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## Recent Trends in the Criminal Law

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## RECENT TRENDS IN THE CRIMINAL LAW

### A LOOK BEHIND THE LABEL OF SENTENCING

The United States Supreme Court has recognized that the label that attaches to a criminal statute or procedure should not be determinative of which due process guarantees must be afforded a defendant.<sup>1</sup> However, two recent federal court decisions<sup>2</sup> have determined that one such guarantee, embodied in the vagueness doctrine, is inapplicable to Title X of the Federal Organized Crime Control Act.<sup>3</sup> These decisions were supported largely by attaching to the statute the label of sentencing. Since sentencing procedures normally involve unchecked judicial discretion,<sup>4</sup> the reasoning of the courts in these two cases suggests a disturbing trend toward denying due process rights under two-tiered statutes merely because they are labeled as sentencing statutes.

*Williams v. New York*<sup>5</sup> marked a recognition by the Supreme Court that not all due process guarantees must be incorporated into sentencing procedures. Upon finding Williams guilty of first degree murder, the jury had recommended a sentence of life imprisonment rather than death.<sup>6</sup> Under then applicable New York law, the death sentence was automatically imposed unless the jury recommended a sentence of life imprisonment; the judge had discretion whether to follow the jury's recommendation. The judge chose to sentence Williams to death, despite the jury's recommendation.<sup>7</sup>

<sup>1</sup> This principle is illustrated by three cases since 1966: *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Specht v. Patterson*, 386 U.S. 605 (1967); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

<sup>2</sup> *United States v. Stewart*, 531 F.2d 326 (6th Cir. 1976); *United States v. Holt*, 397 F. Supp. 1397 (N.D. Tex. 1975). *But see United States v. Duardi*, 384 F. Supp. 874 (W.D. Mo. 1974) (alternative holding), *aff'd on other grounds*, 529 F.2d 123 (8th Cir. 1975).

<sup>3</sup> 18 U.S.C. §§ 3575-3578 (1970).

<sup>4</sup> Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 MICH. L. REV. 1362 (1965) [hereinafter cited as Coffee]; Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L. REV. 1, 4 (1972) [hereinafter cited as Frankel]; Murrah & Rubin, *Penal Reform and the Model Sentencing Act*, 65 COLUM. L. REV. 1167, 1172-73 (1965) [hereinafter cited as Murrah & Rubin].

<sup>5</sup> 337 U.S. 241 (1949).

<sup>6</sup> *Id.* at 242.

<sup>7</sup> *Id.* at 244.

Williams challenged his sentence because it had been based on information contained in a pre-sentence report which had been supplied by witnesses whom he was unable to confront, cross-examine, or rebut.<sup>8</sup> The Supreme Court rejected this argument, holding that sentencing procedure need not be frozen into the trial mold of evidential procedure.<sup>9</sup> In reaching this decision the Court noted the historical tradition of granting to the judge wide discretion in the sources of evidence which could be used to aid in determining the proper sentence.<sup>10</sup> The Court also based its decision on the ground that "sound practical reasons" dictated the need for distinguishing trial and sentencing procedures.<sup>11</sup> Unlike the trial, where the issue is narrowly confined to the question of guilt, a sentencing judge's task is to determine the appropriate punishment. According to the Court, this task requires that the sentencing judge have available "the fullest information possible concerning the defendant's life and characteristics."<sup>12</sup> The Court feared that proper sentencing would be thwarted if a judge were confined to the restrictive rules of evidence used at a trial. It is important to note that despite the result reached, the Court did not make its decision until it had first analyzed the purposes of the sentencing procedure and the purposes of the due process rules which were relied upon in making the challenge, and had found them incompatible.

The Supreme Court has refused to extend the result in *Williams* to all sentencing proceedings. In *Specht v. Patterson*<sup>13</sup> the Court considered the constitutionality of the Colorado Sex Offenders Act.<sup>14</sup> This Act provided for extended sentences to defendants convicted of certain sex offenses who were found to constitute a threat of bodily harm to the public, or were habitual offenders, or were mentally ill.<sup>15</sup> The defendant in *Specht* was convicted of indecent liberties, which carried a maximum sentence of ten years, but was sentenced under the Sex

<sup>8</sup> *Id.* at 243.

