the panel's decision was vacated, and the case remanded on other less sweeping grounds by an en banc court.⁷² Similarly, the Kentucky Supreme Court, in *Workman v. Commonwealth*,⁷³ invalidated a statute, as it applied to juveniles, which imposed a sentence of life imprisonment without parole for rape. *Weems*, *Workman*, and *Watson* are not true proportionality cases, however, since in each the court struck down a statutory minimum which was far in excess of what civilized men could tolerate.

This fault cannot be found in *Ralph v. Warden*.⁷⁴ In *Ralph*, the defendant was found guilty of rape and sentenced to death by a three-judge district court.⁷⁵ The Maryland statute permitted precisely this discretionary decision; the penalties prescribed ranged from eighteen months' imprisonment to death.⁷⁶ In a significant opinion, the Court of Appeals for the Fourth Circuit held that the imposition of the death

Fleming, or both read together "rejected" the proportionality doctrine of *Weems* when neither case discussed the doctrine seems strange indeed. It is true, of course, that an application of the *Weems* doctrine might have resulted in a different conclusion, but that is far from saying that the Court sub silentio rejected *Weems*, particularly since *Badders* was decided only five years after *Weems*, and *Fleming* was decided before *Weems*.

⁷⁰ The cases holding that courts will not review sentences within the legislative maximum are legion. Thus, for example, a sentence of eight years' imprisonment for an 18-year-old convicted of stealing approximately one dollar at knifepoint has been upheld where the statutory maximum was not transcended. *Stanford v. State*, 110 So. 2d 1 (Fla. 1959). Other cases are collected in S. RUBIN, H. WEIHOFEN, G. EDWARDS, & S. ROSENZWEIG, *THE LAW OF CRIMINAL CORRECTION* 381-82 (1963). See also Mosk, *The Eighth Amendment Rediscovered*, 1 LOYOLA U.L. REV. 4, 11 (1968).

⁷¹ 37 U.S.L.W. 2352 (D.C. Cir. Dec. 13, 1968), *vacated and remanded*, 439 F.2d 442 (D.C. Cir. 1970).

⁷² 439 F.2d 442 (D.C. Cir. 1970).

⁷³ 429 S.W.2d 374 (Ky. 1968).

⁷⁴ 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972).

⁷⁵ The lower court opinion is unreported. For the interesting background of *Ralph's* case, which includes four petitions for post-conviction relief and four prior habeas corpus petitions, see 438 F.2d at 787 & n.1.

⁷⁶ Md. CODE art. 27, § 461 (1957).

penalty under the particular circumstances of the case violated the eighth amendment. Yet the court did not invalidate the death penalty for all rapists,⁷⁷ and it went out of its way to make clear that it did not necessarily find the death penalty unconstitutional per se.⁷⁸ *Ralph*, therefore, cannot be dismissed as striking down the minimum sentence which the judge could impose pursuant to statute with reference to all criminal defendants. The court, employing its discretion, differentiated among the *types* of criminal offenders within the class. It indicated that various gradations of wrongdoing could be said to fall within the statutorily delineated offense, and endeavored to apportion the penalty according to the gravity of the misconduct of the offender. In a sense, therefore, the court tailored the penalty to the heinousness of the wrongdoer's offense, thereby effectively reviewing the determination of the trial court on the particular sentence as applied to the particular defendant.

One caveat must be added. Although the narrow holding of the court was that the sentence imposed upon the defendant was too severe for his particular crime, the opinion can be read as standing for the much broader proposition⁷⁹ that in any case in which life has not been endangered or taken,⁸⁰ the imposition of the death penalty is unconstitutional. In a sense, therefore, the court did strike down a penalty imposed upon a class—a theme common to *Workman* and *Watson* as well.⁸¹ The broader language and implications of the case cannot be

⁷⁷ Cf. *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari); Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970). Of course, the Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), if interpreted to hold the death penalty unconstitutional in rape cases, would obviate the need for determining the precise point at issue in *Ralph*. Nevertheless, the Fourth Circuit's opinion in *Ralph* is the "official" opinion since certiorari was ultimately denied, and it can surely be cited for the proportionality concept in orienting punishment to defendants as individuals.

⁷⁸ See 438 F.2d at 793.

⁷⁹ [W]e conclude, therefore, that two factors coalesce to establish that the death sentence is so disproportionate to the crime of rape when the victim's life is neither taken nor endangered that it violates the Eighth Amendment. First, in most jurisdictions death is now considered an excessive penalty for rape. . . . Second, when a rapist does not take or endanger the life of his victim, the selection of the death penalty from the range of punishment authorized by statute is anomalous to the large number of rapists who are sentenced to prison.

Id.

⁸⁰ There is some question as to what the court meant here. The defendant had in fact threatened the woman and her child with a tire iron if she refused to submit. Thus, the court must have meant that violence—above and beyond the rape itself—must have actually occurred, and, because of the violence inflicted, life must have been endangered.

⁸¹ The same kind of analysis might be applied where the court has clearly abused its discretion in imposing the maximum. The latest example, and perhaps the most important,

easily dismissed. *Ralph* stands as one of the key cases establishing the view that sentences disproportionate to either the offense or the offender can be struck down on constitutional grounds by appellate courts.

The proportionality doctrine has also been applied in other areas of penology, notably in the determination of punishments for disciplinary infractions within the prison itself. Now that procedural due process is rapidly becoming a requirement in prison disciplinary hearings,⁸² some restrictions must be placed upon the punishments which can be meted out by disciplinary boards, lest the due process requirements become a hollow guarantee.

The first hint that the doctrine of proportionality might be applied in the prison setting came in *Fulwood v. Clemmer*,⁸³ where a prisoner had been involved in a scuffle involving proselytizing for the Black Muslims. "Reclassified" to maximum security segregation for over two years, he sought and obtained relief from the federal courts. In reaching its decision, the district court declared, "[A] prisoner may not be unreasonably punished for the infraction of a rule. A punishment out of proportion to the violation may bring it within the bar against unreasonable punishments."⁸⁴

A number of courts have followed the *Clemmer* lead. In *Dabney v. Cunningham*,⁸⁵ an inmate's "attitude," as reflected in his request for "meaningful" work, was used as a reason for sending him to solitary confinement; the court overturned the decision. Similarly, in *Wright v. McMann*,⁸⁶ the court upheld an award of damages to an inmate who had been sent to one year of solitary confinement for refusing to sign a "safety sheet" in the prison industry. The court took special pains to

is *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971). The court there overturned a five year sentence (the maximum) for a draft resister when it was discovered that the sentencing judge had, for the 30 years in which he had been on the bench, *always* sentenced draft resisters to the maximum. Such a blanket rule, the court held, was an abuse of discretion, and could therefore be overturned. *Cf. United States v. West Coast News Co.*, 357 F.2d 855 (6th Cir. 1966), *rev'd per curiam sub nom. Aday v. United States*, 388 U.S. 447 (1967); *United States v. Wiley*, 267 F.2d 453 (7th Cir. 1959).

⁸² Although the cases vary as to the quantum of procedural due process which must be accorded, they all agree that more is required than is currently given in most prisons. For cases granting the most sweeping remedies, see *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Clutchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Bundy v. Cannon*, 328 F. Supp. 165 (D. Md. 1971).

