Denver Law Review

Volume 61
Issue 2 *Tenth Circuit Surveys*

Article 11

January 1984

Criminal Law

Shaun C. Kaufman

Carl E. Stahl Jr.

Criminal Law

CRIMINAL LAW

OVERVIEW

As shown by the title headings, a variety of criminal law issues reached the court in the last year. Among the more significant decisions were constructions of statutes involving food stamp crimes and trial court probationary powers, a constitutional challenge to enhanced sentencing, and the "necessity" defense in the context of political protests.

I. BLOATING FEDERAL CRIMINAL JURISDICTION: TAKING MONEY BY FALSE PRETENSES AND THE FEDERAL BANK CRIMES STATUTE

Chief Judge Seth's opinion in *United States v. Shoels*[1] interpreted 18 U.S.C. § 2113(b),[2] the Federal Bank Crimes Statute, to include the crime of taking money by false pretenses.[3] This interpretation was subsequently approved by the Supreme Court in *Bell v. United States*,[4] which resolved a circuit court split over the reach of section 2113(b). The *Bell* decision and its federalistic implications will be discussed following a review of the *Shoels* decision and its circuit court antinomes.

A. United States v. Shoels

In *Shoels*, the Government alleged that the defendant presented a $1,200 personal check for collection at a Denver savings and loan association in July 1980. The check was made payable to Irving Butler, who testified that although he had an account at the savings and loan association he had never received the $1,200 check.[5] Evidence showed that the check had been taken, possibly by Shoels, in a burglary of the home of a man who sold Shoels an automobile earlier in the week.[6] The government contended that Shoels' conduct violated section 2113(b); the jury agreed, finding Shoels guilty.[7]

---

1. 685 F.2d 379 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 3117 (1983).
2. 18 U.S.C. § 2113(b) (1982) states in pertinent part:
Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both . . . .
3. Taking money by false pretenses is defined as:
1) A false representation of material present or past fact;
2) Which causes the victim to take certain action;
3) The action taken involves transfer of title;
4) The transfer is to the wrongdoer;
5) The wrongdoer knows his representation is false; and
6) The wrongdoer intends to defraud the victim.
W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 655-72 (1972); R. PERKINS, CRIMINAL LAW 296-319 (2d ed. 1969).
4. 103 S. Ct. 2398 (1983).
5. 685 F.2d at 381.
6. *Id.*
7. *See id.*

Shoels argued on appeal that his actions constituted obtaining money by false pretenses, a state crime which was not punishable under the federal law.[8] His reasoning was that the phrase "to steal or purloin" in section 2113(b)[9] indicated Congress' intent to limit the statute to common law larceny, which did not encompass stealing by false pretenses.[10] The Tenth Circuit disagreed and embraced a broad construction of section 2113(b), relying on *United States v. Turley*,[11] a Supreme Court decision construing the National Motor Vehicle Theft Act.[12]

Turley rejected the notion that the word "stolen" in the Motor Vehicle Theft statute was confined to the definition of common law larceny.[13] Finding the word "stolen" to lack an established common law meaning,[14] the Court examined the statute's legislative history and purpose. Three factors were determinative in the decision to reject the proposed limitation on the definition of "stolen." First, there was no indication in the legislative history of an intent to distinguish common-law larceny from other felonious takings.[15] Second, the public and private interests at stake were damaged equally regardless of the nature of the felonious taking.[16] Third, because federal regulation was prompted by the interstate dimensions of the crime it was unlikely that Congress had intended to leave "loopholes for wholesale evasion" of the law.[17]

As noted, the Tenth Circuit cited the *Turley* rationale with favor.[18] This rationale, in conjunction with the paucity of contrary legislative history, led the court to conclude that the words "steal or purloin" in section 2113(b) included behavior not constituting common law larceny.[19]

Relying on essentially the same rationale as *Shoels*, the Second, Third, Fifth, Seventh, and Eighth Circuits had also adopted a broad reading of section 2113(b).[20] Conversely, the Fourth, Sixth, and Ninth Circuits had limited the application of section 2113(b) to common-law larceny.[21] Because an understanding of the reasons for adopting the narrower view is important for understanding the federalisic implications of the Supreme

8. *Id.*

9. *See supra* note 2.