<sup>9</sup> *Id.* at 251.

<sup>10</sup> *Id.* at 246.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 247.

<sup>13</sup> 386 U.S. 605 (1967).

<sup>14</sup> COLO. REV. STAT. §§ 39-19-1 to 10 (1963).

<sup>15</sup> *Id.*

Offenders Act to an indeterminate term of from one day to life. He attacked the procedure of the Act because it provided for an increased term based on hearsay evidence, without a hearing, thus giving him no chance to cross-examine adverse witnesses or to present his own evidence through compulsory process.<sup>16</sup> The Court declared that it would adhere to *Williams*, but declined to extend it to this situation. It found that the Sex Offenders Act did not make commission of an offense the basis of sentencing. Rather, the Act made conviction the basis for commencing a new proceeding to determine new issues of fact that were not ingredients of the offense charged. The punishment imposed was criminal, even though it was designed to protect the public rather than to provide retribution.<sup>17</sup> The Court determined that the procedure involved the making of a new charge leading to criminal punishment; therefore the defendant must receive notice and an opportunity to be heard as well as other due process guarantees.<sup>18</sup> The essential aspect of this decision is that the Court looked through the sentencing label attached to the statute and recognized that the procedure involved more than ordinary sentencing, thus requiring different treatment.

The Supreme Court in *Mullaney v. Wilbur*<sup>19</sup> again refused to allow the label of a statute to determine which procedural safeguards need be applied. In *Mullaney* the Court considered the validity of Maine's requirement that a defendant seeking to reduce his offense from murder to manslaughter bear the burden of proving that he acted in the heat of passion after sudden provocation. The Court felt itself bound by the statutory interpretation of the Maine Supreme Judicial Court, which held that murder and manslaughter are both categories of the same generic offense of felonious homicide and that the heat of passion was merely a mitigating factor to be taken into account after guilt for the generic offense had already been determined.<sup>20</sup> But although the Supreme Court accepted this interpretation, it rejected the corollary that since heat of passion was merely a mitigating factor, the state need not bear the burden of proving its absence. The

Supreme Court argued that the Maine analysis failed to recognize that the criminal law of Maine was "concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability."<sup>21</sup> The essence of the Court's holding was that the state could not avoid due process in imposing additional penalties merely because the defendant had already been found guilty of one crime. It refused to allow the requirements of due process to be discarded merely because the state chose to characterize elements of a crime as different punishment categories.<sup>22</sup>

*Williams*, *Specht*, and *Mullaney* all used a functional approach to determine whether due process guarantees should apply in a given situation. That is, the Court looked to the needs of the state and the defendant in each situation. In each case the purposes behind the due process guarantee were examined to determine if the guarantee should apply in the particular situation. None of the cases looked solely at the label of the statute to determine what guarantees should apply.

This functional approach should be used in examining the constitutionality of Title X of the Federal Organized Crime Control Act.<sup>23</sup> Title X allows a judge to impose an extended penalty<sup>24</sup> on a defendant convicted of a felony (or triggering offense) and found to be a dangerous special offender.<sup>25</sup> A special offender is defined as a recidivist,<sup>26</sup> or one who is

<sup>21</sup> *Id.* at 697-98.

<sup>22</sup> *Id.* at 698.

<sup>23</sup> 18 U.S.C. §§ 3575-3578 (1970).

<sup>24</sup> The penalties imposed under Title X may be up to twenty-five years, but are not to be disproportionate in severity to the maximum penalty provided for the offense of which the defendant was originally convicted. 18 U.S.C. § 3575(b) (1970).

<sup>25</sup> 18 U.S.C. § 3575(b) (1970).

<sup>26</sup> 18 U.S.C. § 3575(e) (1) (1970). This section provides: (e) A defendant is a special offender for purposes of this section if—(1) the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under

<sup>16</sup> 386 U.S. 605, 608 (1967).

<sup>17</sup> *Id.* at 608-09.

<sup>18</sup> *Id.* at 610. The Court specified that the rights to have counsel present, to have an opportunity to be heard, to confront witnesses, to cross-examine, to offer evidence using compulsory process, and to have meaningful findings by the court were necessary to due process.

<sup>19</sup> 421 U.S. 684 (1975).