⁸³ 206 F. Supp. 370 (D.D.C. 1962).

⁸⁴ *Id.* at 379 (footnote omitted).

⁸⁵ 317 F. Supp. 57 (E.D. Va. 1970).

⁸⁶ 460 F.2d 126 (2d Cir. 1972).

point out that the inmate had not refused to work, but had simply feared that he was releasing the state from liability for any injury he might sustain on the job.⁸⁷

The vast majority of cases still do not apply the proportionality doctrine to prison punishment.⁸⁸ Solitary confinement has been handed out for standing watch for an inmate poker game,⁸⁹ for refusing to work,⁹⁰ for calling a guard a Klansman,⁹¹ for "impudence,"⁹² and for failing to "shell peanuts."⁹³ Revocation of time credited toward the term of imprisonment for good behavior ("good time") has been upheld, or at least has not been invalidated, in situations in which an inmate who had four ounces of grain alcohol in his cell lost one year of good time,⁹⁴ and in which an inmate in the federal penitentiary in Atlanta lost 227 days of good time credit for having "conspired to defame the character" of a prison employee and for "[using] a typewriter without authority."⁹⁵ Some cases, however, have indicated a willingness to apply the proportionality doctrine to cases involving potential loss of accrued good time.⁹⁶

The proportionality issue is similarly raised when determinations are made concerning the length of time a prisoner is sent to solitary confinement or is otherwise deprived of certain privileges. Here, the courts have been almost uniformly resistant,⁹⁷ although noting that the leading authorities on penology suggest a maximum time limit of no more than thirty days in solitary confinement.⁹⁸

Intriguingly, courts which have applied the proportionality doctrine to prison discipline while citing *Weems* and other cases⁹⁹ have

⁸⁷ *Id.* at 133.

⁸⁸ The courts usually have not rejected the point; it simply has not been raised in many cases by prisoners filing pro se complaints. The following cases (notes 89-98 and accompanying text *infra*) are unique in this regard.

⁸⁹ *Startti v. Beto*, 405 F.2d 858 (5th Cir.), *cert. denied*, 395 U.S. 929 (1969).

⁹⁰ *E.g.*, *Draper v. Rhay*, 315 F.2d 193 (9th Cir.), *cert. denied*, 375 U.S. 915 (1963); *Rhinehart v. Rhay*, 314 F. Supp. 81 (W.D. Wash. 1970); *Fallis v. United States*, 263 F. Supp. 780 (M.D. Pa. 1967).

⁹¹ *See Novak v. Beto*, 453 F.2d 661, 674 n.4 (5th Cir. 1971).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Sullivan v. Ciccone*, 311 F. Supp. 456 (W.D. Mo. 1970).

⁹⁵ *Thierault v. Blackwell*, 437 F.2d 76, 77 (5th Cir.), *cert. denied*, 402 U.S. 953 (1971).

⁹⁶ *See, e.g.*, *Katzoff v. McGinnis*, 441 F.2d 558 (2d Cir. 1971); *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970).

⁹⁷ *See, e.g.*, *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).

⁹⁸ *See Sostre v. McGinnis*, 442 F.2d 178, 191 & n.14 (2d Cir. 1971).

⁹⁹ *E.g.*, *Trop v. Dulles*, 356 U.S. 86 (1958); *Williams v. Robinson*, 432 F.2d 637 (D.C. Cir. 1970).

not hesitated or stumbled over the possible limitations upon the proportionality doctrine. Instead, these courts have simply applied the concept of "nonexcessiveness" to invalidate the punishment assessed.¹⁰⁰ Although these courts remain in the distinct minority, their number is constantly increasing.

III

COMPARING THE EFFICIENCY OF THE TWO DOCTRINES

The headway that the proportionality doctrine has made in the world of penology suggests that some courts are uncomfortable with a system which allows both the length of a man's imprisonment and the kind of imprisonment he is to undergo to be determined by a trial judge whose determination is not subject to judicial review.¹⁰¹ Although a recent Supreme Court case indicating that the substantive grounds for parole revocation may be subject to appellate scrutiny¹⁰² may also suggest a requirement of appellate review of sentences, the practical reality is that few sentences are reviewed, and of those only a small percentage are reversed or modified on appeal. Except for express statutory provisions,¹⁰³ the only entrance to such appellate review thus far has been the proportionality doctrine.

The doctrine of proportionality has many limitations, however, which require the exploration of other approaches if substantive limitations are to be placed upon punishments which can be meted out,

¹⁰⁰ See, e.g., *Courtney v. Bishop*, 409 F.2d 1185 (8th Cir.), cert. denied, 396 U.S. 915 (1969); *Startti v. Beto*, 405 F.2d 858 (5th Cir. 1969); *Fallis v. United States*, 263 F. Supp. 780 (M.D. Pa. 1967). All three cases held that solitary confinement was "justified" on the facts, hence nonexcessive.

¹⁰¹ Although appellate review of sentences is gaining momentum in this country, the majority of states still do not allow it, notwithstanding the findings of many important study commissions which have endorsed the concept. For some key materials on the issue, see AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968); Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671 (1962); Sobeloff, *The Sentence of the Court: Should There be Appellate Review?*, 41 A.B.A.J. 13 (1955); Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193 (1968); Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960).

¹⁰² *Arciniega v. Freeman*, 404 U.S. 4 (1971) (per curiam). The Supreme Court's decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972), holding that due process must be observed before parole may be revoked, promises protection for the inmate's procedural rights both in the revocation and release stages. It is likely that the reasons for revocation or denial, and perhaps even conditions of parole or probation, will become increasingly important.

¹⁰³ E.g., IOWA CODE § 793.18 (1971); N.Y. CODE CRIM. PRO. § 450.30 (McKinney 1971).

either in sentencing or in the prison itself. The first and most important of these drawbacks is that the proportionality doctrine, at least as thus far implemented, puts the burden of proof upon the defendant or prisoner to demonstrate that the penalty inflicted is excessive. Application of the least drastic alternative doctrine, on the other hand, would clearly place the burden of justification upon the state.¹⁰⁴ Articulation of the premise of the latter doctrine with respect to the prison situation suggests that if the state seeks to deprive the defendant of his liberty, it must demonstrate that the severity of the restriction is "necessary" to the purpose of the incarceration.

Closely related to this weakness of the proportionality doctrine, indeed, almost an inevitable corollary of it, is the standard which has accompanied the birth of the concept: that the eighth amendment proscribes as excessive only those punishments which "shock the conscience" of civilized society.¹⁰⁵ Thus, in *Weems*, the Court looked to punishments inflicted in parts of the United States for various crimes, comparing the severity of each punishment with the social undesirability of each offense.¹⁰⁶ Similarly, in the *Ralph* case, the court spent much of its time rehearsing the position of other countries on whether the death penalty could be inflicted for rape. Citing United Nations studies and statutes from other jurisdictions in this country,¹⁰⁷ the court concluded that the eighth amendment dictated that the death penalty should not be imposed for the crime of "nonviolent" rape.¹⁰⁸

The difficulty with this approach is that it is susceptible of reducing the scope of the eighth amendment to the least common denominator. So long as other countries and jurisdictions tolerate or endorse a given practice, conservative courts, loath to expand the Constitution to review sentencing or punishment determinations, can find locales in which those sentences or punishments are still standard. The state can be expected to argue that if there is one other system which has adopted a given sentence or which consistently gives some specific kind of sentence to offenders of the class being considered, that

¹⁰⁴ See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966).

