From R. C'ZAR
1:16 PM
07/31/03
to:
DIANA MURPHY, Chair
MICHAEL COURLANDER, Public Affairs
In answer to "Request for Comments" – on downward departure from sentencing guidelines in the "Protect Act".
27 pages
To be backed with regular mail copy

bona fides

We established the *Imperial Pornography Commission* in 1985 – after the *MEESE Pornography Commission* undertook to repudiate the earlier federal pornography commission's finding that pornography was harmless.

As most government opposition to pornography currently falls on "child pornography" our focus has intensified there.

Research Field and Discipline ***"0407108 Child Pornography"***, is designated in *The Eighth Edition of the Grants Keyword Thesaurus* (Copyright 1982-1999). Initially funded by the federal government, the *Grants Keyword Thesaurus* is used by FEDIX's participating Federal Agencies, The *NIH Guide*, and *NSF Bulletin* as the government standard for designating a common research classification system to be used by the federal government for categorizing vocabulary for both federal agencies and grant applicants. The terms have been examined by professional library scientists to ensure consistency with leading discipline dictionaries in each research field listed.

We negotiated and secured our 501-(c) 1 tax exemption from the IRS in Los Angeles in 1985.

We were the principal legal defender of the now perished 50-year-old nudist colony, *Samagatuma*, which was extirpated in a government sanctioned pogrom, in 1982, The violence used to destroy the colony would today probably be recognized as terrorism. It was predicated upon *hate* for nudists.

The region has a long history of violence and intolerance for sex, nudity and pornography.

Counter Factuals

About the same era that TED TURNER established CNN, we traveled to Los Angeles to the cable television association's annual convention and endeavored to establish a nudist cable network. Had we been successful establishing a nudist

cable channel back then, today's hysterical Neo-puritan movement would probably not exist.

We also declared a moratorium on the war-on-sex, as the Neo-puritan movement continually misstates the facts. Their myriad fictions largely account for today's laws. Had the government observed this moratorium, draconian intrusions upon personal rights to sex, nudity, pornography, etc. would likely have never come to be.

Eliminating downward departures

The *Sentencing Commission* is being marched by forces into no-downward departure sentencing guidelines. We believe that this is preliminary to US Rep. TOM DELAY re-introducing his death penalty bill for sex crimes that he previously withdrew from the loaded-up *Amber Bill* legislation. We believe this is really about mandatory death sentencing.

We witnessed *Senate Judiciary Committee* member JEFF SESSIONS claim that the sentencing guidelines of the *Sentencing Commission* must be made uniform, with only the maximum sentence being allowed.

The *Sentencing Commission's* actual role in all of this reminds us of the anecdote of a man attending a political dinner: One of the waiters is going around the tables placing pats of butter on the plates. A gruff diner barks, "I want another butter, do you know who I am?" To which the waiter snaps, "Do you know who I am? I'm the guy who hands out the butter."

High road, low road

We have long believed that the government's ultimate goal is to eventually supplant the War on Drugs and the War on Terrorism with the War on Sex. We have been aware that there seems to be a secret central coordinator in the War on Sex. For instance, on Tuesday, May 20, 2003, there was a *massive* blitz of television stories on "sexual predators". The same day, the local county board of supervisors launched their day-long "Chairman's Conference on Sexual Predators". It included the law enforcement community, the prosecutors, and just about every one that has a financial stake in a War on Sex. The TV blitz and county conference timing seemed powerfully coordinated.

We guessed that the conference was funded by a massive OJJP grant that had been published in the *Federal Register*. We have since learned we were right. Their main objectives were to **change the laws** regarding minor offenses, to major felonies for "sexual predator" crimes (in which they included possession of child pornography), and to insure massive punishments, such as life imprisonment, as they asserted that "sexual deviants cannot be cured". They planned to pursue massive new grants for myriad programs under this cash-cow.

Yet commensurate with our moratorium on the War-on Sex, some 30,000 registered sex offenders failed to register in California. If the 400 victims per offender figure was real, we would have seen an enormous number of offences by those 30,000 ("incurables") in that time. We didn't. The number is obviously wholly exaggerated.

Back on August 29th 2001, the Scottish Rite Center hosted the *"First Bilateral Conference on Commercial & Sexual Exploitation of Minors"*, a salient in the anti-sex, anti-nudism and anti-pornography pogroms.

Dr. RICHARD ESTES from the **University of Pennsylvania** was the chief attack-dog, introducing his *iatrogenics*. Dr. ESTES warned that there were probably pedophiles secretly in attendance, and he pronounced "pedophiles" with the same hate, loathing, animus and disdain as other bigots might intone the slur, "nigger-lover".

Dr. ESTES laid out conference goals as being to initiate fundamental change in the laws, including, raising the age-of-consent in all 50 states, and then around the world. He stressed the agenda of passing harsh criminal sanctions against child pornography and sexual relations involving minors.

To fail to do so, he insisted, was to invite acceptance, and "normalcy". We inquired at the conference, "what is the critical mass necessary to achieve 'normalcy'?"

We registered and provided our e-mail address and requested to be notified of the next conference. We returned home and later that day received a tax bill from the IRS despite our exemption. We were dis-included from notification of the subsequent conference date two years later, but on that same day received yet another such hit letter from the IRS.

County supervisors began broadcasting a tirade of anti-"sexual predator" cable television programming with copious amounts of factual distortion of upwards of around three hours a day, day in, day out. This was punctuated with the "need to" and strategies to "change the laws" at the state level. The constant guest from *Citizens for Community Values*, has the same last name as the woman administering the program at the Department of Justice.

Such deliberate and open politicking uses of those grant dollars was improper and probably illegal. Yet consider that the Inspector General's budget at DOJ next year is only $56 million, yet Juvenile Justice receives some eight times that amount.

Similarly, someone took the low road for a retaliatory attack against our tax exemption. It is further improper to not include those many opposing

arguments to their War-on-Sex, etc. Throughout the legislative process, obstruction to opposing input has been the same. That is why it is exceptional conduct for the *request for comments* by the *Sentencing Commission.*

The local county supervisors generally embrace religious establishments, and have on several occasions referred to pornography as but "filth". Yet myopic vision can prove negligent:

oops

DAVID X. SWENSON Ph.D., in his compilation, *"The Ouroboros Effect: The Revenge Effects of Unintended Consequences", writes:*

> *"Solutions to problems are usually intended as final fixes, but more often than not, while solving one problem, they generate more problems. In some cases the new problems from the intended solution are bigger, worse, or more complicated than the original problem; in other cases, the intended solution feeds back into the original problem and simply exacerbates it. The German word, 'verschlimmbessern', can be interpreted as 'to fix something more broken,' or to worsen through attempts to make better. These unintended consequences have been called 'revenge effects' and are largely a function of limited scope in problem strategy conceptualization: most problem solving deals only with the problem (as defined) at hand, and does not consider the long term effects, ripple and spin-off effects (contingencies), or feedback effects in a larger system."*

Even where planning includes professionals from several disciplines, professionals of limited disciplines often make the same error: they solve the problem only for the immediate situation, not considering the systemic implications of the overall picture.

In one of Dr. SWENSON's numerous examples:

> *"The purpose of the French Revolution was to rid France of the corruption and injustice of the old regime. To this goal Dr. JOSEPH IGNACE GUILLOTINE expanded on the plans for a new form of* ***merciful*** *execution using a large falling blade (the machine bearing his name), and even went to LOUIS XVI (who loved riddles and problems) for suggestions on the proper angle of the blade (which Louis later became intimately acquainted with). The device was promoted by ROBESPIERRE whose Jacobite committee dominated the new regime. His cold-hearted methods and new laws led to numerous beheadings--his included--as French crowds became caught up in rampant accusations, impulsive convictions, and summary executions. It was later estimated that a severed head retained consciousness for as long as 15 seconds--not so quick a death. The intent of a merciful execution*

had unexpectedly fostered over two years of public butchery and cost an estimated 13,800 lives."

Reproductive Law

We understand that age-of-consent in this state was 10-years-old until towards the end of the late 19th Century. Age-of-consent laws are generally considered as part of *Reproductive Law*, which is regarded as one part of *Population Control*. MALTHUS held that short of the leveling-forces of war, famine, plague (disease), and pestilence, population would eventually outrun available sustenance. The period of relatively slow growth of a population is called the *lag phase*. The human population reached 6 billion in October of 1999. Today it is 6.3 billion. The human carrying capacity for earth is popularly estimated in the 10-12 billion range.

Low range estimates of sustainable world population, with the world at U.S. dietary standards, are 1.2 billion; at U.S. energy consumption, are less than 1 billion.

High range estimates of some 45 billion or more are envisioned as possible if we cultivate all arable land; mass convert to nuclear power and renewable resources and expand mining. This assumes technologies and solutions that do not yet exist. The upper *earth sustainable human population* figure is 157 billion if population shifts to grain diet.

The annual percentage growth rate of the world's population has remained relatively flat at 1.7% for the last 15 years. *The Doubling Time* for population is currently estimated at 41 years. The *True Doubling Time* is the Doubling Time adjusted for migration.

World Total Fertility Rate is 3.8 per women. In More Economically Developed Countries, TFR is 2.1. In Lessor Economically Developed Countries TFR is 2.7. Approximately 1/3 of the world population is currently under 15 years of age. Women younger than 15, represent the greatest impact on future growth, as they will be reproducing in subsequent years. And yet, despite increasing AGPR, the TFR is dropping.

Human population growth is affected by the same factors as other populations as well as philosophical and ethical considerations. We have heard of groups suggesting raising the age of consent for both sex and drinking to 25 years-of-age in this country. We found this to be a rather arbitrary age, yet learned that China has already set that delayed age for marriage. Couples must then wait another two years after marriage to have children. Couples must formally agree to have only one child. China offers free birth control, and abortions. If a woman gets pregnant with a second child, China offers incentives for termination, and penalties if she bears the child. The Chinese government has linked prosperity and

low growth rate in its citizen's minds. Overall, the world's average age that a woman has her first child is 20-years-of age.

India has had very little success in instituting reproductive laws. Japan handles high-density population well, but they obtain resources (ore, energy, food, etc) from low-density areas. Curiously, some of the world's most sensuous pornography, especially child pornography, comes from Japan. While some child pornography comes from India, the exploitation of children in that country is generally regarded as owing to menial labor.

Infectious disease is caused by biological organisms. Non-infectious diseases, i.e., those that lack an agent of transmission, include such diseases as cancer, hemophilia, diabetes, etc.

Bubonic plague killed 67% of Europe's population in 1348. 50% of its population then perished from the plague again, 13 years later.

Today, HIV is devastating Africa. Condoms have regained popularity as an effective barrier method to HIV, STDs and pregnancies. Other popular barrier methods against unwanted pregnancies include hormonal methods such as Norplant, the pill, and the morning-after-pill, (*RU-486*, which competes with progesterone for binding sites on placental cell membranes.)