10. *Id.* at 381-82.

11. 352 U.S. 407 (1957).

12. 18 U.S.C. §§ 2311-2313 (1982). The offense under this act involves interstate transportation of a motor vehicle "knowing the same to have been stolen." *Id.* § 2312.

13. The Supreme Court held that the term "stolen" in section 2312 included "all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." 352 U.S. at 417.

14. 352 U.S. at 411.

15. *Id.* at 414-15.

16. *Id.* at 416.

17. *Id.* at 416-17.

18. 685 F.2d at 382-83. The court also stated that the term "steal" is usually given a broad meaning under federal statutes. *Id.* at 383.

19. *Id.* at 383.

20. *See* United States v. Hinton, 703 F.2d 672 (2d Cir.), *cert. denied*, 103 S. Ct. 3091 (1983); United States v. Simmons, 679 F.2d 1042 (3d Cir. 1982); United States v. Bell, 678 F.2d 547 (5th Cir. 1982), *aff'd*, 103 S. Ct. 2398 (1983); United States v. Guiffre, 576 F.2d 126 (7th Cir.), *cert. denied*, 439 U.S. 833 (1978); United States v. Johnson, 575 F.2d 678 (8th Cir. 1978).

21. *See* United States v. Feroni, 655 F.2d 707 (6th Cir. 1981); LeMasters v. United States, 378 F.2d 262 (9th Cir. 1967); United States v. Rogers, 289 F.2d 433 (4th Cir. 1961).

Court's resolution of the circuit court conflict, the next section examines *LeMasters v. United States*,[22] the most articulate exposition of the "narrower" view.

B. LeMasters v. United States

LeMasters obtained a duplicate savings passbook for another person's account by misrepresenting his identity, and then used this passbook to withdraw $6,700 from the account.[23] After trial, the defendant moved for acquittal maintaining that while the indictment (based on section 2113(b)) charged larceny, the government had proved the crime of obtaining money by false pretense, not larceny.[24] The trial court denied the motion.[25] The Ninth Circuit reversed, placing emphasis on the legislative history and purpose of section 2113(b).[26]

The Ninth Circuit noted first that although an early form of the bill which became section 2113(b) contained specific provisions for federal punishment of obtaining money by false pretenses, these provisions were deleted by subsequent amendments.[27] Legislative history indicated that Congress deleted the false pretenses provisions because it did not want the United States to enter areas of state concern, such as forgery, fraud, and bad checks.[28] The Ninth Circuit invoked the statute's historical context to support this contention. Federal bank crimes legislation was needed (and intended) to restrict interstate bands of "gangster bank robbers," not to protect banks against all criminal defalcations.[29] Congress intended to address a specific problem, not to federalize crimes involving bad checks and forgeries, crimes which did not significantly threaten interstate commerce and which were already adequately regulated by local law enforcement authorities.[30]

The Ninth Circuit court rejected the *Turley* analogy because the motivation underlying the Motor Vehicle Theft statute was "wholly different" from the purpose animating section 2113(b).[31] The Motor Vehicle Theft statute could be broadly construed because the interstate evils perceived by Congress included all illegal motor vehicle sales.[32] In enacting section 2113(b), Congress was concerned only with evil of interstate bank robbers.[33] *Turley*'s