¹⁰⁵ See, e.g., *Trop v. Dulles*, 356 U.S. 86, 101-03 (1958); *Weems v. United States*, 217 U.S. 349, 365-68 (1910).

¹⁰⁶ There are degrees of homicide that are not punished so severely [as the punishment for the falsification of a government ledger], nor are the following crimes: misprision of treason, inciting rebellion, conspiracy to destroy the Government by force, recruiting soldiers in the United States to fight against the United States, forgery of letters patent, forgery of bonds and other instruments for the purpose of defrauding the United States, robbery, larceny and other crimes.

217 U.S. at 380.

¹⁰⁷ *Ralph v. Warden*, 438 F.2d 786, 791-92 nn.18 & 20 (4th Cir. 1970).

¹⁰⁸ *Id.* at 793; see notes 79-80 and accompanying text *supra*.

sentence would be prima facie applicable to the present offender as well. Conversely, under the doctrine of the least drastic alternative, it may be argued that if other prison systems comparable in material respects to the one challenged in the proceeding before the court can survive without the particular regulation, then the latter must also survive, even if still other systems have not yet moved as far.¹⁰⁹ Thus, a prison system or sentencing structure under attack should be compared with systems which have abandoned the challenged practice. If the latter system has continued without grave deficiency and the two systems are indeed comparable, then the court may well strike down the sentence or regulation.

A third weakness of the proportionality doctrine also stems from the burden of proof problem. Because it does not put the government to any test, but rather requires that the challenger show that other governments have abandoned a given practice, the doctrine fails to elicit a purpose or rationale for the practice attacked. Thus, for example, if the challenge is to sentences of fifteen years imprisonment and the government demonstrates that some countries, at least, con-

¹⁰⁹ One of the most important cases applying this doctrine is *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971). The *Brown* case involved the admission of Black Muslim reading materials into state prisons. This issue had been treated previously by the same circuit in *Abernathy v. Cunningham*, 393 F.2d 775 (4th Cir. 1968), where the court had allowed virtually all such material to be banned. In *Brown*, the court held that the issue presented was a factual question as to the existence of serious danger to the institution and that sufficient time had passed since *Abernathy* to warrant another hearing on the effect of the reading materials on prison administration. In so holding the court relied heavily upon the fact that other prisons which had previously banned the same materials now allowed them in without experiencing disruption. 437 F.2d at 1232. In this sense, at least, *Brown* suggests the adoption of a totally new approach to prison litigation.

A similar decision was reached in *Theriat v. Carlson*, 339 F. Supp. 375 (N.D. Ga. 1972), where the court chided past prison administrators for their fear of Black Muslim activities and required the federal penitentiary in Atlanta to recognize the newly-formed Church of the New Song and to grant it all rights given other religious groups in the institution.

Another example of the use of the doctrine inside prisons is the court's finding in *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), that placing an inmate in chains or handcuffs is excessive.

Finally, one court has ambiguously employed the phrase in speaking of the rights of pre-trial detainees. In *Breneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972), Judge Zirpoli, speaking of conditions at a local jail, declared:

Holding [pre-trial detainees] continuously in cells is unquestionably an expedient method of insuring security, but such oppressive confinement is not the least restrictive alternative available to the defendants for maintaining jail security. . . .

. . . .

. . . Certainly it is difficult to conceive of a compelling necessity to deny the plaintiff class liberal access to a basic library of books, magazines and newspapers. Merely because all such resources may be labelled "rehabilitative" in other institutional contexts does not justify denying them to pre-trial detainees.

Id. at 140.

tinue to impose such sanctions, one would not expect a court to throw that practice out, *even though the purpose of the two systems in inflicting penalties may be totally different*. If eight countries, for example, continue to use solitary confinement, it might be said that solitary confinement is not unconstitutional, even if the stated purpose of punishment in those countries is retribution, where the purpose of punishment in this country is something different. Under the proportionality doctrine, qualitative analysis yields to quantitative measurement. In contrast, the least drastic alternative by definition seeks to know the *purpose* of the practice involved, for it is only if that purpose is articulated that the court may determine whether the method chosen serves that purpose. Again, an example may clarify. If a court sentenced a pickpocket to have his right hand chopped off, the proportionality-civilized society standard would simply ask whether other countries allowed such a punishment. The least drastic alternative doctrine would ask *why* we impose a sentence; if the answer were, for example, that sentences should be imposed to individualize treatment and rehabilitate the offender, no possible defense could be raised to protect the brutal sentence from being invalidated, no matter how many other countries allowed such a punishment. The fact that those other countries might seek vengeance as a motive for punishment would be irrelevant in the proportionality test, but critical in the least drastic alternative formula.

"May no fate willfully misunderstand me," Robert Frost once said, "And half grant what I wish . . ." ¹¹⁰ The proportionality doctrine has its place in both sentencing and judging prison disciplinary sanctions. It should be retained and invigorated where consistent with its theoretical limitations. But the thesis expounded here is that the doctrine of the least drastic alternative should be vigorously applied to the entire system of corrections, starting, particularly and importantly, with the sentencing process, and continuing until the prisoner's final release from any custody or supervision. We turn, then, to examine how this might be accomplished and how far the courts have already moved toward this goal.

IV

APPLYING LEAST DRASTIC ALTERNATIVE DOCTRINE TO SENTENCING

Because application of the doctrine in the civil liberties field is new, there is some uncertainty about its parameters, particularly as ap-

¹¹⁰ R. FROST, *Birches*, in MOUNTAIN INTERVAL 37, 39 (1916).

plied to sentencing techniques.¹¹¹ Chief Justice Burger's short, bitter dissent in *Dunn v. Blumstein*¹¹² was concerned lest the compelling state interest standard and, by implication, the least drastic alternative doctrine, establish an "insurmountable" barrier to any effective action by the state. He suggested, as illustrative of the path he believed the standard must require, that all age limits on voting, being inherently arbitrary, could never meet the compelling state interest test.¹¹³ Assuming that this taciturn remark was intended to say that there is no compelling state interest in an age limit of, say, eighteen, because not all persons one day less than eighteen are less mature, etc., than their one-day elders, he is undoubtedly correct. And, surely, if the Court were saying that numerical barriers must fall because there is never any showing that the barrier minus one unit cannot achieve the goal just as easily, he is correct. But a closer inspection of both the least drastic alternative doctrine and the Court's approach in *Dunn* demonstrates that the Court was not making such a sweeping declaration.