Worldwide, abortion plays a significant factor in reducing births. Abortions, throughout the ninth month, are routine in China. Some estimate that China had performed 63 million abortions through 1986.

China also executes many prisoners, subtracting from population. Those in prison labor camps also reduce reproduction rates.

War and rumors of war, we are told, will always be with us. Wars seem to occur regularly throughout history as part of the human condition in order to reduce the human population. From an *Ethological* point of view- *(ethology is the study of animal and human behavior)*, wars break out as part of the human animal's condition, and not as he expects – owing to religious or political disputes.

And yet as stated previously, human population growth is affected by the same factors as other populations as well as philosophical and ethical considerations.

abstinence schemes.

Conatus – is desire, the will to live. Optimum population, versus quality-of-life is an extremely subjective tradeoff. Human sexuality is a vital and necessary component in people of all ages for quality-of-life. Man often invents

institutions such as religion that impinge on areas like sexuality. Frequently, such institutions endeavor to substitute rigors, strictures and mortifications in place of sexuality. Challenges for abstinence are generally made to the postponing of intercourse – and not for choosing lifetime celibacy. Usually, other forms of sexuality may be substituted, allowing more of the whole-person to exist.

But sexual repression diminishes *conatus.* Despite the *Heritage Foundation's* clever attempt to correlate higher suicide rates to sexual activity in young girls, the actual will to live correlates to whole-personality. It is these extreme repressive morals which regularly give rise to a greater inclination to war. Repression similarly seems to exacerbate intolerance.

If a society is less inclined to war, it will probably be less repressive, more repressive – more inclined to war. This seems to be the religious component to population control.

Acculturation

Acculturation is the mingling and blending of cultures. It is the cross-fertilization of cultures. It is the acquiring understanding of other cultures or the revealing to a child, cultural traits or social customs.

Right-wing extremism frequently denies cultural diversity, cultural pluralism. RONALD REAGAN promptly withdrew the United States participation in UNESCO shortly after we announced we would turn to that source to fund our US Constitutional project, having met resounding opposition from federal funding sources under that administration.

Religious Fundamentalism, whether Islamic or Christian, frequently denies all tenets but its own. Religious Fundamentalism, frequently insists on a literal interpretation of religious tracts – but almost always its own literal interpretation – not those of others. The more extreme Religious Fundamentalism both in this country and elsewhere, have avowed Culture Wars, cultural cleansing, a "Jihad" against "society's dirt", a Holy War.

Frequently, these traits seem almost disingenuous, so as to conceal ulterior motives. Consider the *KEATING Syndrome*, named for CHARLES KEATING, of the Lincoln savings and Loan scandal. KEATING used the misdirection of *absolute moralism* against pornography, to cover his real activity of looting and plundering. It seems to serve as a model to this day for today's Right-wing extremists.

The Christian Coalition, some years back, embarked on a strategy to capture the secular state and force its narrow tenets upon everyone else through law. One of the original items (#9) on the Christian Coalition's *"Contract with America"* was the abolition of pornography. That general liberticide was later revised down to simply child pornography.

PAT ROBERTSON, the Christian Coalition's founder, and son a former senator, also attempted to run for president. ROBERTSON enlisted many powerful members of the Republican Party to join his "inner-circle" sponsorships. Strategy involved disguising true intentions and operating "under the radar" by stealth. When former Republican chairman and former Governor JAMES GILMORE expressed the party's strategy, he said it would be a stealth administration.

Christian Coalition's RALPH REED shared the Coalition's stealth political strategy. In an interview with Norfolk *Virginian-Pilot,* November 1991, Religious Right candidates were encouraged to conceal their religious agenda and to advocate popular issues such as lowering taxes. "I want to be invisible. I paint my face and travel at night. You don't know it's over until you're in a body bag."

In an interview with the *Los Angeles Times,* in March 1992, REED says, "It's like guerrilla warfare. If you reveal your location, all it does is allow your opponent to improve his artillery bearings. It's better to move quietly, with stealth, under the cover of night."

Some time ago we watched PAT ROBERTSON declare on his *700 Club*, that he had made the necessary arrangements to end pornography "once-and-for-all".

Immediately, House Judiciary Chairman JAMES SENSENBRENNER and along with fellow porn-fighters BOB GOODLATTE AND STEVE LARGENT, et al, called A.G. JOHN ASHCROFT on the carpet in the committee and demanded he crack down on pornography.

A flurry of activities ensued, culminating in where we are today. Now laws targeting pornography, (unlike other speech), allow professed "victims" to sue in court, and by showing a nexus to injuries, to collect damages.

Yet hidden right-wing, war-on-sex terrorist cells exist in America. Little effort is made to discourage these elements. We have written to newspapers and congressmen previously about these individuals, gone to the police and the prosecutors and the courts. Too many embrace religiosity and moral absolutism, and they frequently also conspire to deny the irreligious their own lives for living.

Moral Absolutism is an interesting concept. One essay we encountered explained it as thus. *"If you were to stand up end-on-end, an infinite number of dominoes, with the last domino being marked with a letter 'X', knocking over the first domino, how long would it take for the toppling dominoes to topple over the one marked with an 'X'?"*

The logical fallacy is that the author contradicts himself by defining a "last domino" in an infinite row. He then answers his question, "Never", and explains that this then proves the existence of God. Since the existence of God is proved,

then there must be Divine Law. Since there is Divine Law, he concludes, then there must be Absolute Moral Law, that is, moral absolutes which can never be changed.

DAVE DUFFY writes in his essay, "*Can America be saved from stupid people?*":

> *"There are a lot of taboos, that is, things we're not supposed to talk about, in modern society.* ***If we do talk about them we are labeled a racist or worse. [Pedo?]****... In the old days, ... [about the mid-17th century back], most people lived a bare* ***subsistence existence****. They spent their lives toiling to feed themselves and their families, then died young. All political and economic power was in the hands of an* ***elite, usually a combination of clergy and aristocracy*** *who were often the same people. Only this ruling elite was educated, and their power was typically inherited, entailing the power of life and death over poor people, who comprised 90% or more of the population. Poor people, for the most part, acquiesced in this situation, accepting that aristocrats and clergy somehow belonged in their elevated positions and that it was the poor's lot to be miserable, especially since the ruling elite assured them that* ***heavenly reward awaited them in the afterlife.*** *It was a great con game played by the aristocracy and clergy for hundreds of years, and it was enforced with the torture and execution of anyone who didn't go along.*
>
> *"But beginning in the early 17th century, advances in knowledge, in particular scientific knowledge, began a renaissance of thought, at first among a few enlightened clergy and aristocrats, that said one didn't have to live a subsistence living, that one could better one's life through the application of this new technology, that one could grow more food, heal the sick, and in general understand and harness the natural world so that everyone, not just an elite, could enjoy life.*
>
> *"Gradually this revolutionary idea took hold and technological advance turned into economic and political advance, and by the middle of the 18th century a significant portion of the world's civilized population, at least in western Europe, thought that every person had the right to a better life on this earth. Much of the aristocracy and most of the clergy fought bitterly against this idea, since it meant the loss of their power over poor people. But it won out anyway, with a few isolated pockets of aristocrats and clergy maintaining power over the very poorest places.*
>
> *"In historical hindsight we refer to this time that ushered in a better life for everyone as the Age of Enlightenment. It spanned just about all of the 17th and 18th centuries and, in the latter half of the 18th century, led directly to America's founding with its wonderfully*

enlightened Constitution that guaranteed the average person the right to seek happiness on this earth, in this life. This is important, because a lot of stupid people think America sprang into existence suddenly, out of a few people's heads. It did not. It was the result of a long process of people gradually becoming aware that this life was worth enjoying and pursuing happiness in. Early Americans like JEFFERSON were the product of this process and they wrote the best of it into America's Constitution."

Modern times have seen a reversion to top-heavy, control-down. The Aristocracy-Clergy resumes some of its former control with religious-slavery. Little-or-no attempt is presently made for the convention of *noblesse oblige.*

In SUZANNE PRESTON BLIER's essay, *"Crisis and Creativity: The Social and Cultural Roots of Artistic Florescence"*, she notes,

"... [I]t is becoming increasingly evident that humanistic scholarship is on the brink of a major paradigm shift. In part this shift is generated by the new potentials of electronic media. It also is based on a growing desire to creatively move beyond existing research orientations and methodologies - positivist, materialist, deconstructionist, and otherwise. Equally important has been the sense of isolation that scholars in many disciplines have felt due to increased sub-field specialization. In art studies specifically, although researchers have brought to light massive new data on artists and art traditions around the world, to date, little if any attempt has been made at a synthesis of these findings. With early evolutionary and teleological models of art long held to be untenable, the time is right for a new scholarly orientation which seeks to locate broader patterns existing within art traditions in various settings.

"Recent writings of GILES DELEUZE and other Neo Formalist philosophers, have offered provocative paradigms for rethinking about art along more global lines. Rereading DELEUZE in the last few months, however has left me with a sense of frustration and sadness at the underlying evolutionism of its central nomadic trope, in which, it would appear, Africa is again positioned at the bottom, albeit here as a sort of reframed noble savage. A truly global historical model in art history delimited along these lines is clearly problematic because of ongoing issues of marginalization. Yet I also see striking potentials in the idea that form again might be addressed through the lens of what we have learned in the last three decades of scholarship on the social and political grounding of art. What better subject to take up in this regard than artistic innovation in its diverse social and global settings.

"Psycho-biological models ... may suggest that artistic talent or giftedness are readily passed down within a culture. Associated data run counter to both art historical and cultural exemplars. As the anthropologist A. L. KROEBER pointed out in the later 1940s (1948:390 ff) during certain key periods in history one finds a striking increase in the number of extraordinarily gifted individuals at work within a given area (the Italian Renaissance for example). If 'artistic genius' (his term) is a wholly (or predominantly) hereditary phenomena, one would expect to have roughly equal numbers across periods and even societies. And, say in 19th century Italy, we would expect that many of the great grandsons and daughters of key Renaissance artists would have gained similar fame. KROEBER argued in this light that the innovative potentials of fully 75-90% of all persons who had inherited such "gifts" had in some way lost or neutralized them. Things could be worse, in his view, however, for without some form of societal acceptance of innovation the loss would be 100%. Initially when I began working on this project I saw crisis as the most important factor in the promotion of artistic change, with issues such as internal and external war, religious proselytization movements, trade route changes, and technological shifts being of critical importance. Artistic innovation in this light might be seen to share important complements with theories of chaos and disorder. Associated crises offered the means of escaping what has called (1990:265) the 'coercive structure of order.' Creative individuals seem to be able not only to adjust to new socio-cultural forms but also to take advantage of the associated conditions of flux to bring into being dynamic new artistic models.

