Department of Justice

ADDRESS

OF

THE HONORABLE GRIFFIN B. BELL
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

LAW COUNCIL OF AUSTRALIA
AUSTRALIAN/AMERICAN ASSOCIATION

AND THE

AMERICAN CHAMBER OF COMMERCE IN AUSTRALIA

THURSDAY, JULY 20, 1978
7:00 P.M.
LEONDA BALLROOM
WALLEN ROAD
HAWTHORN, VICTORIA
AUSTRALIA

It is a pleasure for me to be in Australia and to share ideas and experiences with a people whose legal, historical, and cultural roots so closely parallel those of my own country.

Culturally, we share a common language and hence a common literature.

Legally, we share the tradition of the English common law. It forms the essence of our jurisprudential thought, and modifications made on it in one country are closely watched in the other. We also share the unique structure of federalism, and thus have in common the difficulties and the advantages of parallel legal and judicial systems.

My home state of Georgia shares a special historical parallel with Australia. Its founder, James Oglethorpe, saw the new colony as presenting an alternative to the imprisonment of debtors. Many of your early settlers came to these shores as an alternative to incarceration in England.

Much has changed in correctional law since the days of debtors' prisons and penal colonies. Our knowledge of crime and criminals has grown enormously.

We, as well as you, have begun to reassess long-held positions on the purposes and form of punishment for criminal conduct.

I would like to review today some of the events taking place in the United States concerning these issues, and I hope in my individual discussions with you to learn more of the approaches being taken in Australia.

One method widely used to respond to crime is the sentence to a lengthy period of confinement with the understanding that the defendant actually will have to serve only a fraction of that period -- an undetermined fraction. The concept of the so-called "indeterminate sentence" derives from the belief that confinement in penitentiaries leads to rehabilitation of offenders, and that there is no reason to detain offenders once they have been rehabilitated. The resulting process of saying to an offender that he will be released as soon as he is thought to be rehabilitated was considered a strikingly progressive reform at the time of its origin. However, in the light of experience gained over more than half a century, we are now prepared to reject the concept of indeterminacy as an idea whose time has not yet come.

To help explain that comment, let me describe the sentencing system as it now exists at our federal level. The federal government prosecutes only a small percentage of the total crimes committed in our country -- about 40,000 federal cases each year. But the states, which have the primary law enforcement responsibility, often tend to adopt federal approaches.

The existing federal sentencing system is essentially a two-step process. As the first step, the judge imposes a sentence somewhere within the maximum range specified by law for the offense. Generally speaking, he has unrestrained discretion to choose any sentence within that maximum -- his determination is guided only by his personal views of the offense, of the offender, and of the purposes of sentencing. Unlike in Australia, no provision exists for judicial review of the sentencing decision. After the offender is imprisoned, however, the second step occurs -- the Parole Commission determines what portion of the original sentence should be the actual amount of time to be served by the offender. In most instances, that time will be about one-third of the term imposed.

In the last several years, a growing number of persons of all political views have called for reform of the existing sentencing and parole practices. This stems partly from recognition that the present system produces unwarranted disparities in sentencing, with persons similarly situated receiving different sentences for similar offenses committed under similar circumstances. Impetus for reform also stems from a belated recognition that the theory of rehabilitation, which forms the primary basis for indeterminate sentencing, has proven very unsatisfactory in practice.

Australian experts seem to have been well ahead of Americans in recognizing the dual problems of disparity and indeterminacy. Disparity was the subject of study and critical comment as early as 1967, even though, I would assume, the availability of appellate review of sentences in Australia would have exerted some control on the level of disparity. In 1968, the Tasmanian Indeterminate Sentences Board recommended to the Attorney-General that indeterminate sentences be abolished. It stated five general reasons why the system of imposing such sentences should be abandoned.

---First, the Board noted, it results in expanded sentences and relegates to an administrative body the actual power to determine the time to be served.

Second, it has an adverse psychological effect on prisoners and their families because of the inability to plan for the future when it is not known when that future will begin.

Third, it creates problems for prison authorities in their attempts to develop programs for prisoners who may be incarcerated for years or who, instead, may be released in weeks.

Fourth, it results in an atmosphere of bitterness and unrest because the prisoners regard it as unfair.

Fifth, it requires special, expensive types of facilities that, unlike existing facilities, are designed fundamentally for rehabilitative purposes.

I would add to that list one more item -- the system's uncertainty of punishment robs the law of its deterrent impact. The deterrent value of the criminal law and the public respect for the criminal justice system are not aided by a system in which the public reads of an offender being given a substantial sentence and then sees that same offender free on the streets a relatively short time later.

The expressed concerns about sentencing have coincided in our country with an effort to codify the substantive federal criminal law. This effort was made necessary by the ad hoc manner in which our federal criminal laws have evolved. Many of you must be familiar with the anomalies sometimes produced

by such a process. For example, our present federal criminal code -- in the midst of provisions dealing with such grave offenses as murder, kidnapping, and bank robbery -- punishes the transportation of water hyacinths; and I understand that New South Wales has a statute punishing malicious damage to a vine in a garden by up to ten years penal servitude.

The resulting bill to reform our federal criminal laws has been subject to a great deal of work by the Department of Justice and the Congress. It not only modernizes and recodifies the substantive provisions, it introduces major reforms to address the sentencing problems as well.