First, the *Dunn* Court simply invalidated two state voting registration waiting periods, one of one year's residence in the state and the other of three months' residence in the county of application, suggesting that these time limits were too long, that is, disproportionate, properly to achieve the legitimate purposes of the state. In discussing the federal Voting Rights Act of 1965 and its thirty-day limitation period on residency for presidential elections,¹¹⁴ the Court compared the practices of other jurisdictions and suggested that these jurisdictions were able to protect their interests with less severe requirements.¹¹⁵ Moreover, the Court adhered to the principle that the jurisdictions must be comparable in some meaningful sense. Thus, for example, if a challenge to registration procedures were to be raised in New York City based on the fact that North Dakota has no registration at all, anywhere in the state, the challenge would probably fail, since a cogent argument could be made that the two populations and jurisdictions are not sufficiently similar.¹¹⁶

¹¹¹ For example, it might be suggested by those who oppose the application of the doctrine to sentencing that a defendant could argue that a sentence of five years' imprisonment is "too drastic," since a sentence of 4 years, 11 months, and 29 days would be "less drastic" and still serve the needs of the community.

¹¹² 405 U.S. 330, 363-64 (1972); see notes 25 & 32 and accompanying text *supra*.

¹¹³ 405 U.S. at 363.

¹¹⁴ 42 U.S.C. § 1973aa-1 (1970); see 405 U.S. at 344.

¹¹⁵ 405 U.S. at 346. Since *Dunn*, a number of cases have struck down durational residence requirements, strongly hinting that only a 30-day period will be tolerated in the future. See, e.g., *Hinnant v. Sebesta*, 346 F. Supp. 913 (M.D. Fla. 1972); *Nicholls v. Schaffer*, 344 F. Supp. 238 (D. Conn. 1972); *Graham v. Waller*, 343 F. Supp. 1 (S.D. Miss. 1972).

¹¹⁶ If, however, the challenger could show that the jurisdictions were similar, or that

More importantly, the Court in *Dunn* assumed, in the absence of a state showing to the contrary, that a thirty-day residence requirement was sufficient to meet the only state interests which the state could legitimately press: voter familiarity with election issues and administrative ease in handling voting on election day.¹¹⁷ An alternative showing could have been made; the state could have come forward to demonstrate that there was no conceivable way in which it could administratively handle election processes unless given sixty or ninety days. The problem in *Dunn* was, simply, that the state had pressed "interests" which could not be shown to require a longer waiting period. If such a showing could have been made on the record, it is likely that the Court would have decided for the state. Further, if there were no interest capable of proof and there existed an action which the state conceded was arbitrary, the state might still prevail under certain circumstances. Thus, for example, if a four-year-old sought to vote in an election, the state could concede that the eighteen-year-old level was arbitrary, but argue that in protecting its interest, there being no provable criteria which were administratively feasible, the state *must* be arbitrary. A thirty-day filing limit on appeals, on the other hand, might be more susceptible to challenge, since the interests at stake there (finality of litigation, etc.) might bend to the facts of a particular case without damaging the interest totally. Thus, the fears of the Chief Justice could be allayed, while the thrust of the majority opinion would remain.

Given this analysis, one may quickly dispose of the suggestion that a defendant sentenced to five years' imprisonment could argue that one day less imprisonment would be constitutionally mandated. Like the eighteen-year-old vote situation, the state must concede that the actual number of days chosen is somewhat arbitrary, an approximation only, and argue instead that the approximation is necessary to preclude impossibly intricate factual determinations concerning each individual. Moreover, in a battle of this type, the state has, at least potentially, an insuperable ally—the possibility that parole may be granted in the future, which thus blunts the offender's challenge of a specific *maximum* sentence.

Thus, in terms of the length of incarceration per se, the least drastic alternative doctrine may either be inapplicable by its very nature or so cumbersome to employ that it must be abandoned. But

there was no relevant difference, the opposite result might well follow. See, e.g., Michigan State UAW Community Action Program Council v. Austin, — Mich. —, 198 N.W.2d 385, 389-90 & n.8 (1972) (comparing Michigan's "purge" statute with those of other states).

¹¹⁷ See 405 U.S. at 345-60.

*Covington*¹¹⁸ and *Lake*,¹¹⁹ and to a lesser extent *Dixon*¹²⁰ and *Ashe*,¹²¹ suggest a new, and perhaps even more exciting arena for the doctrine in the sentencing process. Like *Ralph*,¹²² and to a lesser degree, *Workman*¹²³ and *Watson*,¹²⁴ these cases require the government to show that the type of punishment, rather than its length, is justifiable as applied to the specific individual involved. Thus, in the *Lake* situation the state must demonstrate that institutionalization is the least drastic alternative for *this* petitioner. In the *Ralph* situation, the state must demonstrate the capital punishment is "necessary" to serve the state's purpose when the facts of *this* defendant's crime are considered. In short, the doctrine, as applied to sentencing, would require the state to demonstrate that, as to the specific defendant before the court, the type of punishment inflicted is "necessary" to achieve its "purpose" in sentencing anyone.

It is not necessary to delve into the long and tedious debate over the "purpose" of the criminal law or of sentencing. I have elsewhere attempted to enunciate the goals of the sentencing process;¹²⁵ here I shall simply attempt to summarize that discussion.

The goal of the criminal law in its broadest sense is the protection of innocent persons from further criminal activity on the part of those whom we determine to be law violators. In the past, several ways have been suggested in which the sentencing process may achieve this goal: (1) special deterrence of the individual criminal; (2) general deterrence of the noncriminal population as it views the punishments which are inflicted upon the criminal;¹²⁶ and (3) rehabilitation of the criminal, transforming him from law violator to law obeyer. Of these methods, only the last may truly prove achievable. Special deterrence by sim-

118 *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969).

119 *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966).

120 *Dixon v. Jacobs*, 427 F.2d 589 (D.C. Cir. 1970).

121 *Ashe v. Robinson*, 450 F.2d 681 (D.C. Cir. 1971).

122 *Ralph v. Warden*, 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972).

123 *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968).

124 *Watson v. United States*, 37 U.S.L.W. 2352 (D.C. Cir. Dec. 13, 1968), *vacated and remanded*, 439 F.2d 442 (D.C. Cir. 1970).

125 R. SINGER, SENTENCING DISPOSITIONS (forthcoming), to be published as a working paper to the National Advisory Commission on Criminal Justice Standards and Goals.

126 The concept of general deterrence may be ascribed first to Bentham. 1 J. BENTHAM, *Principles of Penal Law* pt. II, bk. 1, ch. 6, in WORKS 399 (1843). The concept has received continuous criticism. See, e.g., Sellin, *Death and Imprisonment as Deterrents to Murder*, in THE DEATH PENALTY IN AMERICA 274 (H. Bedau ed. 1964). Recent modifications of the doctrine, most made by Professor Johannes Andenaes, have resulted in a revitalization of the principle. See Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L.C. & P.S. 176 (1952); Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966). The entire area of deterrence has been examined recently in F. ZIMRING, PERSPECTIVES ON DETERRENCE (1971).

ple incarceration does not work; high recidivism rates¹²⁷ show that while incapacitation clearly protects the public from the offender while he is in prison, it does not achieve lasting deterrence. Nor does general deterrence, as originally espoused by Bentham, work. First, the "clearing" rate of criminal activity is so low¹²⁸ that those involved in criminal activity are not deterred because the likelihood of actual detection is minimal.¹²⁹ Second, the theory presupposes that the criminally prone calculate the chances of being detected against the pleasure to be obtained by law violations; most violators are not so rational at the moment of commission. Third, the theory presupposes, again erroneously, that the general public is aware of the actual punishments inflicted upon those who are detected.¹³⁰

These observations cast grave doubts upon the deterrent efficacy of punishment and particularly of sentencing dispositions. Since we have long rejected the goal of simple retribution as a legitimate aim

127 Estimates of recidivism vary widely. It is reported that among those convicted defendants for whom the prior criminal record [arrests and convictions] was reported, 64 percent had a prior criminal record compared to 66 percent in 1968 and 65 percent in 1967. The proportion of persons sentenced to probation with a prior criminal record decreased from 53 percent in 1968 to 49 percent in 1969. While 82 percent of all persons sentenced to imprisonment had a prior criminal record, this proportion was 89 percent for persons with mixed sentences.