"That crisis plays such a critical role in artistic innovation also has been examined in several provocative studies on fashion. The first, an exploratory essay by the sociologist GEORGE SIMMEL, argued that (1971:302) 'The more nervous the age, the more rapidly its fashions change.' The more detailed fashion study by A. L. KROEBER showed similarly that fashion innovations often occurred in times of war, revolution, and social crisis. Two key moments of fashion change as defined by measurable shifts in hemlines, waist shapes and bust forms between the years of 1788 and 1936 were documented. According to him, the first great shift occurred around the French Revolution, leading up through the political concerns of 1830; the second coincided with political tensions surrounding the first world war. In Africa similarly anthropological studies in Ghana suggest that a shift to more flamboyant royal costume forms has tended to occur in periods in which power has significantly dissipated, most importantly the early era of colonialism.

"While I still maintain that crisis is central to the process of artistic change, it is also clear that crisis alone is not enough. What is

equally important is the coming together of several quite different cultures in contexts in which there are relatively comparable freedoms of expression. ***When the established order, and specifically those in positions to effectuate change respond to major crises by interacting with competing cultures, creative breakthroughs are encouraged.*** *Artistic innovation in this way seems to be linked in vital ways to multi-cultural exchange, however unsettling or difficult such exchanges may at first appear to be. And if the modern and post colonial worlds are identified with particularly striking artistic innovations it is because of the ready access to new communication means which have encouraged strikingly different cultures to come together more often and in new ways.*

"Scholars working in the comparative-civilizational approach ('the comparative study of total societies as social systems' -NELSON 1981:238) offer interesting models for related scholarship. NELSON notes (1981:239) with regard to the primary interests of this approach include that: 'All socio-humanistic patterns and processes are studied in historical-sociological psychological depth. Equal emphasis is given in principle to a) social structures in all institutional spheres, b) structures of consciousness , c) symbolic designs; and d) changes. However because of the underlying evolutionary focus of the above, related studies in my view often are problematic.'

"ROBERT A. NISBET notes key problems with the comparative method for similar reasons (1969:189; 190-1):

"Closely related to the theory of social evolution, inseparable from it indeed, is the system of culture classification known admirably in the nineteenth century under the name of Comparative Method....The Comparative Method is thought to be the consequence of the 'scientific' anthropology of the late nineteenth century. It is not....In fact...as we find it in the writings of the nineteenth-century social evolutionists and to a considerable degree at the present time, is hardly more than a shoring-up of the idea of progressive development generally, and more particularly, of the belief that the recent history of the West could be taken as evidence of the direction in which mankind as a whole would move and, flowing from this, should move. COMTE, MARX, SPENCE, TYLOR, MORGAN, without exception were convinced that the specific line of development which they thought they could see culminating in Western Europe was much more than Western development alone. They saw the West, and most especially England and France, as the vanguard in a mighty movement of historical development that would eventually encompass the rest of the world."

Enforcement

Chief Justice WILLIAM H. REHNQUIST, delivered the keynote address at the Dedication of the ROBERT H. JACKSON Center in Jamestown on Friday, May 16, 2003. Chief Justice REHNQUIST quoted Justice JACKSON from the famous 1943 case *"WEST VIRGINIA STATE BOARD OF EDUCATION et al. v. BARNETTE et al.,* No. 591. :

> *"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."*

(Unless of course, one's very core beliefs and core values are being proscribed in the *Sentencing Commission,* in setting up an inflexible structure, intended to, and suited only for the institution and implementation of the ultimate application of the ultimate sentence – Death.)

Another interesting line from the *WEST VIRGINIA STATE BOARD OF EDUCATION . v. BARNETTE* case:

> *"Objections to the salute as 'being too much like **Hitler**'s' were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs."*

Two years later, Justice JACKSON was the lead prosecutor at the Nuremberg Trials in Germany following World War II, in 1945.

It wasn't until another two years in 1947, that the much and long sought after evidence was found, of the minutes of a conference held on January 20, 1942 at a villa in Wannsee, a district of Berlin. At this conference, the plans for the "Final Solution to the Jewish Question" were made.

In all, fifteen top Nazi and SS officials attended the conference at the Wannsee villa, (which now serves as a Holocaust Museum). Then 36-year-old ADOLF EICHMANN took down the 15 pages of minutes of the meeting. HBO Films/BBC Films co-produced has award winning documentary *"Conspiracy: The Meeting at Wannsee"*, on this meeting.

The excerpt of *part one* (those in attendance) reads as follows:

Minutes of discussion.

I.

The following persons took part in the discussion about the final solution of the Jewish question which took place in Berlin, am Grossen Wannsee No. 56/58 on 20 January 1942.

***SS-Obergruppenführer* REINHARD HEYDRICH**
Chief of the Reich Security Head Office (RSHA), and Chief of the Protectorate of Bohemia and Moravia

Gauleiter Dr. MEYER and
Reichsamtleiter Dr. LEIBBRANDT
Reich Ministry for the Occupied Eastern territories

Secretary of State Dr. STUCKART
Reich Ministry for the Interior

Secretary of State NEUMANN
Plenipotentiary for the Four Year Plan

Secretary of State Dr. FREISLER
Reich Ministry of Justice

Secretary of State Dr. BÜHLER
Office of the Government General

Under Secretary of State Dr. LUTHER
Foreign Office

SS-Oberführer KLOPFER
Party Chancellery

Ministerialdirektor KRITZINGER
Reich Chancellery

SS-Gruppenführer HOFMANN
Race and Settlement Main Office

SS-Gruppenführer MÜLLER
Reich Main Security Office

SS-Obersturmbannführer EICHMANN
Security Police and SD

SS-Oberführer Dr. SCHÖNGARTH
Commander of the Security Police and the SD in the Government General

SS-Sturmbannführer Dr. LANGE
Commander of the Security Police and the SD for the General-District Latvia, as deputy of the Commander of the Security Police and the SD for the Reich Commissariat "Eastland".

REINHARD HEYDRICH, chose the lovely, serene setting by Lake Wannsee, for a conference, surrounded by a library, swimming pool, flower gardens and bird houses. Of those in attendance, most were well educated, and several had law degrees.

While the actual minutes contained euphemisms, "transportation to the east" or "evacuation to the east" *(nach dem Osten abgeshoben)* of the 11 million Jews in Europe, the actual meaning was understood to denote murder.

HITLER's own comments, as dutifully recorded by his secretary during his "table conversations", fall, 1941:

> *"From the rostrum of the Reichstag, I prophesied to Jewry that, in the event of war's proving inevitable, the Jew would disappear from Europe. That race of* ***criminals*** *has on its conscience the two million dead of the First World War, and now already hundreds and thousands more. Let nobody tell me that all the same we can't park them in the marshy parts of Russia! Who's worrying about our troops? It's not a bad idea, by the way, that public rumor attributes to us a plan to exterminate the Jews. Terror is a salutary thing"*

The *United States Sentencing Commission* looms very close to such a meeting. No doubt, minutes will be kept. We are unaware of even any SCHINDLER's List type exceptions being made in the current punishment guideline proposals.

Defective, ultra vires, anathema

The First Amendment could not be clearer that "Congress shall make no law... abridging the freedom of speech, or of the press..." There is simply no room for ambiguity. Yet starting with *Redrupp,* and continuing with *Miller,* the High Court has done just that, favoring religious strictures, rigors and mortifications.

In 1928, the Supreme Court held in *Olmstead v. United States,* that wiretapping involved no "search" or "seizure" within the Fourth Amendment's "unreasonable searches and seizures" prohibition. The court held that the Fourth Amendment "shows that the search is to be of material things – the person, the house, his papers or his effects". When a suspect's phone was tapped "there was no searching" as the Constitution's wording "cannot be extended and expanded to

include telephone wires reaching to the whole world from the defendant's house or office." Connecting wires "are not part of his house or office any more than are the highways along which they are stretched."

The notion that signals on a wire were somehow ethereal so that no tangible (material) interest involves, runs counter to today's notions of electronic communication. By such reasoning, how can downloaded pornography be proscribed until it has actually been printed?

Olmstead had been sold to the court on the notion of those rare exigencies where there was a kidnapping victim or some such exceptional circumstance, where a wiretap might lead to a successful rescue of someone and save a human life. In such a case, that part of the evidence should have been excluded from the actual prosecution as *fruit from the poison tree*. And yet as always, when such legal fictions are advanced, and as exceptions to the inalienable rights are carved out, the envelope gets pushed and pushed and pushed and now wiretaps have become quite routine, even for myriad minor transgressions.

Of Heresy:

Socrates

The discipline of *PHILOSOPHY* contains the five fields: *logic, esthetics, ethics, politics* and *metaphysics.* (From WILL DURANT's multi-tomes *Story of Civilization*)

Logic, is the study of ideal thinking. Logic approaches research through observation and introspection, deduction and induction, hypothesis and experimentation.

Esthetics, is the study of ideal beauty, often of form and figure or art.

Ethics, is the study of ideal conduct.

Politics, is the study of ideal social organization *(and not of capturing and keeping office).*

Metaphysics, is the study of final causes, (teleology). It encompasses ontology, cosmology and epistemology. Metaphysics forms the bases for religion.

SOCRATES held that the highest knowledge was that of good and evil, the very *wisdom* of life.

SOCRATES lived in Athens, Greece, the cradle of democracy. 469?-399 BC.) SOCRATES chose death over the censorship of his teachings. Most intellectuals regard him as the first individual to formulate the philosophy of intellectual freedom. He pioneered the marketplace-of-ideas as supreme public service.

SOCRATES propounded a philosophy of self-knowledge of purely objective understandings of such concepts as justice, love and virtue.

In 399 BC, SOCRATES was charged with corrupting the morals of the young and neglecting the gods of the state as well as introducing new divinities, such as the *daemonion.*

He fulfilled his sentence by calmly drinking a cup of hemlock, according to the custom of the day.

A.D.

Emperor JUSTINIAN, (483-565; reigned 527-566), born PETRUS SABBATIUS to village peasants in what was eventually to become the former Yugoslavia. JUSTINIAN envisioned a scheme by which to unite with forces of Christianity, and consolidate his power.

With the help of his two great generals, BELISARIUS and NARSES, he spanned empire across Africa, Spain, and Italy. He rebuilt the eastern capital at Constantinople. With a fertile imagination, he found his power in ideas.

He located a talented lawyer, TRIBONIAN, (died 545), and slashed the multitude of laws and enactments to but one twentieth of their original bulk. He retained only the best of the legal ideas. These resulted in the *Codex* and the *Digest.* Together we get the *Corpus Juris Civilis,* remaining unsurpassed for thirteen hundred more years.

His *Pandect,* his *Compendium,* held that justice consists of rendering every man his due.

About that same time, BOTHIUS, (480-524), JUSTINIAN's coeval, compiled the *Quadrivium,* consisting of four hard sciences, the disciplines of arithmetic, music, geometry and astronomy. He translated and modernized these from the Greek texts, thus saving "the first elements of the arts and sciences of Greece".