<sup>20</sup> *Id.* at 691-92.

considered to be a professional criminal because of the circumstances surrounding the commission of the triggering felony.<sup>27</sup> A dangerous offender is one who is found to present a serious threat of continued criminal activity unless an extended prison term is imposed.<sup>28</sup> A defendant must be found to fit both the special offender and the dangerous offender categories in order to be sentenced under the Act.<sup>29</sup>

The Act follows the lead of the Model Sentencing Act<sup>30</sup> and the Model Penal Code<sup>31</sup> by imposing increased sentences on those who constitute a serious threat to the community. Like the Model Sentencing Act and the Model Penal Code, Title X establishes criteria for a uniform application of sentencing policy.<sup>32</sup> However, the Organized Crime Control Act poses serious constitutional questions concerning which due process guarantees must be accorded a defendant before he can be subjected to the Act's penalties.<sup>33</sup>

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applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof.

<sup>27</sup> 18 U.S.C. §§ 3575(e) (2), 3575(e) (3) (1970). These sections provide that a defendant is a special offender if:

(2) the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

<sup>28</sup> 18 U.S.C. § 3575(f) (1970). This section provides: A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

<sup>29</sup> *United States v. Kelly*, 384 F. Supp. 1394, 1398 (W.D. Mo. 1974), *aff'd* 519 F.2d 251 (8th Cir. 1975); *United States v. Duardi*, 384 F. Supp. 856, 860 (W.D. Mo. 1973) (alternative holding), *aff'd on other grounds*, 529 F.2d 123 (8th Cir. 1975).

<sup>30</sup> COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT, §§ 5, 6 (2d ed. 1972) [hereinafter MODEL SENTENCING ACT].

<sup>31</sup> MODEL PENAL CODE, §§ 7.03, 7.04 (Tent. Draft, 1962).

<sup>32</sup> *Murrah & Rubin*, *supra* note 4, at 1170-73.

<sup>33</sup> Title X imposes some procedural safeguards. Section 3575(a) requires notice of the prosecutor's intention to seek an extended sentence under this Act prior to trial or the

One aspect of due process which has been the subject of conflicting holdings<sup>34</sup> is the vagueness doctrine. This doctrine was established by the Supreme Court in *Lanzetta v. New Jersey*,<sup>35</sup> which dealt with a New Jersey statute making it a criminal offense to be a "gangster."<sup>36</sup> The Court found the statutory definition of the term "gangster" to be unconstitutionally vague.<sup>37</sup> It based the vagueness test upon "ordinary notions of fair play and settled rules of law . . ." which required the "terms of a penal statute creating a new offense [to] be sufficiently explicit to inform those subject to it what conduct on their part will render them liable to its penalties. . . ."<sup>38</sup>

In a later case the Supreme Court made it clear that the requirement of a precise statutory definition of offenses was not to be avoided simply by changing the statute's label. *Giaccio v. Pennsylvania*<sup>39</sup> involved a Pennsylvania statute which allowed juries to impose trial costs upon an acquitted defendant in a criminal case. This power was restricted by court decisions to allowing the jury to impose costs only if it found the defendant's conduct "reprehensible . . . improper . . . outrageous . . ." or where, though acquitted, his innocence was doubtful.<sup>40</sup> The Court found that even with these restrictions, the law was

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acceptance by the court of a plea of guilty or nolo contendere. The notice must specify that the prosecutor believes the defendant to be a dangerous special offender and must set out particular reasons for the belief. Section 3575(b) requires a hearing to determine whether the defendant is a dangerous special offender. At the hearing the defendant is entitled to be represented by counsel. The defense counsel or unrepresented defendant may inspect the presentence report sufficiently in advance of the hearing to permit verification. At the hearing the defendant is entitled to cross-examine witnesses and to call witnesses using compulsory process. The court is required to place its findings on record and identify the information relied upon in making the findings. Section 3576 allows for appellate review of the trial court's findings. Review may encompass the procedure involved and the questions of whether the findings were clearly erroneous or an abuse of discretion.

<sup>34</sup> Cases cited note 2, *supra*.

<sup>35</sup> 306 U.S. 451 (1939).

<sup>36</sup> N.J. Laws ch. 155, § 4 (1934). Section 5 of the Act defined a gangster to be:

Any person, not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or any other state. . . .