....
As in 1968, one out of every four defendants convicted in 1969 had a prior prison record, that is, one or more commitments of over one year to [sic] confinement.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 14, 17 (1969). FBI, UNIFORM CRIME REPORTS (1971) indicates that 63% of all persons released from prison in 1965 were rearrested within four years of that release. *Id.* at 39. The 1970 report indicates that rearrest (not synonymous with recidivism) varied according to the type of crime:

[R]earrests ranged from 25 percent for the income tax violators to 82 percent of the auto thieves. The predatory crime offenders had high repeat rates with 79 percent of the burglars being rearrested within 6 years, 76 percent of assault offenders, and 66 percent of the robbers released in 1963. Likewise, 72 percent of the narcotic offenders who are frequently users were rearrested after release.

FBI, UNIFORM CRIME REPORTS 37 (1970).

128 Of all crimes committed, probably no more than half are reported. Of these, only 20% are cleared by arrest. See UNIFORM CRIME REPORTS (1970), *supra* note 127, at 115.

129 Intriguingly, it appears that those in areas in which crime rates are on the increase overestimate the clearance rate. See N. WALKER, SENTENCING IN A RATIONAL SOCIETY 64-66 (1971).

130 F. ZIMRING, *supra* note 126, at 56-61, shows that persons living in high delinquency areas, where the expectation might be that there would be higher familiarity with the penalties attached to the various crimes, were in fact no more acquainted with the actual punishments than residents of low crime rate areas. Even prisoners, arguably the most well-versed in these terms, were only 25% accurate in choosing the correct answer on a multiple choice test concerning the minimum and maximum sentences for various crimes. *Id.* at 57.

of the criminal law and of sentencing,¹³¹ the one remaining method by which the general public may be protected is the reformation of the individual offender into a law-abiding citizen.

We do not yet know how to "reform" criminals, although efforts along those lines have been a continual goal of the criminal justice system. But we do know some things. We know, for example, that the "failure" rate in "treatment-oriented" institutions is nearly as high as that in "punitive" institutions.¹³² This fact would indicate that incarceration is not universally, and perhaps not even specifically, beneficial in terms of the ultimate goal of the criminal law. We also know, however, that those offenders placed on probation, or otherwise not incarcerated in remote, punitive, institutions, seem to fare better, in terms of recidivism rates,¹³³ than those who are placed in those institutions and released at the expiration of their sentences. It is true, of course, that these statistics are suspect, if for no other reason than the obvious fact that judges are more likely to place on probation those persons less likely to recidivate, thereby skewing the data by a "self-fulfilling" prophecy factor. Also, probation officers may be less prone to seek revocation for a minor violation of a technical condition of probation, whereas a parole officer, faced with the knowledge that the parolee has been sent to prison, may be more willing to seek earlier revocation.

No matter what figures are used, at least one point is patent: probation is ultimately no *more* dangerous to the community than is sending a man to prison. If, as a matter of policy, we determine that liberty is to be taken away completely only if a benefit to the community can be demonstrated, probation or some other form of community supervision should be preferred.

This solution would appear even more attractive if some criteria were developed by which to identify the truly dangerous offender who may in fact recidivate immediately upon release. This would allow a "presumption" of probation for the "nondangerous" offender. In short,

131 Cf. *Williams v. New York*, 337 U.S. 241, 248 (1949), suggesting that retribution is no longer the "dominant" objective of criminal law.

132 See G. KASSEBAUM, D. WARD & D. WILNER, *PRISON TREATMENT AND PAROLE SURVIVAL passim* (1971).

133 According to UNIFORM CRIME REPORTS (1971), *supra* note 127, lowest rearrest rates were found among those persons fined and placed on probation. All those placed in non-incarcerated situations were below an average rate of 63%. *Id.* at 39. Other studies demonstrate a "success" rate of well over 75% of those on probation. See, e.g., England, *What Is Responsible for Satisfactory Probation and Post-Probation Outcome?*, 47 J. CRIM. L.C. & P.S. 667 (1957). See also P. TAPPAN, *CRIME, JUSTICE AND CORRECTION* 576-84 (1960).

the "least drastic alternative" for the "nondangerous" offender would seem to be probation rather than imprisonment.

This suggestion is hardly radical. The American Law Institute has in fact recommended a presumption in favor of probation for every offender.¹³⁴ Similarly, the American Bar Association, after a long and detailed study of sentencing and its effects upon the offender, has declared that nonincarceration is to be preferred—in every case—over any form of incarceration.¹³⁵ Should imprisonment be mandated, however, "partial confinement" is to be preferred over "total

¹³⁴ The presumption is interesting in view of the original (1954) draft of the section, which provided precisely the opposite—that every offender was to be incarcerated unless certain factors in favor of probation were present. MODEL PENAL CODE § 7.01 (Tent. Draft No. 2, 1954). The current version of the presumption is found in MODEL PENAL CODE § 7.01 (1962), which provides:

(1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

(a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institute; or

(c) a lesser sentence will depreciate the seriousness of the defendant's crime.

(2) The following grounds, while not controlling the discretion of the Court, shall be accorded weight in favor of withholding sentence of imprisonment:

(a) the defendant's criminal conduct neither caused nor threatened serious harm;

(b) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(c) the defendant acted under a strong provocation;

(d) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(e) the victim of the defendant's criminal conduct induced or facilitated its commission;

(f) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;

(g) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;

(h) the defendant's criminal conduct was the result of circumstances unlikely to recur;

(i) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(j) the defendant is particularly likely to respond affirmatively to probationary treatment;

(k) the imprisonment of the defendant would entail excessive hardship to himself or his dependants.

¹³⁵ AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.3(c) & comment *e* at 72-73 (1967).

confinement."¹³⁶ Both of these studies conclude that all interests of society can best be protected by requiring the state to justify severe restrictions on liberty and freedom. The only difference between those recommendations and the analysis offered here is that those bodies simply recommended, as good policy, the implementation of such a system. The analysis set forth here suggests that this system is constitutionally required as a matter of due process under the doctrine of the least drastic alternative.