These gave rise to the *Trivium,* which was produced in the Middle Ages, defining the verbal disciplines of grammar, rhetoric and logic. Taken together, the *Quadrivium* and *Trivium* comprise the seven Liberal Arts.

In 1209, in the first documented genocide in modern European history, some thirty thousand troops eradicated at least fifteen thousand men, women and children in wholesale slaughter.

The famous line attributed to one of Pope INNOCENT'S III's officers, when asked how to tell the difference between heretics and true believers was, "kill them all, God will recognize his own." The same officer later declared, "Neither age, nor sex, nor status was spared".

About this same time in England, the *Chartæ Liberatum* was enacted. It consisted of the *Magna Charta* and the *Charta De Foresta.*

The *Magna Charta,* or Great Charter, was granted by King JOHN of England in 1215. Its 38 chapters formed the foundation for personal liberty, the administration of justice, setting distinctions between temporal and ecclesiastical jurisdictions, securing rights of property and defining the limits of taxation.

The *Charta De Foresta* was issued and granted by HENRY III. Having originally appeared within the *Magna Charta,* it defined grants of property and liberty for the woodland population. While both were held inviolable, Lord COKE observed that they needed to be confirmed some thirty times, interregnum.

In 1833, two committees were formed to publish suppressed documents of the history of France. Among those scholars gracing the committees, were VICTOR HUGO and JULES MICHELET. MICHELET compiled the voluminous *Le Procès des Templiers,* detailing records of the trials of the Knights Templar in the Inquisition.

This was anathema to the Church, which, due to Darwinism, was already experiencing a crisis of faith.

California Senator Joseph Dunn recently observed that the history of this country is one recurring cycle of group after group being denied their rights. The *California Senate Select committee on Citizen Participation* has already held hearings on the numerous Mexican-American citizens that were rounded up and expatriated simply because they had brown skin.

Another senate committee recently examined California's shameful legacy with the early eugenics movement, and forced sterilization.

Still others examined the Japanese-Americans internment, have looked at the shameful period of lynching, have discussed the virtual eradication of indigenous peoples – California Indians. Others have addressed the shameful period of slavery.

Many in California have called for a ***Truth and Reconciliation Commission***, to address these shameful series of wrongs. The obvious fact is that in real time, that is, while the outrages are occurring, they seem appropriate and proper. It is only in historical perspective that the egregious injustice comes clear.

These things we do know however: The marginalized and the target groups lack critical-mass to fight back. Further, all opinion advanced in defense of the group is stilled and silenced. In today's age, a constant, unending blitzkrieg of demagoguery pours out of the radio, television and print media, which deny any voice to the target group, the socially disfavored. Owing to going unchallenged, gross exaggerations are then advanced and the group is further demonized, vilified, and dehumanized.

While the *Miller* decision pretended to Community Values, (a ruse; witness the pogrom at Samagatuma or the California Proposition 215), at least *Miller* respected literary, artistic, political, and scientific value. *New York v. Ferber,* fails dismally in that regard. Without the multi-disciplinary examination of a social current or group, then what we have with *Ferber,* is a grotesque caricature of early human sexuality pathologically perverted to the narrow purview of police mostly operating in their self-interest.

Intellectual CHRISTOPHER HITCHENS observed that there exists a "pornographic element" to law enforcement. We concur, by watching the way police frequently denigrate and abuse women they arrest for prostitution and other sex offenses. On *Cops,* one cop named "JACKSON", in Oregon, stopped a young female that he had previously targeted and accused her of street walking. She became distraught and panicked at his antics. He hog-tied her and displayed her like that with her dress hitched up fully revealing her brief underwear, to other laughing officers.

The "Long Island Lolita" (AMY FISHER), reported that she was repeatedly raped by prison guards.

California used to have *Penal Code 4030,* which was said to have allowed police to accuse women of an offense (such as soliciting), and then to body-cavity search them. Allowing cops to essentially molest females, practically at will, virtually amounted to a pornographic sexual police "perk"

Recently on TV, a Cops program showed cops in a room, with a naked female, her arms pinned behind her by one cop, thus forcing her naked breasts to thrust forward while the other cops jeered. She begged them to allow her to at least put on her brassiere and one finally brought her bra extended at arms-length and on the end of a stick, with the cop acting as if the bra was poisonous.

We know of human behavior, that slavery took a civil war to end. Like owning pets, owning other human beings is a powerful sense of might and

control. That explains another reason that kidnappers, even after having been paid ransoms, sometimes kill their captives. It explains why prison wardens don't like to release their wards.

When police are given such total power over other human beings, it is this pornographic element that often comes in to play. They frequently toy with people because of this. They often only reluctantly release them.

When NYPD Officer JUSTIN VOLPE violently sodomized Haitian immigrant ABNER LOUIMA, with a wooden stick, and in so doing, actually ruptured LOUIMA's internal organs, it was a brutal sexual act. We understand such use of the "night stick" is a long-running joke amongst many cops. One finally acted out on it.

A San Diego County sheriff's deputy was recently dismissed for exacting sex from a women he went to investigate, and where he found her at home intoxicated. She filed charges of rape, which we understand were dismissed.

When the FBI presented evidence to the judiciary committee on child pornography, during Senator GRASSLEY's bill, it was of their own material that *they* put up on the Internet. It brought the FBI $30 million. More money! More Power! cf. *Operation Starburst; Innocent Images; Candyman; Hamlet; et. al.* The FBI poses as both purveyor and seeker of porn. Original strategies included controlling access to adult materials. Past efforts include the EXON Amendment (aka Communications Decency Act), COX/WYDEN bill, LEAHY bill, and spurred on by the now discredited Carnegie-Mellan study by student MARTY RIMM, the *Child Pornography Protection Act of 1995, (S. 1237),* sponsored by HATCH, ABRAHAM, GRASSLEY, and THURMOND. criminalized even virtual imagery. Upheld U.S. District Judge SAMUEL CONTI of San Francisco, that opinion cited secondary effects chargeable to the very imaginations of artists.

The CDA challenge of AMERICAN CIVIL LIBERTIES UNION,: CIVIL ACTION et al., : v. : JANET RENO is a clear example of splitting hairs. It could as easily be called "How Many Angels Can Dance on the Head of a Pin?" It exemplifies compound error. *The American Psychological Association* issued a report debunking the belief those children having sex (even with adults), leads to long-term psychological problems. Yet there is a huge multi-million-dollar child sex abuse industry which has its own momentum. One has to wonder what the Founding Fathers would have thought about the First Amendment's explicitly clear language "no law", admitting exceptions, and then the perpetually escalating sophistry by which such rationale would of necessity have to compound error of legal fictions. And yet ACLU v. RENO is considered a victory by many for overturning the CDA.

In the hot-button, witch-hunt hysterical climate, numerous false assumptions abound, yet are just plain wrong. Because they have been purposely

repeated so often, they have become accepted as factual. These are far too many to list and one-by-one, here, but by way of example, the term "pedophile" regularly gets used (albeit inaccurately) interchangeably with "molester" and "predator", and always in the pejorative. (*the DSM IV* defines a "pedophile" as someone whose predominate sexual interest favors children.)

In another example, FBI Agent DEBORAH DANIELS, the Justice Department spokesperson appearing on C-SPAN stumping for HATCH's "Protect Act", revealed that the actual number of kidnappings of children resulting in murder in a particular year was 44. The irate citizen caller on the phone line disputed her and insisted that she was wrong. He insisted that the real number was 700 thousand. People want to believe that!

We believe that this notion came about because an organized effort to distract from *Enron's* multi-billion dollar crime wave, which funded much the president's candidacy, as well as that of the attorney general in his race in Missouri.

When it became apparent that Enron and others were looting California for *themselves,* we let out a cry of indignation and soon, many others followed suit.

Congressional hearings soon followed, and those hearings rapidly captured the country's spotlight. The President's chief benefactor and buddy, KEN LAY, claimed his 5th Amendment rights against self-incrimination. Enron's CLIFF BAXTER agreed to cooperate with investigators with full disclosure. He ended up dead before full disclosure was made, killed by "RAT SHOT".

In testifying about J. CLIFFORD BAXTER's death, JEFFREY SKILLING announced that BAXTER had complained, "They're calling us CHILD MOLESTERS!"

Upon the uttering of that remark, the media went off in a seriously organized red-herring feeding frenzy against "child molesters", and Enron thereafter, was largely ignored. The red herring soon reified into all-out media frenzy against the Catholic Church. Hardly new, incidents occurring even 30 years ago, were called "news" and yet that story took over the cable news programs and newspaper front pages. We kept hearing that 700,000 kids disappeared a year and that one-third were killed within the first 3 hours. They repeated that over and over and over. The thing is, it's just not true.

We were told by media that Catholic priests were the worst of the worst. But allegations surrounding priests had been reported since 1996 on the *Fresh Petals* web site when it was run by IANTHE. The hysteria generated was an all-out a red-herring.

The worst priest incident we heard was that the actual worst case was 40 victims. Yet the sex abuse industry insists that the average is 400 per offender.

The language is suspect as well. JEFFREY DAMER was accurately labeled a "sexual predator". However, the police and media began to apply that pejorative to all sexual offenders. A predator is an animal that kills and eats other animals. A *natural predator* selects out the sick and weak and feeble from herds, for instance. "Top-Line Predators", such as human being hunters, tend to select-out the largest, healthiest trophy animals, usually in their prime-of-life.

If we accept the malapropism of human predators for something other than killing-and-eating, then perhaps "Top-Line Predating" explains assassinations of the best leaders. We recently saw a quote from the *Talmud* instructing to target and kill the enemy's top leaders.

Interestingly, the Jews have historically been a tragic target group. They now boast the *ADL*, in defense. Jews represent approximately 3.5% of America's population. Blacks now account for about 12.5 %; homosexuals, approximately 5%. Apparently, the US Supreme Court believed that that group had achieved critical mass. *Lawrence vs. Texas* offers some amazing insights into the court's mindset. *Justice Stevens*' declared *"the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."*

In Justice SCALIA's dissent he faults "A law against public nudity targets 'the conduct that is closely correlated with being a nudist,' and hence 'is targeted at more than conduct'; it is 'directed toward nudists as a class'". He says, "It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."

Such a position accepts that there are always socially disfavored groups under attack. It does nothing to shore up the rights of those being marginalized until the dust settles.