<sup>37</sup> 306 U.S. at 458.

<sup>38</sup> *Id.* at 453.

<sup>39</sup> 382 U.S. 399 (1966).

<sup>40</sup> *Id.* at 404.

too vague to be upheld.<sup>41</sup> It reasoned that "[i]t would be difficult if not impossible for a person to prepare a defense against such abstract charges as 'misconduct' or 'reprehensible' conduct."<sup>42</sup> The Court also rejected the argument made by the Pennsylvania Supreme Court that the Act was not a penal statute but was simply a method of collecting court costs. The Supreme Court reasoned that regardless of the label given to the statute, it provided a method of depriving the defendant of liberty or property. The Act was therefore required to meet due process standards, including the vagueness test.<sup>43</sup> The applicability of the vagueness doctrine was not to be determined by the label given to the proceeding, but rather by a functional analysis of the vagueness doctrine and its applicability to a given situation.

The purpose of the vagueness doctrine is essentially two-fold. First, fundamental fairness requires that those subject to a law be able to know in advance what conduct is required or prohibited.<sup>44</sup> Second, it is necessary that the law be definite to prevent the arbitrary imposition of penalties by judges and juries.<sup>45</sup> The extent to which precision is required in a penal statute should be determined with reference to these two purposes. However, one must also look to the needs and purposes of the penal statute itself to determine whether the vagueness doctrine is appropriate.<sup>46</sup>

In light of the Supreme Court holdings, the

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, at 402. Note 8 of the majority opinion denied that anything in its reasoning was meant to cast doubt on the common state practice of allowing juries to fix punishment within legally prescribed limits after finding a defendant guilty of a crime. In a concurring opinion, however, Justice Stewart suggested that much of the majority's reasoning "served to cast great doubt . . ." on this practice. 382 U.S. 399, 405 (Justice Stewart, concurring).

<sup>44</sup> *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Screws v. United States*, 325 U.S. 91, 101 (1945). In *Lanzetta* the Court held: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." 306 U.S. at 453. In *Screws* the Court explained the problems of a vague statute:

The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning.

<sup>45</sup> 325 U.S. at 101. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966); *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

<sup>46</sup> *Cf.*, *Williams v. New York*, 337 U.S. 241 (1949). The basis of the *Williams* decision was that rules of evidence used at trial were incompatible with the needs and purposes of sentencing procedure.

method used to determine the applicability of the vagueness test to Title X in recent federal court decisions seems somewhat surprising. *United States v. Duardi*,<sup>47</sup> *United States v. Holt*,<sup>48</sup> and *United States v. Stewart*<sup>49</sup> reached varied results, but none of the cases used the functional approach dictated by *Williams*,<sup>50</sup> *Specht*,<sup>51</sup> and *Mullaney*<sup>52</sup> in order to determine whether the Act was a sentencing statute or whether it actually defined new elements of a crime. None of the cases discussed whether Title X gave adequate warning of its prohibitions or was specific enough to prevent arbitrary application.

In *Duardi*, the first case to consider the vagueness question in relation to Title X, the court questioned whether the condition that an offender be found dangerous was sufficiently definite to meet the requirements of the vagueness test and due process.<sup>53</sup> Quoting extensively from *Lanzetta*<sup>54</sup> and *Giaccio*,<sup>55</sup> the court ruled that the statute did not meet the vagueness test, but failed to consider that while the New Jersey statute<sup>56</sup> considered in *Lanzetta* was a crime-defining statute, Title X purports to be a sentencing statute. The court also failed to explain specifically what was unfairly vague about the definition of dangerousness. While the court could have reached the same result by the use of a functional analysis, its major fault was that it failed even to question whether the vagueness test should apply.

In *Holt*, the court gave little consideration to *Duardi*. It simply noted that while the statute<sup>57</sup> considered in *Lanzetta* made it criminal to be a gangster, Title X does not make it a crime to be dangerous. Rather, the court argued, Title X specifies special handling for defendants already convicted of violating the law.<sup>58</sup> The court then drew an analogy between the special handling under Title X and that accorded to dangerous defendants who are denied bail under 18 U.S.C. § 3148.<sup>59</sup> The court

<sup>47</sup> 384 F. Supp. 874 (W.D. Mo. 1974) (alternative holding), *aff'd on other grounds*, 529 F.2d 123 (8th Cir. 1975).