Some courts have already moved toward such a position. Of the cases thus far decided, none is more clear and forward looking than *United States v. Waters*.¹³⁷ In *Waters*, a young offender was eligible for sentencing under the Youth Corrections Act,¹³⁸ which specifies that the purpose of sentencing under that act is rehabilitation.¹³⁹ He was instead sentenced by the trial court as a regular adult felon. On an appeal from that sentence, the District of Columbia Court of Appeals, in a unanimous holding, declared that trial courts must in the future specify the reasons for not sentencing an otherwise eligible offender under the Youth Corrections Act.¹⁴⁰ In effect, the court held that there was a *presumption* in favor of sentencing young offenders under the

¹³⁶ *Id.* §§ 2.4(c), 2.5(c) & comment *n* at 107-08.

¹³⁷ 437 F.2d 722 (D.C. Cir. 1970).

¹³⁸ 18 U.S.C. §§ 5005-26 (1970).

¹³⁹ *Id.* § 5011.

¹⁴⁰ The court said,

While the District Court does have discretion to sentence a 19-year-old "youth offender" under either the applicable statutory offense provision or the Youth Corrections Act, we believe that this discretion is circumscribed by the findings of fact in the individual case which the District Judge is required to make either explicitly or implicitly. Under Section 5010(b), it is clear that the appellant is a "youth offender," and it is clear that the offense is punishable by imprisonment under other applicable provisions of law. Therefore, the court *may* sentence under this subsection (b) or the following subsection (c), both of which provide for rehabilitative treatment in a youth institution. Or, alternatively, the court *may* sentence under the following subsection (d), *but only if* the applicable facts in the individual case meet the statutory requirements. Subsection (d) requires: "*If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.*"

• • • •

• • • Only if the court found that the appellant youth offender would *not* derive benefit from rehabilitative treatment under the Youth Corrections Act did the District Court have discretion to sentence appellant under the regular adult statutory provision.

437 F.2d at 725-27 (emphasis in original) (footnotes omitted). The case was remanded for resentencing, and the lower court again sentenced Waters under the regular adult felon classification. *United States v. Waters*, 324 F. Supp. 1056 (D.D.C. 1971). However, it did so only after specifying reasons as the court of appeals had held was required. *Id.* at 1061.

Act and that the state agent, in this case the judge, bore the burden of demonstrating that such a rehabilitative sentence was not justified on the facts of this particular record.

Waters can, of course, be distinguished from the "normal" case. First, *Waters* dealt with a specific statute which articulated the general purpose to be achieved in sentencing *any* young offender; in the normal adult offender case, no such statutory directive can be found. Second, the court was apparently exercising its supervisory powers over the District of Columbia, rather than issuing a decision based on the Constitution, thereby limiting the effect of the opinion to the District. Third, the case involved a specific "type" of offender, much like the drug offender in *Watson* or the juvenile offender in *Workman*, towards whom the courts and the criminal justice system generally have been more solicitous.

The impact of *Waters* is, therefore uncertain. But there is no doubt that the spirit of the decision was followed and given breadth in *United States v. Albrook*.¹⁴¹ In *Albrook*, a district court panel held that failure to sentence youthful offenders to Lorton Youth Center in Virginia on the sole basis that Lorton was overcrowded was an invalid exercise of sentencing power. Instead, the court ordered the immediate relief of the overcrowded situation at that institution.¹⁴² Again, it may be urged that *Albrook*, another Youth Corrections Act case, is distinguishable on that basis alone. Several factors, however, do not support such summary treatment. First, the court spoke not in terms of the Act, but rather in terms of the need for rehabilitation. Second, the court, in a supplemental memorandum dated nearly two weeks after the original decision, noted that although some action had been taken to comply with the opinion, more forthright steps were necessary.¹⁴³ In its last sentence, the court declared that "[t]he Constitution, the Youth Corrections Act, and the conscience of a civilized society require that youth offenders receive firm but effective opportunity for treatment and realistic rehabilitation."¹⁴⁴ The reference to the Constitution was the first in the entire opinion; that the court deemed it significant seems obvious from its inclusion. Perhaps equally important, however, is the reference to the "conscience of a civilized society." This oblique reference to the scope of the eighth amendment allows anticipation of future elaboration on the *Albrook* case, changing it from one of ambiguous

¹⁴¹ 336 F. Supp. 973 (D.D.C. 1971).

¹⁴² *Id.* at 979.

¹⁴³ *Id.* at 981.

¹⁴⁴ *Id.* at 983.

constitutional dimensions to one brimming with constitutional implications.¹⁴⁵

Since, as we have seen, probation, or at least some form of punishment less severe than prison seems to serve affirmatively the state's initial interest in protecting society, there remains only the question whether some subsidiary interest might sufficiently overcome the concept of a presumption of probation. The major ground the state would have for objecting to the presumption of probation, given the data already presented, is that the problem of proving that probation is unwarranted is too difficult and that failure to meet the presumption could easily result in the premature and unwise release into society of persons who do not belong there.

Several responses to this argument are possible. First, the problem of defining the "dangerous" criminal has been dealt with by a number of studies, each of which has devised its own definition.¹⁴⁶ While there are gaps in their coverages, these definitions could be used as initial at-

¹⁴⁵ This road has been traveled before on similar issues. In *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966), the District of Columbia Court of Appeals held that there was a statutory right to psychiatric treatment. In successive cases, the court strengthened that holding, and expanded the scope of judicial review of hospital decisions. See *Ashe v. Robinson*, 450 F.2d 681 (D.C. Cir. 1971); *Jones v. Robinson*, 440 F.2d 249 (D.C. Cir. 1970); *Williams v. Robinson*, 432 F.2d 637 (D.C. Cir. 1970); *Dixon v. Jacobs*, 427 F.2d 589 (D.C. Cir. 1970); *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Tribby v. Cameron*, 379 F.2d 104 (D.C. Cir. 1967). Then, scarcely five years after *Rouse*, the United States District Court for the Middle District of Alabama, relying heavily on the analysis in *Rouse*, held that the right to treatment was a constitutional right which needed no statute for its protection. *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala.), modified, 334 F. Supp. 1341 (M.D. Ala. 1971), modified, 344 F. Supp. 373 (M.D. Ala. 1972). The story of the *Wyatt* case is painstakingly captured in Drake, *Enforcing The Right to Treatment: Wyatt v. Stickney*, 10 AM. CRIM. L. REV. 587 (1972). For earlier discussions of the general area, see Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969); *Symposium—The Right to Treatment*, 57 GEO. L.J. 673 (1969). The progenitor of the theory was Morton Birnbaum. See Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960); Birnbaum, *Some Remarks on the "Right to Treatment,"* 23 ALA. L. REV. 623 (1971). There has been recent speculation as to an analogous "right to rehabilitation" in prisons. See, e.g., Comment, *A Jam in the Revolving Door: A Prisoner's Right to Rehabilitation*, 60 GEO. L.J. 225 (1971); Comment, *A Statutory Right to Treatment for Prisoners: A Society's Right of Self-Defense*, 50 NEB. L. REV. 543 (1971). Yet another issue is the right to refuse treatment. See *McNeil v. Director*, 407 U.S. 245 (1972); Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972). See also N. KITTRIE, *THE RIGHT TO BE DIFFERENT* (1971).