When PAT ROBERTSON heard the court's decision in *Lawrence*, he went apoplectic. ROBERTSON immediately initiated "Operation Supreme Court Freedom" and inveigled imprecations and deprecations from his followers, taking the low road to influence the court. Apparently, ROBERTSON had had other plans in the works for those he socially disfavors, The Coalition's *Christian American* magazine was promoting and selling a book called *Legislating Immorality*, which says the Bible requires the death penalty for homosexuals. (January 1996)

Congressman TOM DELAY recently accepted the 2002 Distinguished Christian Statesman Award. He is recorded as saying, "As individuals and as a nation, we are what we believe. Our collective convictions about life's most

important issues can't be divided from the condition of our country. The strength of American society rests on a set of fundamental values that begins with faith in God . . .
: "Now I think we all remain disturbed by the dirt of our society. We can all see distressing signs that our popular culture is at odds with our very core of beliefs . . . it is obvious that healing our culture will require all of our work and all of our help."

The Washington Post ran an in depth story on Rep Delay, (by PERL), revealing that DELAY holds a literalist interpretation of the Bible (that the Word *really is* the thing). We are informed that he has disowned his own 3 siblings and his own mother. While they are all devoutly religious, apparently they do not accept a literal interpretation of the Bible. So what would Tom DELAY do to those he cares nothing about, that do not submit to his literalist interpretation of the Bible?

Back in 1999, Congressman DELAY undertook to undermine the Scientific Community and force them to retract their position, substituting, instead, his own religious convictions:

H. CON. RES. 107

Expressing the sense of Congress rejecting the conclusions of a recent article published by the American Psychological Association that suggests that sexual relationships between adults and children might be positive for children.

IN THE HOUSE OF REPRESENTATIVES

May 12, 1999

Mr. SALMON (for himself, Mr. DELAY, Mr. PITTS, and Mr. WELDON of Florida) submitted the following concurrent resolution; which was referred to the Committee on Education and the Workforce

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CONCURRENT RESOLUTION

Expressing the sense of Congress rejecting the conclusions of a recent article published by the American Psychological Association that suggests that sexual relationships between adults and children might be positive for children. ...

Those religious strictures have evolved far beyond that position, now. Legislators everywhere seem to be one big Society for the Perpetual Increase of Punishment. That is one of the side-effects of repression. And yet bills dealing with sex or nudism or pornography are sexy. Lawmakers simply cannot refrain from revisiting them again and again with every legislative session, in order to ratchet-up and ramp-up increasing penalties. Even when existing penalties are already Draconian.

If there is one absolute certainty, it is that lawmakers will again and again introduce more such legislation with ever-escalating penalties.

No matter that it is settled law, already. For example, when the US Supreme Court overturned prohibitions on virtual child porn, the Attorney General grew incensed and held a press conference and announced that he would not accept that decision. He declared that he would simply charge such works as obscenity until he could arrange for legislators to vote down the court's decision. *(Marbury v.?)*

On the Senate side, despite our moratorium, ORRIN HATCH contrived SB51 the "Protect Act" which loaded up religion and Draconian punishments into an otherwise sensible AMBER Bill, that presumes to overrule the court's ruling on virtual porn.

We trace this barbarism to HATCH's religious roots, known as "Blood Atonement". His church has voluminous historical records of its founders and leaders insisting that only by the spilling of blood, can an immoral sinner (such as an adulterer), be "forgiven and gain entry to heaven". Many tracts indicate that those founders of his religion believed that they were doing sinners a favor by killing them by spilling blood, so that they could "gain entry into heaven". We have read reports of Mormon strategies to place as many politicians into office as possible, so as to force universal compliance with their moral strictures.

We have heard ORRIN HATCH refer to pornography in general as simply "filth".

Other developments as a result of increasing repression include a recent movement to institute torture into society. The High Court's recent Miranda ruling in *Martinez* suggests some rather disturbing regression towards torture, especially where Justice THOMAS comments that the Oxnard police detective's methods were "not egregious".

The High Court is slated to hear 3 more Miranda related cases next term.

The Court upheld state sex offender's registry requirements and also California's 3-Strike Law. The court found that proportionality was not one of the requirements of the 8th Amendment. Balderdash. That is *law-as-a-disease*, or *religion masquerading as law*. Such want of proportionality is nothing less than *barbarism*. As such, it portends disturbing trends.

Where we know that scapegoat groups of the socially disfavored are denied a voice with which to protest, let alone advocate, how does one persevere?

Where is the difference between "rule-of-law" and "authoritarianism"? If, as Senator ARLEN SPECTER claims, "rule-of-law" is the highest ideal, (coming from the mouth of a law-maker), why was ROSA PARKS accorded the Medal of Honor? Wasn't all that ROSA PARKS risked being a $100 fine?

What about defending one's very essence and core values where the penalties are life imprisonment or even death? But then, America seems to prefer dead heroes. That way their heroics are fixed, and they can no longer be "troublemakers".

And if it takes one to know one then it seems to us that more often than not, latent pedophiles will insinuate themselves into those jobs ostensibly attacking or policing child pornography, but secretly allowing cover for access to indulge in an appetite for the material.

We long ago recommended that ERNIE ALLEN at the *National Center for Missing and Exploited Children,* in Arlington Virginia, maintain a perpetual archive of known child pornography for referencing.

Since then, as reported by *AP,* the *US Justice's Department Child Victim Identification Program* plans to catalogue thousands of thousands of pornographic pictures seized from suspects and those harvested from the Web, making the Justice Department archives the world's largest collection of child pornography.

America has lots of demagogues. Nudists are aware that MARK FOLEY has made his career on persecuting Social Nudism. FOLEY's predecessor, former Florida Rep. BILL MCCOLLUM, was also a demagogue and had declared on the floor of the House that no professionals would be allowed to find that marijuana had any medical use or was safe. He lost his House seat.

FOLEY's political opponent states on his web site that "Former U.S. Rep. BILL MCCOLLUM looks like Howdy Doody, and current U.S. Rep. MARK FOLEY has earned most of his name recognition by holding news conferences to announce: A) he won't comment on whether he's gay or B) he's steadfastly against nudist camps.

FOLEY led a recent crusade to outlaw minor models wearing bathing suits on web sites, as child pornography. He is currently strong-arming Florida's Governor JEB BUSH to outlaw 6th Grade nudist camps. Foley first objects to minors in nudist camps because there are also adults there and then he objects because there are *not* enough adults there.

This week it was a tirade by FOLEY against former nudist association president WALT ZADANOFF for offering nudist videos on his web site featuring minor nudists made overseas. Yet:

In UNITED STATES OF AMERICA v. VARIOUS ARTICLES OF MERCHANDISE, SCHEDULE NO. 287, the UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, reversed the District Court's order of December 30, 1999 and directed the District Court to enter judgment for

Alessandra's Smile and to take all necessary steps to restore seized materials to *Alessandra's Smile.*

Circuit Court Judge LEONARD I. GARTH ruled: *"The photos portray people involved in a variety of outdoor activities, all of which are natural and expected for healthy and active children, teenagers, and adults. The only unusual aspect is that almost all of the subjects are nude."*

The three-judge panel of SLOVITER, SCIRICA and GARTH, Circuit Judges, unanimously reversed a decision by a federal judge in New Jersey that the magazines - *Jeunes et Naturels and Jung und Frei* - violated federal law against importing obscene materials.

Alessandra's Smile web site was owned and run by LAWRENCE ALLEN STANLEY, who also ran the "MiniModels" web site under the well-known professional name of L.A. STANAMAN, which featured professional models, primarily girls of ages 8 to 14 .

FOLEY objected to these bathing suit web sites ostensibly because the models appeared to strike sensuous poses.

The renowned STANAMAN, was arrested June 8, 2002 in Brazil after police there were tipped to the photographer's web site. They said they found more than 1,000 photographs and more than 100 videos of young girls in swimsuits and underwear.

To serious collectors of child pornography, commercial sites generally offer the best fare. Models are generally photographed in "sets", including clothed, states-of-undress, and nude. They are photographed by leading world photographers accomplished in the genre. The highest prized value is in the collection of complete sets, each image with its original name, i.e., not renamed. The studio's individual logo left intact on the image is paramount, as the studio itself is what lends specific prestige to each artwork.

Most collectors shun child pornography depicting actual sex acts, preferring child erotica instead. Some acknowledge that most average jurors are incapable of making any such distinction, and it's all kiddie porn to them. Some argue that virtually anything can be labeled violative of child porn laws.

Most *Linguists* understand about Semiotics, that the *word,* (or picture) is *not* the thing. Despite all of the convolutions of logic that opponents of pornography propound, that irrefutable logic remains the same: the word, (or picture) is *not* the thing.

The Ukraine currently produces the bulk of the finest studio porn. The United States has been attacking them regularly on myriad fronts over a variety of

pretexts. A recommended aid package of $92 million was challenged last week and zeroed out until Rep KAPTUR, (who interestingly opposes child pornography), made an impassioned plea on the floor of the House to restore the amount.

The state department issued a report in June attacking "sex-trafficking" and concluded that the (vastly inflated number estimates) included willing participants because they hadn't been educated as to what they were doing was "wrong". Unfortunately, these women were often leaving regions which simply could not provide for them. Instead of addressing world slavery in general, which includes, more common forms of slavery such as chattel slavery and state slavery (prison labor camps) the report of sexual slavery bolsters the push to War-on-Sex.

Former Oklahoma Governor FRANK KEATING looked for a while like he wanted to be the secret central coordinator behind the War-on-Sex. KEATING scrambled to spearhead the Catholic Church flagellation, after having been passed over to head the Department of Homeland Security. Yet presidential Executive Order 13257 of February 13, 2002, now subjects those engaging in "underage" consensual relations, (now deemed a "violent crime" equating to terrorism), to the jurisdiction of the Department of Homeland Security when travel is involved. Further, The DPS has arrogated itself "Operation Predator" to enter the War-on-Sex. Vast new resources have already been allocated by government to fund "public service announcements" targeting "child abuse", already contending with the ubiquitous War-on-Drugs spots. They should begin appearing soon in vast quantity.

We notice these perennial pogroms mostly flare during the cold winter months and generally subside during warm summer months, when skimpy clothing is much more prevalent. This year has been a notable exception, as the Neo-puritan moralists have barely subsided at all yet this summer. Perhaps Doctor NORMAN ROSENTHAL's book, *"Winter Blues"* may explain some of the chemistry and biology at work in this seasonal phenomenon.

Annotatio,

H.I.M. C'ZAR

July 15, 2003

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Murphy,

I am a member of Families Against Mandatory Minimums (FAMM) writing to urge you to hold the line and strongly support judicial discretion in your upcoming work to comply with the PROTECT Act mandate to review, and substantially limit the incidence of, downward departure.

As you know, judicial discretion is a hallmark of American justice. Recent attacks on judicial departures from sentencing guidelines threaten to undermine the tradition we've enjoyed since the founding of the country. Judges - not lawmakers, prosecutors, or defense attorneys - should determine the appropriate sentence based on the facts of each case they consider. Departures are necessary to a guided sentencing system. Without them, we fear the guidelines will become no more than the mandatory minimums complete with the disparities and injustice that plague them.