22. 378 F.2d 262 (9th Cir. 1967).
23. *Id.* at 263.
24. *Id.*
25. *Id.*
26. *Id.* at 263-68.
27. *Id.* at 264-65.
28. *Id.* at 264-66, 268.
29. *Id.* at 265 n.3 (citing S. REP. NO. 537, 73d Cong., 2d Sess. (1934)). Although this report accompanied a predecessor bill to section 2113(b), the court pointed to the lack of any changed circumstances between the time the report issued and the time section 2113(b) was enacted. At both times the salient problem was interstate bank robbery not involving stealth or misrepresentations. 378 F.2d at 265-66.
30. *Cf.* 378 F.2d at 268 (Congress rejected extending federal law to false pretenses because such an extension would "serve no purpose except to confuse and dilute state responsibility for local crimes which were being adequately dealt with by state law.").
31. *Id.* at 267.
32. *Id.*
33. *Id.*

definition of "stolen" was therefore inapposite.[34] Finally, the *LeMasters* court found that the language of section 2113(b) was ambiguous, and that ambiguities in federal criminal statutes should be resolved in favor of the accused, at least where broad construction would result in duplicating a state offense.[35]

C. Bell v. United States

The Supreme Court resolved the circuit court conflict in *Bell v. United States*,[36] by adopting a broad reading of the statute and holding that the crime of taking by false pretenses was within the scope of section 2113(b).[37] The dissent in *Bell*, however, vigorously criticized the majority as ignoring both the legislative history and *LeMasters'* compelling arguments for judicial restraint in expanding federal criminal jurisdiction.[38]

In *Bell*, a check taken from the mail in Ohio was eventually deposited in a federal savings and loan account in Miami. Bell was arrested and charged with a violation of section 2113(b).[39] Justice Powell, writing for the majority, found that those who favored narrow construction of section 2113(b) based on its text placed false reliance on the statute's "takes and carries away" common law language.[40] Rules of statutory construction normally require that in a federal criminal statute an undefined common law term such as "takes and carries away" must impart its common law meaning.[41] Congress, however, did not incorporate all the elements of common-law larceny into the language of section 2113(b). Because the language used was therefore not consistent with an intent to limit the statute solely to common law larceny,[42] the defendant's proposed common law meaning was not inherently embodied in the statute.[43]

Justice Powell then examined the legislative history of section 2113(b). This section had been added as an amendment to a statute proscribing only those bank thefts involving force or violence or the creation of fear.[44] The Court treated this history as evidencing congressional intent to protect banks from all asset-depleting thefts, regardless of whether all the elements of common-law larceny were present.[45] Unlike the *LeMasters* court, the Court felt that a change in legislative purpose had taken place during the interval between 1934, when a legislative provision directly addressing false pretenses

34. *Id.*
35. *Id.* at 268 (citing Jerome v. United States, 318 U.S. 101 (1943)).
36. 103 S. Ct. 2398 (1983).
37. *Id.* at 2402.
38. *Id.* at 2402-04 (Stevens, J., dissenting).
39. *Id.* at 2399.
40. *Id.* at 2399-2400.
41. *Id.* at 2401 (citing *Turley*, 352 U.S. at 411).
42. 103 S. Ct. at 2401. The Court extracted two textual indicia of an intent to go beyond common-law larceny. First was the application of the statute to non-tangible property; common-law larceny was limited to personal property. Second, the statute—unlike the common law—did not require a taking from the possession of the property's owner. *Id.*
43. *Id.*
44. *Id.* at 2402.
45. *Id.*

was rejected,[46] and 1937, when section 2113(b) was enacted.[47] That change stemmed from experience with a statute which did not encompass nonviolent bank crimes.[48] Reacting to that experience, Congress enacted a statute encompassing all acts involving an illegal "taking and carrying away" of bank assets, regardless of common-law distinctions.[49]

The dissent took a contrary position, and argued forcefully for a narrow reading that would limit the breadth of federal criminal jurisdiction. Justice Stevens found "strong evidence of Congress' specific, limited intent" to confine the statute to takings without a bank's consent.[50] Agreeing that the purpose of the amendment including section 2113(b) was to correct omissions in the original bank crimes statute, he disagreed on the scope of the correction. The original statute did not proscribe taking without violence, burglary, or larceny by stealth, all crimes involving taking without consent.[51] Congress' concern in amending the statute was limited to non-consensual takings; there was no intent to reach all bank crimes.[52] Justice Stevens concluded that the legislative history of the statute precluded an interpretation imposing federal punishment for the crime of obtaining money by false pretenses.[53]