<sup>48</sup> 397 F. Supp. 1397 (N.D. Tex. 1975).

<sup>49</sup> 531 F.2d 326 (6th Cir. 1976).

<sup>50</sup> 337 U.S. 241 (1949).

<sup>51</sup> 386 U.S. 605 (1967).

<sup>52</sup> 421 U.S. 684 (1975).

<sup>53</sup> 384 F. Supp. 874, 885 (W.D. Mo. 1974).

<sup>54</sup> 306 U.S. 451 (1939).

<sup>55</sup> 382 U.S. 399 (1966).

<sup>56</sup> N.J. Laws ch. 155, §§ 4, 5 (1934).

<sup>57</sup> *Id.*

<sup>58</sup> 397 F. Supp. 1397, 1399 (N.D. Tex. 1975).

<sup>59</sup> 18 U.S.C. § 3148 (1970) provides:

noted that in construing the bail statute in *Sellers v. United States*,<sup>60</sup> Mr. Justice Black was "not troubled by the lack of precise definition of the statutory word 'dangerous'."<sup>61</sup> But the *Holt* opinion failed to consider whether the purposes behind the vagueness test might not be as applicable to Title X as to a crime defining statute. *Holt* also failed to consider whether there might be a distinction between statutes imposing increased sentences for specified categories of defendants and one which denies bail to dangerous defendants. While one imposes a prison term of up to twenty-five years, the other only denies bail to a defendant until his trial, while awaiting sentence, sentence review, or during appeal.

In *Stewart*, Title X was challenged as being unconstitutionally vague in both its application and sentencing provisions. The defendant first argued that the length of sentence provision<sup>62</sup> was so indefinite the defendant could not be sentenced without a denial of due process. The term "dangerous" was attacked as being unconstitutionally vague.

In rejecting the first contention, the Sixth Circuit noted that the provision requiring that the extended sentence not be disproportionate to the maximum sentence for the triggering offense was enacted to guarantee that the extended sentence would not "represent in effect a penalty for a different crime or crimes."<sup>63</sup> The court noted that Title X had provided procedural safeguards far in excess of those ordinarily used in sentencing. Finally, the court noted

that judges had long exercised great discretion in determining the length of sentences.<sup>64</sup>

When dealing with the term "dangerous," the *Stewart* court followed the path of *Holt*. It rejected the holding in *Duardi* by stating that Title X was a sentencing statute rather than a crime-defining statute.<sup>65</sup> *Stewart* borrowed terminology from *Specht*, holding that Title X created a new issue rather than a new charge.<sup>66</sup> But the court did not explain how Title X differed from the Colorado Sex Offenders Act which *Specht* held to create a new charge which required due process protections. The *Stewart* opinion stated that Title X provided for no more than an increase in the penalty for the original offense<sup>67</sup> and that, since the conduct embraced within the criteria must be factually related to the triggering felony, it could not constitute a separate charge.<sup>68</sup> The court did not consider whether the sentencing criteria used by Title X could be distinguished from those considerations which *Mullaney*<sup>69</sup> required to be shown beyond a reasonable doubt in order to impose an increased penalty.<sup>70</sup> In each case the sentencing label was attached to conditions requiring an increased penalty.

The court also argued that the term "dangerous,"

<sup>64</sup> *Id.* at 331-32.

<sup>65</sup> *Id.* at 332, 336. The court said:

It is important to emphasize that Title X does not make it a criminal offense to be "dangerous," as was the case of the New Jersey statute discussed in *Duardi*, which made it unlawful to be a "gangster." Rather, this statute is directed against criminals—not convicted of being "dangerous"—but of having violated a law of the United States.

*Id.* at 336.

<sup>66</sup> *Id.* at 332.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* This is a misreading of the Act. Neither the special offender criteria nor the dangerous offender standard requires the facts to be related to the offense originally charged. For example, § 3575(e) (1) allows a defendant to be found a special offender if he has previously committed two or more felonies, neither of which needs to be related to the charge triggering the extended sentencing proceedings. Further, the element which *Mullaney* ruled must receive due process guarantees was intimately related to the offense charged.