¹⁴⁶ See MODEL PENAL CODE § 7.03 (1962); MODEL SENTENCING ACT § 5 (1963); AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 3.3(f) (1967). See also, PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 7, at 203 (1967). There is considerable debate, however, over whether dangerousness can ever be predicted. See generally von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717 (1972).

tempts to solve this operational dilemma. Protection of the public safety would be left in the hands of the legislature, which would be able to alter or amend any of these standards. Of course, any attempt to undermine the concept, such as defining a "dangerous criminal" as anyone convicted of a felony, would be highly suspect constitutionally.

Second, the difficulty of determining who is "dangerous"¹⁴⁷ has, in the past, led the courts too often to err on the side of caution and excessive incarceration. Two separate studies demonstrate this. In Florida, after *Gideon v. Wainwright*¹⁴⁸ established that indigent defendants have a right to counsel in state criminal prosecutions and that a trial and conviction without such assistance violates the fourteenth amendment, it was determined that rather than retry all of the inmates so convicted, it would be administratively more convenient simply to release them. The results were astounding: the recidivism rate of the *Gideon* releasees was one-half that of prisoners who served their maximum sentence.¹⁴⁹ Even accounting for idiosyncracies, these data bring

¹⁴⁷ Until the 1971 Term of the Supreme Court, the problem of defining dangerousness might have been viewed as an esoteric one. In the wake of three highly significant recent decisions, however, that may no longer be true. In *Humphrey v. Cady*, 405 U.S. 504 (1972), the Court strongly indicated that thin statutory lines between those defined as "mentally ill" and those defined as "sexual criminals" did not justify different commitment procedures. *Id.* at 512. In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Court took this reasoning one step further, specifically holding that a state may not, consonant with due process, continue to incarcerate an individual charged with a crime even though it appears that he will never become competent to stand trial and, further, that due process almost certainly requires an individual's release as soon as he becomes "nondangerous." *Id.* at 731-39. Although the *Jackson* case did not really seek to define dangerousness, its main stress was on danger to others, rather than, for example, danger to oneself. Finally, in *McNeil v. Director*, 407 U.S. 245 (1972), the Court ordered the release of a convicted criminal after the expiration of his maximum sentence, although the state sought to continue his incarceration to determine whether he was a "defective delinquent" subject to indeterminate incarceration under Maryland's famed statutory network. These three cases, taken together, could indicate an entirely new thrust in the field of constitutional correctional and civil liberties law connected with incarceration. It is probably sufficient to note here that (1) *Jackson* clearly held that extended precriminal incarceration beyond the point of dangerousness was violative of due process; (2) *Humphrey* clearly indicates that the distinction between criminal/noncriminal and precriminal/postcriminal, in terms of the purpose of incarceration and procedures by which incarceration may be determined, are highly suspect constitutionally; and (3) *McNeil* suggests that, at the very least, the state cannot hold an offender past the term of his criminal sentence without having proved adequate justification for civil commitment, which, under *Jackson*, seems to be a showing of dangerousness. Together, the cases might—and this is highly tentative—pave the way for an eventual holding that criminal incarceration (as opposed to civil incarceration) can only be justified on the basis of dangerousness, and that nondangerous criminals must be dealt with on a basis other than incarceration. The revolutionary thrust of this interpretation of these cases is evident.

¹⁴⁸ 372 U.S. 335 (1963).

¹⁴⁹ See C. EICHMAN, *THE IMPACT OF THE GIDEON DECISION UPON CRIME AND SENTENCING IN FLORIDA: A STUDY OF RECIDIVISM AND SOCIOCULTURAL CHANGE* 71-73 (1966).

both enlightenment and distress, for it seems to indicate that the more time one spends in prison, the less likely he is to succeed on the outside; while this is certainly a common-sense impression, it is a very unpleasant piece of information to digest.

The second study, "Operation Baxstrom,"¹⁵⁰ indicates the difficulty which would result from an imprecise definition of "dangerous." The operation, named after another Supreme Court case which held that prisoners could not be transferred to the maximum security criminal mental hospitals at the expiration of their criminal sentences without due process,¹⁵¹ sought to transfer to civil or other hospitals many of those who had been previously dealt with under the invalidated procedures. Again, the results were astounding—of the more than 900 "dangerous" inmates transferred to less secure institutions, over 140 were released from the hospital within a year, and only seven were actually returned to the criminal hospital for the dangerous.¹⁵²

These experiences with the difficulty of determining dangerousness—and with the awesome fear that we may be increasing dangerousness by extending incarceration—should lead legislatures to define clearly, concisely, and narrowly a category of offenders who meet the definition of dangerous.¹⁵³ Given the indications of what prison does to human beings,¹⁵⁴ such a definition should clearly restrict rather than expand the category of individuals it embraces.

The difficulty in establishing guidelines for the choice between probation and incarceration in a penal institution can be reduced substantially by adoption of innovations now being advocated by virtually every member of the corrections profession. I speak here of the role which so-called "community corrections centers" can play to assist the individual in realistically adjusting to that community through his continued rehabilitation and contact with the community, and by his supervision under the care of professionals.

Community corrections centers, or near counterparts, are already in operation in many states in this country.¹⁵⁵ The concept envisions a

¹⁵⁰ See Hunt & Wiley, *Operation Baxstrom After One Year*, 124 AM. J. PSYCHIATRY 974 (1968).

¹⁵¹ *Baxstrom v. Herold*, 383 U.S. 107 (1966).

¹⁵² Hunt & Wiley, *supra* note 150, at 976.

¹⁵³ Even if dangerousness is defined for purposes of legislative clarity, the problem remains whether, in fact, the capacity for or likelihood of violence is predictable with any degree of certainty. One of the leading authorities in criminology has attacked all of the sentencing studies which include a dangerousness concept on the grounds that psychiatry simply cannot assure, even to a 50% likelihood, that a given individual is dangerous. See Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968).

¹⁵⁴ See notes 159-62 and accompanying text *infra*.

¹⁵⁵ For a general discussion of the concept, see U.S. BUREAU OF PRISONS, THE RESIDEN-

program in which small groups of offenders live together in a house or dormitory facility. The offender is not placed directly back into the environment which contributed to his delinquency nor is he entirely removed from the community. Care includes both in-house service and post-release service, aimed at enabling the offender to adjust to tensions which others are able to deal with or to forget.¹⁵⁶

The major difference between these centers and penal institutions is the degree of responsibility which the residents have in the facility's operations. Most houses allow the residents a large voice in deciding both admissions to the center and conditions under which a new admittee will live.¹⁵⁷ "Treatment" is a constant theme. In addition to the group therapy sessions which seem to be omnipresent in these institutions, educational and vocational rehabilitation opportunities are constantly made available. Most encouraging of all, however, is the fact that these corrections centers, halfway house, pre-release centers, and other facilities of this type cover the gamut of possible offenders¹⁵⁸ with apparently no adverse effects.

The present success of these programs and centers, whatever their current composition, argues strongly in favor of their consideration as methods alternative to sentencing. Community closeness ensures that ties with family and friends will be continued, rather than effectively severed as so often occurs as a result of distant incarceration.¹⁵⁹ Work release programs retain the offender's earning power by day, while affording him guidance and care at night, hopefully enabling him to discover different methods of dealing with life's problems. It seems clear that community centers offer much hope for the future of corrections and for those who have run afoul of the penal system.