D. *Federalistic Implications of* Shoels *and* Bell

Justice Stevens' dissent in *Bell* was motivated by a strong aversion to an approach to federal criminal jurisdiction which would subject a person to prosecution by both federal and state authorities for the same act.[54] In his dissent to *McElroy v. United States*,[55] Justice Stevens, after carefully analyzing the legislative history of the statute in question,[56] concluded that the Court should not unnecessarily expand federal criminal jurisdiction in order to prevent the federal prosecutor from "encroach[ing] into an area of state respon-

---

46. *See supra* note 29 and accompanying text.

47. *See* Pub. L. No. 75-349, 50 Stat. 749 (1937).

48. 103 S. Ct. at 2402.

49. *Id.* The Court did state that had Bell not "taken and carried away" the money he would not have violated section 2113(b), because the statute requires an asportation. *Id.* at 2401.

50. *Id.* at 2404 (Stevens, J., dissenting).

51. *Id.* at 2403 & nn.3-4.

52. *Id.* The dissent also noted that an unanimous Court had previously rejected an interpretation of federal bank crime laws which would bring all "asset depleting" acts within federal jurisdiction. Justice Stevens quoted the following passage from Jerome v. United States, 318 U.S. 101 (1943):

> It is difficult to conclude in the face of this history that Congress, having rejected in 1934 an express provision making state felonies federal offenses, reversed itself in 1937. . . . It is likewise difficult to believe that Congress, through the same clause, adopted by indirection in 1937 much of the fraud provision which it rejected in 1934.

318 U.S. at 105-06, *quoted with approval in Bell*, 103 S. Ct. at 2404 (Stevens, J., dissenting).

53. 103 S. Ct. at 2404 (Stevens, J., dissenting).

54. *Id.* at 2402.

55. 455 U.S. 642 (1982).

56. *McElroy* construed 18 U.S.C. § 2314 (1982), which prohibits the interstate transportation of forged securities. The Court held that the "interstate" element was satisfied if a security was forged while in the "stream of commerce," regardless of whether the forgery took place prior to the instrument's crossing state lines. 455 U.S. at 653-54. Justice Stevens, dissenting, interpreted the legislative history to require forgery prior to crossing an interstate boundary. *Id.* at 661 (Stevens, J., dissenting).

sibility and . . . cross[ing] a line that Congress has drawn."[57]

The central fault with *Shoels* and *Bell* is that the opinions misread the statutory limits evinced by section 2113(b)'s legislative history. This misreading recognizes the semantic distinction between larceny and obtaining money by false pretenses, but ignores the substantive distinction drawn by Congress. The danger in the jurisdictionally expansive approach underlying *Shoels* and *Bell* is the bloating of federal criminal jurisdiction, and ultimately the "unnecessary growth of a national police force."[58]

II. DUE PROCESS CHALLENGE TO THE EVIDENTIARY STANDARD IN THE DANGEROUS SPECIAL OFFENDER STATUTE

In *United States v. Schell*[59] Mr. Schell made a five-prong attack on the constitutionality of 18 U.S.C. § 3575,[60] which permits a federal district court to increase the sentence prescribed for a particular offense.[61] To give this increased sentence, the court must make additional factual findings, not required for conviction, that the convicted person is "dangerous"[62] and a "special offender."[63] Schell's challenge, although unsuccessful, raised some

57. 455 U.S. at 675 (Stevens, J., dissenting).

58. *See* 103 S. Ct. at 2403 (Stevens, J., dissenting). Other courts and commentators have expressed concern over expanding federal criminal jurisdiction, especially where "no special federal interest or subject matter is involved." ABRAMS, *Consultant's Report on Jurisdiction*, in 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 34 (1976). *See also* United States v. Archer, 486 F.2d 670 (2d Cir. 1973).