The problem of unwarranted disparity in sentencing is addressed directly in the sentencing provisions of our proposed new Federal Criminal Code. Those provisions clearly define the appropriate purposes of sentencing, establish a guideline sentencing system, and provide for appellate review of sentences falling outside the guidelines.

The proposed Code sets forth four generally recognized purposes of sentencing, one or all of which may be applicable to a given case -- deterrence, protection of the public, assurance of just punishment, and rehabilitation. A Sentencing Commission is created and directed to establish a series of

guidelines to govern the imposition of sentences for federal offenses, taking into consideration factors relating to the purposes of sentencing, the characteristics of the offender, and the aggravating and mitigating circumstances of the offense. In sentencing offenders, a judge will be expected to sentence within the range specified in the Commission's guidelines, although if he considers the applicable guideline range inappropriate for a particular case he is free to sentence above or below the guideline range as long as he explains his reasons for doing so. If an offender is sentenced above the range specified in the guidelines he may obtain appellate review of his sentence; if he is sentenced below the range specified in the guidelines, the government, with the Attorney General's concurrence, may obtain appellate review of the sentence. The system is designed to promote greater uniformity and fairness -- fairness to the defendant and to the public alike -- while retaining necessary flexibility.

The other basic problem with existing sentencing law is the inappropriateness of imposing illusory, indeterminate sentences with the achievement of "rehabilitation" as the standard for determining the amount of prison time that should actually be served. This is also addressed by the proposed Code.

The theory underlying the indeterminate sentence focuses on rehabilitation and largely ignores punishment, deterrence, or incapacitation. The theory assumes that by definition an offender is socially "ill," that he should be confined to prison for purposes of "treatment," and that he should be released just as soon as it is determined by parole authorities that he is "cured." The difficulty with the rehabilitative idea is that it is unrealistic. Recent studies have demonstrated that our behavioral sciences do not know with any certainty how to rehabilitate prisoners, nor can they even provide a means of identifying a prisoner who actually has become rehabilitated. If there is no way to tell when a person has become rehabilitated, there is no reason in the first instance for sentencing him to an indeterminate term with his release to be based on some fancied recognition of rehabilitation. He might better be sentenced instead to a shorter but definite term.

Our proposed new Code would, for most cases, abandon the indeterminate sentence. Its sentencing system provides that the sentence announced by the judge should be the sentence actually to be served. The Sentencing Commission would be required to take into account the fact that the sentence imposed would be the sentence actually served, and, consequently, would be expected to recommend shorter sentences than those imposed today.

With the abandonment of the indeterminate sentence, the principal reason for maintaining our existing parole system would disappear -- but none of parole's four basic purposes would be lost.

The first purpose -- helping to eliminate unfairness -- will be much better served by the sentencing guideline system. The second purpose -- monitoring rehabilitative progress -- has fallen into such general disrepute that today the Parole Commission generally bases its release determination only upon factors known at the time of sentencing rather than upon a prisoner's behavior while confined. The third purpose -- encouraging good behavior -- is felt to be unnecessary by the Federal Bureau of Prisons. Granting or withholding various privileges has been found to be a more effective means of encouraging compliance with prison regulations. In any event, a modest credit for time served with good behavior could provide any additional incentive that might be needed. The final purpose -- prevention of recidivism -- is now attempted through post-release assistance and supervision. That aspect of the parole system designed to assist prisoners in making the transition back to society could be replaced by requiring prisoners to spend a short period of time in a half-way house or other similar facility and by giving them post-release access to the assistance of the Probation Service.

Determinate sentences resulting from the abolition of parole offer two clear advantages over indeterminate sentences.

By eliminating all uncertainty concerning a prisoner's release date, a major cause of prisoner complaints would be removed. The increased fairness, and the increased appearance of fairness, could reduce a major cause of prison bitterness. This bitterness hampers preparation for reentry into society since real or imagined injustices focus a prisoner's attention upon relitigating the propriety of his incarceration rather than upon his future after release. Participation in educational and training programs would no longer be designed simply to try to secure favorable treatment from parole authorities. Participation would become truly voluntary, and hence more effective.

Another clear advantage is that a determinate sentencing system would enhance the credibility of sentences handed down by courts. Most persons recognize that even the small percentage of criminals who reach the end of the criminal justice process today will not be required to serve anything close to the periods prescribed in their sentences. This lack of credibility in sentencing makes a measurable contribution to the current disrespect for the criminal justice system and decreases deterrent impact.

I should emphasize that none of the reforms I have spoken of are yet law. I will not make predictions about when Congress will be able to respond to the Code proposal, but I hope it will be soon. It is sorely needed.

These special concerns of mine, criminal code reform and judicial reform among others, involve taking a series of simple ideas and handling them in a logical and comprehensive fashion. I strongly believe that such an approach will be effective. I do not mean to suggest that crime will be eliminated or that the public's confidence in the administration of justice will skyrocket. But, by approaching our problems in an orderly manner, by assuring that we know the facts, and by acting on those facts rationally, I believe we will be sped on the path to a safer and more just society.

One essential part of that process is the exchange of ideas. That is why I value so highly the opportunity to be here. I hope that my travels and conversations here can lead to a greater exchange. And, two years from now, when criminal law experts from throughout the world will be gathering in Sidney for the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, I trust that our government will be strongly represented. I know that you have already gone to a great effort in preparing for the Congress and we look forward with pleasure to further exchanges of ideas at that time.

# # #