Consideration of these factors leads to a supplemental position in terms of constitutional law: that the state's interest as well as the inmate's interest in most circumstances require either a disposition of probation or, if probation seems unwise because of some possibility of repeated offenses, then a disposition of supervision in a community corrections center. Where, then, the state wishes to restrict more se-

TIAL CENTER: CORRECTIONS IN THE COMMUNITY (1971), which includes a comprehensive bibliography.

¹⁵⁶ See *id.* at 1-2.

¹⁵⁷ In California youth centers, the group determines, subject to staff veto, both entrance to and release from the institution. See Saleebey, *Youth Correctional Centers: A New Approach to Treating Youthful Offenders*, 34 *FED. PROBATION* 49 (March 1970).

¹⁵⁸ The residents of such an institution in Pennsylvania, known as Yoke Crist, include a rapist, an armed robber, and a drug pusher. Detvieler, *The Convicts Who Live in a Mansion*, *PARADE*, Dec. 12, 1971, at 6.

¹⁵⁹ See, e.g., P. MORRIS, *PRISONERS AND THEIR FAMILIES* (1965).

verely the liberty of the individual—virtually to remove him from all ties with the community and his family and to subject him to the spartan regimen of a true penal institution—it must demonstrate that his personal characteristics require such incarceration to serve both the purpose of rehabilitation and the protection of society from further criminal activity. In short, since the least drastic alternative is probation or a community correction center, the state must bear the burden of justification when it seeks incarceration in a penal institution.

This proposition is not likely to be eagerly embraced by many who see “law and order” as consisting of more remote, harsher, more secure, institutions, with longer sentences for their residents. But if the tragedy of Attica has taught us nothing else, it should be that these methods have not succeeded. Prison today is in many ways more dangerous¹⁶⁰ and more degrading¹⁶¹ than it was a century ago. While guard-inmate brutality seems to have been significantly reduced, at least in the physical sense, the indignities suffered by those who seek parole from an indifferent and ill-prepared board¹⁶² are staggering. The frustrations which arise from petty rules, often enforced by petty officials whose total dedication to security makes them incapable of seeing the world more humanely, are thoroughly attested to by the great number of prisoner writings which are being published today.¹⁶³ These frustrations

¹⁶⁰ The many reports of assaults in our institutions seem to warrant a conclusion that, for the inmates at least, things are more dangerous than ever. *See, e.g., INSIDE: PRISON AMERICAN STYLE* (R. Minton ed. 1971); Bunker, *War Behind Walls*, *HARPER'S MAGAZINE*, Feb. 1972, at 39. The reason for this increased hostility is unclear, but much of it may be racial animosity, perhaps intensified by guards and, in some cases, higher administrators. Prison unions, which are just beginning to form, have been touted, at least by prisoners, as one way to bring solidarity to otherwise warring inmates. *See generally* Note, *Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority*, 81 *YALE L.J.* 726 (1972).

¹⁶¹ That prison is a process of degradation is clear. Eric Goffman's classic study stresses the “need” for ceremonies of degradation. E. GOFFMAN, *ASYLUMS* (1961). When the present context is considered, inmates who one hundred years ago might have suffered flogging in public, for example, now find themselves one of the few groups left who are subjected to particularly degrading situations such as strip searches.

¹⁶² *See* Goodman, *Would a System Where Sentences Are Fixed by a Board of Experts Be Preferable?*, 30 *F.R.D.* 319 (1961); Hayner, *Sentencing by an Administrative Board*, 23 *LAW & CONTEMP. PROB.* 477 (1958). For an insightful, but bitter, exploration of this entire process, see *INSIDE: PRISON AMERICAN STYLE* ch. 8 (R. Minton ed. 1971).

¹⁶³ *See, e.g.,* E. CLEAVER, *SOUL ON ICE* (1968); A. DAVIS, *IF THEY COME IN THE MORNING* (1971); H.J. GRISWOLD, M. MISENHEIMER, A. POWERS & E. TROMANHAUSER, *AN EYE FOR AN EYE* (1970); G. JACKSON, *BLOOD IN MY EYE* (1972); G. JACKSON, *SOLEDAD BROTHER* (1970); *INSIDE: PRISON AMERICAN STYLE* (R. Minton ed. 1971); *MAXIMUM SECURITY* (E. Pell ed. 1972). A coalition of ex-convicts puts out the monthly *Penal Digest International*, a useful collage of prison writings, letters, views, etc.

can, in time, lead to violence from a nonviolent man, much to his irreparable harm.

Other objections to this proposal—that the criteria of dangerousness are too opaque, that turning a “preference” into a burden of proof problem is unwise, that such considerations will take up too much time in busy courts—seem to pale when it is remembered that the decision made at sentencing literally affects *years* of the one life which the defendant has. One should never lose sight of the fact that this decision is vastly more significant than those made in diversity tort cases, for example, which occupy an inordinately large slice of a federal court’s time, or property settlements and divorce cases, which are key time consumers in state courts. To those who fear appellate review of sentences,¹⁶⁴ which this proposal surely entails, the answers which the American Bar Association,¹⁶⁵ a number of state legislatures,¹⁶⁶ and numerous scholars in the field¹⁶⁷ have given seem sufficient.

CONCLUSION

Sentencing today is an archaic process, operating with often unfair procedures and uncertain goals. The application to this process of the rule of the least drastic alternative—that the government must prove a particular action is necessary to effectuate a clear governmental interest—would both shift the burden of justifying imprisonment to the government and require the government to articulate clearly the rationale for incarceration. Since penologists and apparently courts have rejected all traditional penal goals except deterrence and rehabilitation, and since an examination of empirical data suggests that general deterrence is a fiction, the government would bear the burden either of demonstrating that the individual offender is so dangerous that he must be specially deterred—incapacitated—for an especially long period, or that his rehabilitation calls for some period of incarceration.

If we cannot immediately abolish prisons, as seems clear, then we

¹⁶⁴ See, e.g., Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79 (1965).

¹⁶⁵ See AMERICAN BAR ASS’N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968).

¹⁶⁶ See, e.g., ARIZ. REV. STAT. ANN. § 13-1717 (1956); ME. REV. STAT. ANN. tit. 15, §§ 2141-44 (Supp. 1972); MASS. GEN. LAWS ANN. ch. 278, §§ 28A-28D (Supp. 1972); N.Y. CODE CRIM. PRO. §§ 543, 764 (McKinney 1958 & Supp. 1970).

¹⁶⁷ Virtually all writers on the subject have supported appellate review of sentences. See, e.g., L. ORFIELD, CRIMINAL APPEALS IN AMERICA (1939); Mueller, *supra* note 101; Sobeloff, *supra* note 1; Note, *supra* note 101.

should at least attempt to reduce their populations by employing alternate methods of dealing with those whose incarceration is unjustifiable. Employing preferences and presumptions against imprisonment can do this, and the least drastic alternative offers one clear path to reach such a result.