59. 692 F.2d 672 (10th Cir. 1982).

60. 18 U.S.C. § 3575 (1982).

61. 18 U.S.C. § 3575(b)-(d) (1982) provide in relevant part:

> (b) If it appears *by a preponderance of the information*, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony.
>
> (c) This section shall not prevent the imposition and execution of a sentence of death or of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.
>
> (d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special offender to less than any mandatory minimum penalty prescribed by law for such felony. This section shall not be construed as creating any mandatory minimum penalty.

(Emphasis supplied).

62. Schell was alleged to be "dangerous" according to the terms of 18 U.S.C. § 3575(f) (1982), which provide: "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."

63. Schell was alleged to be a special offender under 18 U.S.C. § 3575(e)(1) (1982), which provides:

> 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 com-

compelling questions about the due process implications of the preponderance evidentiary standard included in section 3575,[64] the dangerous special offender (DSO) sentencing statute.

A. *The Facts*

Of his own accord, James Schell took liberty from the federal correctional facility at Fort Scott, Kansas.[65] Unfortunately for Mr. Schell, the talons of law ensnared him and he was charged with a violation of the federal prison escape statute.[66] While awaiting trial, Schell once again took french leave; this flight also ended in recapture, producing another escape charge.[67]

The United States attorney filed the required pre-trial notice[68] stating that the government reasonably believed that Schell was a dangerous special offender within the terms of section 3575 and should be given an enhanced sentence.[69] Schell pled guilty to the escape charges.[70] The judge then conducted a DSO hearing to determine if the defendant's criminal behavior was sufficiently aberrant to warrant an enhanced sentence.[71] The trial court found that Schell's pattern of violent criminal activity made him "dangerous" within the meaning of section 3575(f),[72] and that Schell was a "special offender" because the number and temporal proximity of his felony convictions and jail terms satisfied the requirements of section 3575(e)(1).[73] The trial court then used section 3575's enhanced sentencing power to sentence Schell to two consecutive ten-year prison terms.[74] The defendant appealed, alleging that the DSO statute contained numerous constitutional deficiencies and that his sentence was improper under the DSO standards.

B. *Schell's Challenge*

1. "Organized Crime" Requirement

Schell contended that Congress aimed the harsh provisions of section 3575 at organized crime figures,[75] and that because there was no proof at

---

mission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under 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.

64. *See supra* note 61.

65. 692 F.2d at 673.

66. 18 U.S.C. § 751(a) (1982). *See* 692 F.2d at 673.

67. 692 F.2d at 673.

68. *See* 18 U.S.C. § 3575(a) (1982).

69. 692 F.2d at 673.

70. *Id.*

71. *Id.* at 674.

72. *Id.* at 675. Schell's criminal record included convictions for bank robbery, aggravated robbery, armed robbery, and murder. *Id.* at 674.

73. *Id.* at 674. The Tenth Circuit explicitly limited its holding to sentences imposed pursuant to the special offender definition under section 3575(e)(1). The DSO statute also permits a person to be characterized as a special offender when that person is a professional criminal or is part of a criminal conspiracy. *See* 18 U.S.C. § 3575(e)(2)-(3) (1982).

74. 692 F.2d at 674.