<sup>69</sup> 421 U.S. 684 (1975).

<sup>70</sup> Presumably, if a factor is considered to be an element of a crime, or has to be proven beyond a reasonable doubt, it is also subject to the vagueness test. Before something can be proven beyond a reasonable doubt it must be sufficiently defined to enable the fact finder and the one attempting to prove it to know what is being proved. Unless a crime is defined it cannot be proven. Thus, a corollary to *Mullaney's* holding would be that the standard of absence of passion must be capable of being understood, and therefore not vague.

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A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or sentence review under section 3576 of this title or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: *Provided*, That other rights to judicial review of conditions of release or orders of detention shall not be affected. As amended Pub. L. 91-452, Title X, § 1002, Oct. 15, 1970, 84 Stat. 952.

<sup>60</sup> 89 S. Ct. 36 (Black, Circuit Justice, 1968).

<sup>61</sup> 397 F. Supp. at 1399.

<sup>62</sup> 18 U.S.C. § 3575(b) (1970). See note 24 *supra*.

<sup>63</sup> 531 F.2d 326, 330 (6th Cir. 1976). Unless one resorts to line drawing it is hard to see why any increased penalty under Title X's criteria does not establish a penalty for a different crime or crimes.

as used in the Act, was not a new concept in the criminal law, citing, as did *Holt*, the federal provision<sup>71</sup> allowing a judge to deny bail to a defendant found to be dangerous.<sup>72</sup> Comparing Title X to normal sentencing procedures, where a judge is given no sentencing criteria, the court found that the procedures of Title X allowed for far less arbitrary sentencing than would normally be the case.<sup>73</sup>

Both *Stewart* and *Holt* were content to label Title X a sentencing statute rather than a crime-defining statute and then summarily dismiss the vagueness doctrine. Neither court dealt adequately with the question of whether a new crime was created by imposing new criteria for which added penalties were imposed.

*Mullaney*<sup>74</sup> rejected the argument that a state could simply define an element of a crime to be a punishment category in order to avoid the burden of proof.<sup>75</sup> *Giaccio*<sup>76</sup> similarly rejected the argument that the vagueness doctrine could be easily dismissed by changing the label of the statute.<sup>77</sup> Although *Duardi* reached a different conclusion than *Stewart* and *Holt*, it also failed to deal with the question of whether the vagueness doctrine should apply to Title X. It applied the doctrine mechanically, without any insight into its basic purpose. What the Supreme Court required,<sup>78</sup> and what *Duardi*, *Holt*, and *Stewart* failed to provide, is a functional analysis of Title X and how the principles of the vagueness doctrine should apply to it. Title X provides a method for imposing additional penalties upon a defendant, thus depriving him of liberty. As *Specht* makes clear, any such deprivation must meet the requirements of due process, presumably including the requirement that it not be unconstitutionally vague.<sup>79</sup> To conclude that the vagueness doctrine should not apply, some affirmative reasons must be advanced to show why its protections should be

inapplicable.<sup>80</sup> Neither *Holt* nor *Stewart* supplied any reasons why Title X should not meet the requirements of the vagueness test. Nor did they show that the vagueness test was unnecessary to protect the defendant's rights.

One purpose behind the vagueness doctrine is to give warning of what conduct is prohibited and what conduct is considered more culpable than others.<sup>81</sup> Title X's concern about dangerousness, however, is not related to defining prohibited conduct or the degree of culpability for a given action. Rather, it is concerned with predicting the defendant's probable future conduct based on his character at the time of sentencing.<sup>82</sup> A defendant could not conform his conduct to such a standard, and the imposition of criminal penalties based solely on such a prediction would certainly violate due process. However, it would be hard to argue that such a factor should not be taken into account in sentencing. In fact, the law has seen many attempts to incorporate such a prediction into sentencing.<sup>83</sup> For the same reasons that the statute does not give warning to a future offender, it would not prevent arbitrary application by a judge. Title X does not prescribe a method for determining when a defendant is dangerous.<sup>84</sup> It does not give any indication of what would manifest a propensity toward future criminal conduct. However, because of the nature of the task itself, *i.e.*, predicting a defendant's probable future conduct, it may be impossible to make such a determination anything but arbitrary.<sup>85</sup>

<sup>80</sup>This was essentially the approach the Court took in *Williams v. New York*, 337 U.S. 241 (1949), when it concluded that trial evidentiary procedures were not required when deciding between a life sentence and the death penalty for first degree murder. See discussion accompanying notes 5-12 *supra*.