I hope you will point out that although judges are criticized for inappropriately departing from federal sentencing guidelines, prosecutors seek the largest share of departures. If prosecutors disagree with a judge's decision to depart, they can appeal the decision. In this way, the system is designed to correct unwarranted departures without stripping discretion from all judges in all cases.

We ask that you hold hearings as part of your review, not just in Washington, but around the country so that judges, prosecutores, defense lawyers and people like me can tell you what departures mean to sentencing. We urge you to explore amending guidelines that invite large departure rates and design adjustments for frequently used departures so that the guidelines can accommodate them. Above all, when you amend the guidelines, please do so in a way that preserves judicial discretion and departure authority.

Sincerely yours,

Harry L. Dantzler

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[131]

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July 31, 2003

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: 2004 Priorities (Response to Request for Comment)

Dear Judge Murphy:

As we begin a new amendment cycle, we write on behalf of the Practitioners' Advisory Group to address the notice of proposed priorities published in the Federal Register notice and to suggest a number of additional priorities we would like to see the Commission address. As always, we view our primary role as assisting the Commission by drawing on our expertise as defense attorneys to provide comment on the issues identified by the Commission as its priorities. We hope we can also be of assistance in a secondary manner by bringing potential issues to the Commission's attention for possible addition to its priorities.

1) Sentence Reduction under 18 U.S.C. § 3582(c)(1)(A)

Initially, we commend the Commission for including consideration of guideline amendment proposals relating to compassionate release programs as proposed priority #9. As a follow-up on a recommendation we made last year, we continue to believe that the issue of sentence reduction under 18 U.S.C. § 3582(c)(1)(A) warrants Commission action. As Professor and former commissioner Michael Goldsmith noted in his letter to you in October of 2001, the Sentencing Reform Act of 1984, in a provision codified at 28 U.S.C.18 U.S.C. § 994(t), specifically directed the Commission to describe the criteria to be applied by a court in considering sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A), including specific examples of "extraordinary and compelling circumstances" warranting sentence reduction. Although it has been nearly twenty years since the 1984 legislation, the Commission has not yet responded to this directive. We urge that the Commission develop policy guidance to

implement 18 U.S.C. § 3582(c)(1)(A) as specified in § 994(t) during the current amendment cycle. In doing so the Commission will provide the guidance Congress intended to courts considering sentence reduction motions under this provision, and to the Bureau of Prisons in making them.

2) **Drug Offenses**

We continue to believe that the drug guidelines are overly punitive and, thus, strongly oppose any reconsideration of the limitation on the base offense level that was enacted less than a year ago (in November of 2002), and which the Commission has identified as proposed priority #12. The PAG remains convinced that the current drug guidelines place undue emphasis on the quantity of the drugs involved and not enough emphasis on other factors such as role in the offense and violence. At the same time, we are obviously concerned that a measure as limited, well reasoned, and technical as the "mitigating role cap" has been identified for reconsideration by the Commission. Depending on the reaction to these issues in the Congress, the PAG is hopeful that additional steps can be taken to tailor drug sentences more closely to the true severity of offenses and culpability of offenders.

3) **Criminal History.**

The Commission has again identified criminal history as an area for review during the upcoming amendment cycle, proposed priority #13. The PAG agrees that this is an important issue requiring Commission attention. We are particularly concerned that in some cases criminal history may be overstated through the inclusion of relatively minor matters which do not serve the predictive or punitive functions of criminal history well. It is also our understanding that variations in state and local sentencing practices cause ambiguity and uncertainty in the application of the current criminal history guidelines, giving rise to disparity and unfairness in some cases.

The Commission's mandate in the PROTECT Act to reduce the number of departures makes reconsideration of criminal history categories particularly appropriate, since overstatement of criminal history has been identified as one of the most frequent grounds for departure.

Finally, criminal history issues play an important role in determining the availability of alternatives to incarceration for first-time non-violent offenders. The PAG continues to believe that the availability of alternatives to incarceration for first-time non-violent offenders should be increased, and we are concerned about new limitations that have recently been placed on the ability of the Bureau of Prisons to designate offenders to serve their sentences in a community corrections setting. While we have previously suggested accomplishing this through an expansion of Zones B and C within criminal history category I of the sentencing table, the same goals could be achieved through the creation of a new criminal history category 0.

In the course of its ongoing recidivism study, the Commission should obtain and review data regarding recidivism by first-time offenders punished by alternatives to incarceration. The PAG believes such data would demonstrate the success of alternative punishments at greatly decreased cost to the criminal justice system. Indeed, we are aware that recent studies have refuted, at least in the white collar context, the notion that extensive terms of incarceration have a general deterrent effect. Rather, the deterrent effect is best achieved by certainty and swiftness of punishment. *See* Sally S. Simpson, Corporate Crime, Law, and Social Control 6, 9, 35 (Cambridge University Press) (2002). In addition to these positive policy considerations, the creation of a criminal history category 0 would better effectuate the original Congressional intent expressed in 28 U.S.C. Section 994(j).

4) **Recommendation to the Federal Rules Advisory Committee.**

As we have mentioned to the Commission before, the PAG believes that the existing Federal Rules of Criminal Procedure could be improved to better reflect practice under the sentencing guidelines. Although the Rules are not within the Commission's scope of authority, they greatly impact the manner in which the guidelines are applied. For this reason, the PAG believes that it is appropriate for the Commission to consider making a formal recommendation to the Federal Rules Advisory Committee to study and potentially revise rules which directly affect sentencing practice and procedure. In addition, the Commission could suggest such practice and procedure matters through an amendment to its policy statements in Chapter 6.

Specifically, the PAG believes that sentencing practice and procedure would benefit from greater disclosure of facts affecting guideline calculation between and among the parties. More than 95% of cases are disposed of by a guilty plea. At present, the government is not required to disclose any facts affecting the application of the guidelines to the defense prior to the entry of a guilty plea. Perhaps even more remarkable, the government is not required to disclose any facts affecting the application of the guidelines to the defense *after* the entry of a guilty plea. Instead, both the government and the defense begin the litigation of guidelines application through the presentation of evidence to the court – in the person of its agent, the probation officer – on a strictly *ex parte* basis. Although the Court ultimately hears evidence in the presence of both parties at a sentencing hearing, by that time there is a presentence report which is often afforded deference approaching a presumption of correctness. This process of dueling *ex parte* submissions is foreign to any conception of an appropriate adversarial system. The rules should, at a minimum, require any party wishing to present evidence to the court's probation officer to disclose such evidence to the opposing party.

The Sentencing Commission is in a unique position to assess and evaluate the interplay of its guidelines with the Rules of Criminal Procedure. Because the current rules hamper the most efficient execution of the guidelines in practice, the PAG believes the Commission should recommend to the Federal Rules Advisory Committee that these issues receive consideration. The Commission should also address these issues in its policy statements in Chapter 6.

5) Relevant conduct

A long term project deserving of the Commission's attention are questions relating to the use of relevant conduct, and particularly the use of acquitted conduct, to punish criminal offenders. In reference to the larger question of relevant conduct, we strongly endorse a paper published by the American College of Trial Lawyers entitled "Proposed Modifications to the Relevant Conduct for the Provisions of the United States Sentencing Guidelines." This paper recommends eliminating consideration of acquitted conduct, limiting the increases for uncharged and dismissed conduct, eliminating the application of certain cross references, clarifying and narrowing the definition of liability for the conduct of others, utilizing no less than a clear and convincing standard of proof to all relevant conduct sentencing elements, and requiring full notice of all relevant conduct before the entry of a guilty plea. While some aspects of a real offense sentencing process appear essential, these limited but compelling reforms would provide considerably greater fairness in the difficult and still evolving process of sentencing by means of "relevant conduct."

In closing, we realize that not all of our priorities will be able to be addressed. We hope that as the Commission sets its agenda for the upcoming amendment cycles, it will do its best to try to incorporate at least some of these suggestions. As always, we appreciate the opportunity to provide input regarding potential Commission priorities, and look forward to working with the Commission through the coming cycle.

Sincerely,

James E. Felman
Barry Boss

JEF/elm

cc: Hon. William K. Sessions
Hon. John R. Steer
Hon. Rubin Castillo
Hon. Ricardo H. Hinojosa
Hon. Michael E. Horowitz
Hon. Michael O'Neill
Hon. Eric Jaso
Hon. Edward Reilly
Charles Tetzlaff, Esq.
Timothy McGrath, Esq.

Families Against Mandatory Minimums
FOUNDATION

August 1, 2003

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Issue for Comment: Proposed Priorities for 2004

Dear Judge Murphy:

Families Against Mandatory Minimums writes in response to the Commission's request for comment on its proposed priorities for the amendment cycle ending May 1, 2004.

Level 30 Cap for Defendants Receiving a Mitigating Role Adjustment

FAMM supports without reservation the 2002 amendment to subsection (a)(3) of §2D1.1 that caps offense levels for defendants receiving mitigating role adjustments. The level 30 cap effectively protects low-level drug offenders from exposure to inappropriately harsh sanctions. It lessens reliance on drug quantities alone in sentencing these offenders. We fear that eliminating the cap will result in sentences disproportionate to low-level defendants' actual culpability. Our files contain the stories of many low-level defendants who receive lengthy guideline sentences driven by quantity. The level 30 base offense level cap for defendants who receive mitigating role adjustments ensures that the severity of penalties will reflect such defendants' blameworthiness by giving due consideration to their role in the offense, something we have long supported.. We also oppose revisiting the amendment in light of the fact that the cap was unanimously approved and has been in operation less than a year. The issue for comment does not explain why the Commission is considering revisiting the unanimous decision and given that it has been in place less than a year, we argue that it is simply too soon to evaluate how it is being applied. We urge the Commission not to reopen the issue or consider repealing the cap.

Sentence Reductions under 18 U.S.C. § 3582(c)(1)(A)

FAMM commends the Commission for identifying sentence reduction under § 3582(c)(1)(A) as a possible priority area for guideline amendments. Currently, the Bureau of Prisons has interpreted section 3582(c)(1)(A) narrowly to permit motions only in cases of impending death or profound illness or disability. FAMM contends that the statute should be read broadly to permit prisoners to seek compassionate release for non-medical extraordinary and compelling reasons. FAMM has long supported the formulation of criteria, content, and examples to guide judges in interpreting section 3582(c)(1)(A). *See* Letter to Diana E. Murphy, June 25, 2001. Such guidance may provide the Bureau of Prisons the confidence to refer more cases to the courts.

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We have appended *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, published in the Federal Sentencing Reporter in 2001 to further explain and support our position. The article reviews legislative history in support of our position and recommends specific language for a policy statement.