75. *Id. See generally* Note, *Organized Crime Control Act of 1970*, 4 MICH. J.L. REFORM 546 (1971) (discussing legislative history of section 3575).

trial of his involvement with organized crime the enhanced sentence under the statute violated his due process rights.[76] The Tenth Circuit quickly dismissed this contention, holding that neither the legislative history of section 3575 nor its language limited its application to organized crime figures.[77]

2. Challenge to Finding of "Dangerousness"

Schell argued that because he faced sixty years in prison for other federal and state convictions he was not a threat to the public, and therefore could not be considered "dangerous."[78] The court rejected this argument because the DSO statute was not intended to involve the federal judiciary in the "complexities and uncertainties of the sentencing and parole procedures of other jurisdictions."[79] Trial judges were therefore not required to calculate the imminence of a defendant's release in applying the DSO statute.[80]

3. Eighth Amendment Does Not Bar Enhanced Sentencing

Schell also argued that because he was subject to lengthy federal and state prison terms the additional twenty years imposed under section 3575 constituted a violation of the eighth amendment prohibition against cruel and unusual punishment.[81] The court dismissed this argument summarily, finding that the eighth amendment only barred sentences "grossly disproportionate to the severity of the crime."[82] The fact that existing sentences remained to be served was insignificant; absent legislative irrationality, the state retained the power to punish lawbreakers for each transgression.[83]

4. Vagueness

Next, Schell argued that the definition of "dangerous" in section 3575 was unconstitutionally vague. The Tenth Circuit joined several sister circuits in rejecting this argument.[84] Even though Congress might have used more precise language, congressional imprecision did not in itself render the statute unconstitutionally vague.[85] The statute required trial judges to consider the defendant's propensity to engage in criminal activity.[86] Trial

76. 692 F.2d at 674.

77. *Id. See also* United States v. Bailey, 537 F.2d 845, 846-47 (5th Cir. 1976), *cert. denied*, 429 U.S. 1051 (1977). *But see* United States v. Fatico, 458 F. Supp. 388, 401 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980) (enhanced sentence permissible under section 3575 because defendant had long-standing connection with New York organized crime "family").

78. 692 F.2d at 675.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* The court cited Rummel v. Estelle, 445 U.S. 263 (1980) for support, and speculated that *Rummel* might permit any non-capital penalty for egregious felony convictions. *See* 692 F.2d at 675.

83. 692 F.2d at 675.

84. *See* United States v. Williamson, 567 F.2d 610, 615 (4th Cir. 1977); United States v. Bowdach, 561 F.2d 1160, 1175-76 (5th Cir. 1977); United States v. Neary, 552 F.2d 1184, 1194 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977); United States v. Stewart, 531 F.2d 326, 331-32, 335-37 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976).

85. 692 F.2d at 675 (citing United States v. Powell, 423 U.S. 87 (1975)).

86. *See* 18 U.S.C. § 3575(f) (1982).

judges, presumably familiar with predictive processes through experience with normal sentencing and bail proceedings, could therefore interpret the definition of "dangerous" without having to "guess at its meaning and differ as to its application."[87] Because section 3575(f) therefore met the minimum standards for notice,[88] it satisfied due process requirements.[89]

5. Evidentiary Standard and Sentencing Proceedings

Finally, in the only challenge generating a dissent,[90] Schell attacked the statute's evidentiary standards. The DSO statute permits a defendant to be found "dangerous" and a "special offender" upon proof by a "preponderance of the information."[91] In a split decision, Judge McKay dissenting, the Tenth Circuit panel held that the preponderance standard satisfies a convicted defendant's due process rights, and rejected Schell's challenge.[92] The majority's analysis of the Supreme Court's opinions addressing the due process aspects of sentencing led it to conclude that the Court had not articulated the evidentiary standard constitutionally required for enhanced sentencing proceedings.[93] In *Specht v. Patterson*[94] the Court recognized that enhanced sentencing proceedings implicated significant due process concerns, and held that a defendant subject to enhanced sentencing was entitled to procedural protections not required when sentencing in the normal range.[95] Because *Specht* had not considered the evidentiary standard question,[96] however, the majority proceeded to analyze Schell's constitutional challenge by applying the interest balancing methodology underlying mod-

87. 692 F.2d at 675. Other circuits have used similar reasoning in rejecting vagueness attacks on section 3575(f). For instance, the Seventh Circuit has stated:

> [W]e [do not] find that the term dangerous is overly broad or vague for the purposes of sentencing. . . . Factors routinely considered by a sentencing judge are the defendant's past record, the probation officer's report, the nature of the present offense and the defendant's attitude. . . . Likelihood of future criminality and the potential danger to society are determinations implicit in sentencing decisions. The concept of dangerousness as defined in § 3575 is a verbalization of considerations underlying any sentencing decision.