<sup>81</sup>See note 44 *supra*; cf. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

<sup>82</sup>Letter from W. Wilson to Emanuel Cellar, September 9, 1970, in 2 U.S. CODE CONG. AND AD. NEWS 4059, 4067 (1970).

<sup>83</sup>*E.g.*, the recidivist statutes and sexually dangerous persons statutes. The recidivist statutes were criticized for imposing unduly long sentences on those who were not really dangerous. The dangerous sex offenders statutes were criticized for lack of uniformity in their application. See *Murrah & Rubin*, *supra* note 4, at 1171.

<sup>84</sup>This should be contrasted with the MODEL SENTENCING ACT, *supra* note 30, which requires the judge to remand the defendant to a diagnostic center to determine whether he is suffering from a personality disorder indicating a likelihood of criminal conduct.

<sup>85</sup>One approach which might reduce the arbitrariness of this decision would be to devise a system similar to that used by the U.S. Parole Board in making parole release

<sup>71</sup> 18 U.S.C. § 3148.

<sup>72</sup> 531 F.2d at 336.

<sup>73</sup> *Id.* at 334, 335.

<sup>74</sup> 421 U.S. 684 (1975).

<sup>75</sup> See notes 19-22 and accompanying text, *supra*.

<sup>76</sup> 382 U.S. 399 (1966).

<sup>77</sup> See notes 39-43 and accompanying text, *supra*.

<sup>78</sup> *I.e.*, *Williams*, *Specht*, *Mullaney*, *Lanzetta*, and *Giaccio*.

<sup>79</sup> 386 U.S. 605, 608-10 (1967). In making its holding, the Court in *Specht* compared the Colorado Sex Offenders Act under consideration with recidivist statutes imposing increased penalties on repeat offenders. Due process guarantees were required in both cases because each required a convicted defendant to face further proceedings leading to criminal penalties.

Considering the serious questions raised about Title X, why did *Stewart* and *Holt* both dismiss the vagueness objection so lightly? The answer can be found in the history of judicial discretion in sentencing. Generally, a judge may impose any sentence within a prescribed maximum and minimum without any guidelines and this discretion has not been questioned by the Supreme Court.<sup>86</sup> When viewed in light of this accepted practice, Title X could hardly

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decisions. Like the sentencing judge under Title X, the Board must make a decision involving a determination of the likelihood of future criminal conduct or, more correctly, the probability of a successful parole. The Board employs an objective evaluation of factors relevant to predicting future criminal activity, and a score is given to each prisoner to determine how much of his sentence he will serve before his parole release. Almost all of the information used by the Parole Board in its decision is available to the judge at sentencing. See *Project: Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975).

<sup>86</sup> *Williams* specifically approved of the wide discretion afforded to judges in sentencing. *Williams v. New York*, 337 U.S. 241, 246 (1949). In *Giaccio* the Court was careful to make clear that it did not intend to cast any doubt on the settled state practice of leaving juries to fix punishment within legally prescribed limits. *Giaccio v. Pennsylvania*, 382 U.S. 399, 499 n. 8 (1966).

be called arbitrary. If it does not give precise standards to guide a judge's discretion, it at least shows the direction in which a judge ought to look. The Act defines the broad policy to be followed in sentencing a defendant to an extended term. Yet, as suggested earlier, Title X goes further than ordinary sentencing and should be subject to stricter standards.

*Stewart* and *Holt* represent a refusal to look behind the labels to the substance of two-tiered sentencing. This conforms to the tradition of allowing complete discretion in imposing sentence. The reasoning involved in these two cases leads to the conclusion that other due process guarantees would be denied in a two-tiered sentencing framework because they are not normally found in sentencing procedure. But this type of statute imposes added burdens on a defendant and therefore requires due process protection. Although the historical sentencing background is conducive to falling into the reasoning of *Holt* and *Stewart*, it is to be hoped that future courts will more closely examine the functions of two-tiered sentencing and the purposes behind due process guarantees before dismissing them as inapplicable.