3. Cocaine Sentencing Policy

FAMM urges the Commission to reconsider cocaine sentencing policy as a priority area in the upcoming amendment cycle. As the Commission's excellent 2002 report *Cocaine and Federal Sentencing Policy* emphasizes, the current penalties for crack cocaine are unsupported and should be lowered. FAMM remains committed to advocating for a reduction in the penalties imposed on defendants sentenced for crack cocaine offenses, and we look forward to further action from the Commission.

Thank you for considering our opinions. We look forward to working with you this year.

Sincerely,

Julie Stewart

Julie Stewart
President

Mary Price
General Counsel

Enclosure

The Other Safety Valve:
Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)

MARY PRICE

General Counsel, Families Against Mandatory Minimums Foundation (FAMM).

While many people are familiar with the Guidelines safety valve, a lesser-known provision tucked away in the federal criminal code has the potential to be an even more powerful way to relieve the incarceration pressure. Title 18, Section 3582(c)(1)(A) allows a court, upon the motion of the Director of the Bureau of Prisons, to reduce a sentence for "extraordinary and compelling" reasons. The Sentencing Commission has an important, but unfilled, role to play in this process. If it follows Congress's intent, the Commission can breathe life into § 3582(c)(1)(A) and make it a meaningful safety valve in a wide range of cases.

On June 25, 2001, Families Against Mandatory Minimums (FAMM), urged the Sentencing Commission to promulgate a policy statement, pursuant to 28 U.S.C. § 994(t), to guide judges considering sentence reduction motions based on "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c)(1)(A). FAMM took this action after learning that such sentence reduction are quite rare, and are generally made only when the prisoner is close to death.

Today, the absence of a guided post-sentencing safety valve means that many cases presenting compelling reasons for sentence reduction are not brought to the courts, but funneled, if pursued at all, through the executive clemency process. Reliance on the President's commutation power to handle such cases is no longer necessary since Congress established in § 3582(c)(1)(A) a method by which the Bureau of Prisons and the courts can address them. That section authorizes courts, with guidance from the Commission, to grant relief in appropriate cases. FAMM's proposal that the Commission provide such guidance is appended to this article.

A. Authority for Post-Conviction Sentence Modification under the SRA

The Sentencing Reform Act (SRA) and the guideline sentencing system it established are premised upon the view that judicial sentencing discretion should be structured and not eliminated. Congress was not seeking to establish a mechanical system devoid of human judgment, but a system in which the exercise of discretion was guided and controlled. While one of Congress's goals was to ensure the finality of sentences, Congress also recognized that sometimes other considerations are important enough to warrant changing a sentence that has otherwise become final.

The SRA provides several ways of modifying an otherwise final sentence. It amended Rule 35 of the Federal Rules of Criminal Procedure to authorize the court, upon motion of the government, to reduce a sentence to reflect substantial assistance to the government rendered by a defendant after imposition of sentence. It also provides two methods for modifying an otherwise final sentence requiring some action by the Commission. One, set forth in § 3582(c)(2), authorizes the court to reduce a sentence where the Sentencing Commission has reduced the guideline range applicable to the defendant. The motion for reduction of sentence may be made either by the defendant or by the Director of the Bureau of Prisons (BOP), and any reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." The Commission is independently required to issue such guidance by 28 U.S.C. § 994(u), and it has complied with that mandate by promulgating and from time to time amending § 1B1.10.[1]

The second method for modifying an otherwise final sentence that involves the Commission is set fort in § 3582(c)(1)(A). That provision authorizes the court, upon motion of the Director of the Bureau of Prisons, to reduce a sentence if the court finds that "extraordinary and compelling reasons warrant such a reduction."[2] As under its companion provision (c)(2) discussed above, the court must find that the reduction is consistent wit "applicable policy statements issued by the Sentencing Commission." The Commission is similarly directed t issue such guidance by 28 U.S.C. § 994(t). To date, the Commission has not done so.

B. Criteria for Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)

Although 18 U.S.C. § 3582(c)(1)(A) speaks of "extraordinary and compelling reasons," in practice the Director of the Bureau of Prisons has moved for a reduction on on behalf of terminally ill prisoners, or, in recent years on behalf of some whose "disease resulted in markedly diminished public safety risk and quality of life."[3] We believe that Congress intended a broader application than that. The plain language of 28 U.S.C. § 994(t) and the legislative history of 18 U.S.C. § 3582(c)(1)(A) evidence a congressional intent that the statutory term "extraordinary and compelling" should embrace a variety of circumstances arising after a sentence becomes final, including not simply changes in an inmate's circumstances but also changes in the law.

The congressional mandate in 28 U.S.C. § 994(t) calls for a policy statement that must contain "the criteria to be applied and a list of specific examples." The

only limitation placed upon the Commission by this section is that "rehabilitation alone shall not be considered an extraordinary and compelling reason." Clearly Congress intended that rehabilitation was a legitimate consideration to be taken into account in deciding whether a case presented extraordinary and compelling reasons, even if it had to be combined with some other factor or characteristic. There is nothing to suggest that the other factor had to be a terminal illness, or indeed illness of any sort.

The Senate Judiciary Committee's Report on the SRA—the authoritative source of legislative history for the SRA—states:[4]

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.... The bill ... provides ... for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.

The distinction in the Senate Report between "severe illness" and "other extraordinary and compelling reasons" demonstrates that non-medical considerations may constitute appropriate grounds for release, consistent with the overall congressional goal that these provisions act as a safety net held by the court.

> The value of the forms of "safety valves" contained in this section lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for "extraordinary and compelling reasons" and to respond to changes in the guidelines. The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.[5]

C. Bureau of Prisons Policy and Practice under 3582(c)(1)(A)

Despite the broad authority contemplated by Congress, in the absence of guidance from the Commission, the Bureau of Prisons, as noted above, has generally limited motions under § 3582(c)(1)(A) to cases where the death of the prisoner is imminent.[6] There is no requirement, however, in the BOP's own policies and regulations that such motions be so limited.

In 1994 the BOP revised its internal guidance to executive staff, expanding the classes of cases eligible for early release consideration.[7] The Bureau had previously confined its motions to those on behalf of terminally ill inmates within six months of death. In the memorandum, Director Hawk advised the staff that the BOP had extended the outer limit of life expectancy to twelve months. Of greater significance, she noted that estimated life expectancy was "a general guideline, not a requirement."

> As we have further reviewed this issue, it has come to our attention that there may be other cases that merit consideration for release. These cases still fall within the medical arena, but may not be terminal or lend themselves to a precise prediction of life expectancy.

The BOP Memorandum sets forth factors to consider when evaluating which cases to present to the court (*i.e.*, nature and circumstance of the crime, inmate characteristics and propensity to reoffend, the inmate's age, risk to the public, etc.). It also presents some guidance based on the nature and severity of the prisoner's illness and sets out three, presumably non-exhaustive examples. They include prisoners with debilitating diseases that clearly limit daily activity and for which conventional treatment is insufficient, those whose condition is terminal but not calculably so, and those who require organ transplantation. This more expansive reading of the power, while still narrower than Congress intended, is consistent with congressional intent as revealed in the legislative history of § 3582(c)(1).

Bureau of Prisons published regulations contemplate that sentence reduction motions may be brought in cases not involving medical considerations. The Bureau of Prisons regulation setting out the procedures for seeking and submitting requests under § 3582 and its "old law" predecessor, 18 U.S.C. § 4205(g), discusses grounds other than the prisoner's health for seeking a BOP motion to reduce sentence for extraordinary and compelling reasons. For example, under 28 C.F.R. § 571.61, entitled "Initiation of request—extraordinary and compelling circumstances," the Bureau directs that the prisoner's request include, *inter alia*, proposed plans upon release, including the proposed residence, how the prisoner will support him or herself, and "if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment." The regulation thus assumes that some extraordinary and compelling circumstances warranting a motion need not be based on the prisoner's health. The BOP process for handling such motions seems to confirm that sentence reduction motions under § 3582(c)(1)(A) may be made on non-medical grounds. The applicable regulations provide for the review of

such motions by the Warden, the Regional Director, the General Counsel, "and either the Medical Director for medical referrals *or the Assistant Director, Correctional Programs Division for non-medical referrals . . . .*"[8] Clearly, if medical and terminal considerations were the only permissible bases for sentence reductions, the specific provision for alternative routing of "non-medical referrals" would be superfluous.

D. Conclusion

The legislative history and the plain language of the SRA amply demonstrate that Congress intended the courts to entertain motions under 18 U.S.C. § 3582 (c)(1)(A) for a variety of circumstances considered so extraordinary and compelling that they warrant a reduction of sentence. The BOP regulations recognize that, despite current practice, such extraordinary and compelling reasons are not limited to medical concerns. But a policy statement from the Commission is needed to provide courts considering motions for sentence reduction with the guidance that Congress directed. That policy statement should embrace a definition of "extraordinary and compelling" flexible enough to account for a variety of post-sentence developments that merit relief. That is what Congress intended.

Notes

[1] § 1B1.10, p.s. authorizes a reduction in the term of imprisonment when the Commission has determined that a particular amendment to the Sentencing Guidelines is retroactively applicable. Such retroactive amendments are listed in subsection (c), and only those listed amendments can be the basis for a motion seeking a reduction in sentence under 18 U.S.C. § 3582 (c)(2).

[2] 18 U.S.C. § 3582 (c)(1)(A) also authorizes a sentence reduction motion for a prisoner who is at least 70 years old, has served at least 30 years on a sentence imposed under 18 U.S.C. § 3559(c), and the Director of the Bureau of Prisons has determined that the prisoner is no longer a danger to the safety of any other person or the community. This provision, specifically applicable only to "three strikes" offenders, was added to § 3582(c)(1)(A) in 1994 by Pub. L 103–322.

[3] See Chart: Bureau of Prisons Compassionate Releases, 1990–2000 (attached as Exhibit II), prepared by the Bureau of Prisons Office of Congressional Affairs (on file with the author.)

[4] "The most important legislative history for the Act [SRA] is found in the report of the Senate Judiciary Committee on the Comprehensive Crime Control Act of 1983 [S.Rep. No.225, 98th Cong., 1st Sess. 37–150, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3220–3373]." Criminal Div., U.S. Dep't of Justice, Prosecutors Handbook on Sentencing Guidelines and Other Provisions of the Sentencing reform Act of 1984, at 83 (Nov. 1, 1987), *reprinted in* THOMAS W. HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE SUPPLEMENTAL Appendix 11 (1989). The quote in the text appears at page 55 of the Senate Report.

[5] *Id.* at 121.

[6] As John Steer & Paula Biderman point out in their article: "[w]ithout the benefit of any codified standards, the Bureau [of Prisons], as turnkey, has unc standably chosen to file very few motions under thi section." John Steer and Paula Biderman, *Impact c the Federal Guidelines on the Presidential Power to Commute Sentences*. 13 FED. SENT. REP. 155 (2001).

[7] Memorandum from Kathleen M. Hawk, Director, Fe eral Bureau of Prisons (July 22, 1994) (BOP Memc randum) (on file with author).

[8] 28 C.F.R. § 571.62 (a) (emphasis supplied). *See als* 28 C.F.R. § 571.62 (a)(3) (directing that the Genera Counsel "solicit the opinion of either the Medical Director or the Assistant Director . . . depending or the nature of the basis of the request") and 28 C.F § 571.62 (c)(stating that "[i]n the event the basis o the request is the medical condition of the inmate, staff shall expedite the request at all levels.")

Exhibit I
FAMM Proposal for Policy Guidance under 18 U.S.C. § 3582 (c)(1)(A)

§ 1B1.13
Reduction in Term of Imprisonment as a Result of Motion by Director of the Bureau of Prisons (Policy Statement)

(a) Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if the court determines that—
  (1) either—
    (A) an extraordinary and compelling reason warrants the reduction; or
    (B) the defendant (i) is at least 70 years old, (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(c for the offense or offenses for which the defendant is imprisoned, and (iii) the Direc of the Bureau of Prisons has determined, a considering the factors set forth in 18 U.S.C § 3142(g), that the defendant is not a dange the safety of any other person or to the community; and
  (2) such reduction is consistent with this policy statement and the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

(b) An "extraordinary and compelling reason" is a reason that involves a situation or condition that -
  (1) was unknown to the court at the time of sentencing;
  (2) was known to or anticipated by the court at th time of sentencing but that has changed significantly since the time of sentencing; or
  (3) the court was prohibited from taking into account at the time of sentencing but would n

longer be prohibited because of changes in applicable law.

An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that together make the rationale for a reduction extraordinary and compelling.

Commentary

APPLICATION NOTE:

The term "extraordinary and compelling reason" includes, for example, that—

(A) the defendant is suffering from a terminal illness that significantly reduces the defendant's life expectancy;

(B) the defendant's ability to function within the environment of a correctional facility is significantly diminished because of a permanent physical or mental condition for which conventional treatment promises no significant improvement;

(C) the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process;

(D) the defendant has provided significant assistance to the government to a degree and under circumstances that was not or could not have been taken into account at the time of sentencing or in a post-sentencing proceeding;

(E) the defendant would have received a significantly lower sentence had there been in effect a change in applicable law that has not been made retroactive;

(F) the defendant received a significantly higher sentence than other similarly situated codefendants because of factors beyond the control of the sentencing court;

(G) the death or incapacitation of family members capable of caring for the defendant's minor children, or other similarly compelling family circumstance, occurred.

Rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason.

Background: Under 18 U.S.C. § 3582(c)(1)(A), the court, upon motion of the Director of the Bureau of Prisons, can reduce the term of imprisonment if the court determines that (1) the reduction is warranted by extraordinary and compelling reasons or (2) the defendant is at least 70 years old and has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(c) for the offense for which the defendant is imprisoned and the Director of the Bureau of Prisons has determined that the defendant is not a danger to the safety of another person or the community. The Commission is directed by 28 U.S.C. § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A), including the criteria to be applied and a list of specific examples." This policy statement implements 28 U.S.C. § 994(t).

Exhibit II

Bureau of Prisons Compassionate Releases 1990–2000

Year	Number	Summary of Releases of Releases Granted
1990	11	Inmates with life expectancy less than twelve months
1991	10	Inmates with life expectancy less than twelve months
1992	16	Inmates with life expectancy less than twelve months
1993	28	Inmates with life expectancy less than twelve months
1994	23	Inmates with life expectancy less than twelve months
1995	22	Inmates with life expectancy less than twelve months
1996	23	Inmates with life expectancy less than twelve months
1997	13	Inmates with life expectancy less than twelve months
1998	22	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and qual ity of life (i.e. Significant Mental Impairment secondary to attempted suicide)
1999	27	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. advanced cirrhosis of the liver, total care stroke patient)
2000	31	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. Alzheimer's Disease, Significant Mental Impairment)

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August 1, 2003

The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: Notice of Proposed Priorities for Cycle ending May 1, 2004

Dear Judge Murphy:

I am writing in my capacity as chair of the ABA Criminal Justice Section's Corrections and Sentencing Committee, to commend the Commission for proposing the issue of sentence modification under 18 U.S.C. § 3582(c)(1)(A) as a priority during the coming amendment cycle. This issue has long been of particular concern to this Committee, and we have written twice in recent years to urge the Commission to take up this important piece of unfinished business. We are gratified that it has now apparently decided to do so. (Copies of our letters of October 10, 2001, and June 15, 2002, are attached.)

Since we last wrote to the Commission on this subject in the spring of 2002, the ABA House of Delegates adopted in February 2003 new ABA policy on sentence modification mechanisms. This new ABA policy speaks directly to the issues implicated by § 3582(c)(1)(A) and the Commission's mandate under 28 U.S.C. § 994(t), and provides further support for the argument that the Commission should give a generous construction to the open-ended language of § 3582 (c)(1)(A). We attach that resolution and accompanying report for your consideration.

The report speaks to the importance of having some "safety valve" in a determinate sentencing scheme to permit the government to address "extraordinary and compelling" situations that arise after sentencing:

> If a safety valve was considered an essential component of a sentencing scheme prior to the advent of

> determinate sentencing, today it is even more essential, because rule-based sentencing may preclude or limit a court's ability to take into account at sentencing the potential for extraordinary developments in a particular case. For example, a prisoner sentenced while in the early stages of a serious chronic illness may have no possibility of release if the progress of his disease makes his sentence more onerous than anticipated or intended. Similarly, when a mother must leave behind young children in the care of family members, there may be no way to ensure that intervening events do not leave them effectively orphaned. Particularly where a sentencing court is permitted to take into account serious health problems and exigent family circumstances in determining an offender's sentence in the first instance, it would seem reasonable to provide a means of bringing these circumstances to the court's attention when they develop or become aggravated unexpectedly mid-way through a prison term.

Report at 3.

As to what may constitute an "extraordinary and compelling" situation, the report takes the position that government should not "restrict use of a 'safety valve' mechanism to cases involving medical or health-related concerns." Report at 5. Rather, "[w]e hope that jurisdictions will want their criteria to be sufficiently broad and elastic to allow consideration of such non-medical circumstances as old age, changes in the law, heroic acts or extraordinary suffering of a prisoner, unwarranted disparity of sentence, and family-related exigencies." Report at 5.

The ABA report specifically discusses the federal "safety valve" mechanism in § 3582(c)(1)(A), noting the breadth and flexibility of the statutory language. Moreover, "the legislative history of this statute indicates that Congress intended its authority to be used broadly, if not routinely, to respond to a variety of circumstances that exceed the burdens normally attendant upon incarceration." Report at 4, citing Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A),* 13 Fed. Sent. Rptr. 188 (2001). For example, the Senate Report accompanying the statute states:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 55, *reprinted in* 1984 U.S.C.C.A.N. 2338-39.

That Congress intended § 3582(c)(1)(A) to be used in a variety of non-medical circumstances is further evidenced by the admonition to the Commission in the final sentence of § 994(t) that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reasons." This sentence shows that Congress expected rehabilitation to be a relevant if not determinative criterion in some cases, and thus that terminal illness and medical disability would not be the only circumstances in which sentence modification might be appropriate under this section. In fact, the predecessor "old law" analogue to § 3582(c)(1)(A), 18 U.S.C. § 4205(g), whose authority Congress professed to be continuing unchanged, was used to reduce sentences in a variety of non-health-related circumstances. *See, e.g., U.S. v. Diaco*, 457 F. Supp. 371 (D.N.J., 1978)(federal prisoner's sentence reduced on motion under § 4205(g) because of unwarranted disparity among codefendants); *U.S. v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(same).

The Bureau of Prisons, which is charged with the gate-keeping function of bringing motions under § 3582(c)(1)(A), has interpreted its mandate under this statute very narrowly, reserving it for cases of terminal illness and profound disability. In the ten years between 1990 and 2000, only 226 prisoners had their sentences reduced pursuant to this authority, almost exclusively on grounds that they were near death. *See* Price, *supra*, at 189. Lack of policy guidance from the Commission may in part account for the Bureau's conservative interpretation of its statutory mandate. *See, e.g.,* John R. Steer and Paula Biderman, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 Fed. Sent. Rptr. 154, 157 (2001). The Commission is thus in an excellent position to ensure that the statutory authority can be utilized as intended by Congress, by providing criteria, content, and examples on which the BOP may rely in bringing cases to the attention of courts.

Thank you for considering our comments. We stand ready to assist the Commission in any way we can in this very important matter.

Sincerely,

Margaret Love

Margaret Colgate Love
Chair, Corrections and Sentencing
Committee

Enclosures

cc: All Commissioners
Charles Tetzlaff, Esq.
Timothy McGrath, Esq.
Albert J. Krieger, Chair, Criminal Justice Section

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October 10, 2001

The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Murphy:

As co-chairs of the Committee on Corrections and Sentencing of the American Bar Association's Criminal Justice Section, we have been authorized to write to reiterate an earlier request from this Committee that the Commission adopt a policy statement regarding sentence reduction motions pursuant to 18 U.S.C. § 3582(c)(1)(A) in the upcoming amendment cycle.

ABA policy provides that procedures relating to compassionate release should be "fully integrated into the law of sentencing, especially with respect to issues such as eligibility for such release." ABA House of Delegates, February 1996, Report 113B. We are concerned that in the absence of guidance from the Commission it has been difficult to identify substantive bases for sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A), and develop appropriate procedures for obtaining judicial consideration of deserving cases.

For your convenience, we enclose a copy of a letter sent to you last June by Professor Michael Goldsmith, our immediate predecessor as chair of this Committee. As Professor Goldsmith's letter points out, the Sentencing Reform Act of 1984, in a provision codified at 28 U.S.C. § 994(t), specifically directed the Commission to describe and give examples of "extraordinary and compelling circumstances" warranting early release under 18 U.S.C. § 3582(c)(1)(A). However,

the Commission has not yet responded to this directive. We urge that the Commission develop policy to implement 18 U.S.C. § 3582(c)(1)(A) during the current amendment cycle. In doing so the Commission will provide the guidance Congress intended to courts considering sentence reduction motions under this provision, and to the Bureau of Prisons in making them.

We have reviewed the Commission's current list of priorities, and we recognize that the development of policy for compassionate release motions could be undertaken in conjunction with the 15 Year Study the Commission plans to begin this year, as Professor Goldsmith notes in his letter. Alternatively, it could be made a goal for the upcoming amendment cycle, and we believe this would be preferable for the need is urgent. We therefore hope that the Commission will consider this request at its upcoming meeting.

Thank you very much for your consideration.

Sincerely,

Margaret C. Love, Co-Chair
Corrections & Sentencing Committee

Jeffrey G. Shorba, Co-Chair
Corrections & Sentencing Committee

cc: The Honorable John R. Steer
Professor Michael Goldsmith