United States v. Neary, 552 F.2d 1184, 1194 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977).

88. *See* United States v. Powell, 423 U.S. 87 (1975); Connally v. General Construction Co., 269 U.S. 385 (1926).

89. 692 F.2d at 675.

90. *See id.* at 679 (McKay, J., concurring in part and dissenting in part).

91. 18 U.S.C. § 3575(b) (1982). *See supra* note 61.

92. 672 F.2d at 679.

93. *Id.* at 677. The Court has held that due process requires use of the "beyond a reasonable doubt" standard in proceedings leading to criminal conviction. *In re* Winship, 397 U.S. 358 (1970). Conversely, the Court has indicated that the preponderance standard is constitutionally permissible when a court is sentencing within the range prescribed for a particular crime. *Cf.* Williams v. New York, 337 U.S. 241 (1949) (no significant due process concerns at sentencing). The Tenth Circuit characterized an enhanced sentencing proceeding as a "halfway house" between a criminal proceeding and a normal sentencing proceeding. 692 F.2d at 676. Because the enhanced sentencing power could not be invoked without making factual findings not required for conviction, *Williams* was not controlling. Similarly, because the proceeding did not involve a separate criminal conviction, *Winship* was not controlling. Thus, the Tenth Circuit was required to engage in an independent analysis. 692 F.2d at 676.

94. 386 U.S. 605 (1967).

95. *Id.* at 609-10.

96. The precise issue in *Specht* was whether a defendant in an enhanced sentencing proceeding was entitled to an adversarial hearing at the enhanced sentencing phase of the prosecution. *Id.* at 608.

ern due process jurisprudence.[97]

Interest balancing methodology requires three inquiries: 1) determining the nature of the affected private interest; 2) evaluating the risk of erroneous deprivation of that interest through existing procedures and the probable value of alternate procedures in preventing such erroneous deprivation; and 3) assessing the nature of the governmental interest.[98] When the calculus of these inquiries balances in favor of a private party, existing procedures are constitutionally inadequate.[99]

The majority recognized that defendants have a liberty interest which is affected by an enhanced sentence, although they did not engage in a meaningful analysis of the nature of this interest.[100] The majority also recognized that evidentiary standards were procedural devices for allocating the risk of error in judicial proceedings.[101] The "reasonable doubt" standard allocates virtually all the risk of error to the government; the "clear and convincing" standard allocates most of the risk to the government; the "preponderance" standard essentially allocates the risk equally.[102] The final elements injected into the due process equation were the government's interests in protecting society and in deterring citizens from the criminal path.[103]

Relying on three factors, the majority concluded that the requirements of due process were satisfied by use of the preponderance standard. First, a defendant in a DSO proceeding is statutorily entitled to the adversarial hearing explicitly required by *Specht*.[104] Second, given the subjective nature of a finding of "dangerousness," the reasonable doubt standard would, as a practical matter, lead to total subordination of the government's interests.[105] Finally, Congress had openly considered the constitutional issue and decided on the preponderance standard; that decision was entitled to great weight.[106] In light of the above, the majority concluded that the parties' interests were roughly equal, and that section 3575's preponderance standard—which divides the risk of erroneous deprivation equally between the parties to a proceeding[107]—adequately satisfied the demands of due process.[108]

Judge McKay, in his dissent, agreed that *Specht* had not resolved the

97. 692 F.2d at 678 (citing Addington v. Texas, 441 U.S. 418 (1979)). *See also* Mathews v. Eldridge, 424 U.S. 319 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972). The Court's interest-balancing approach has been criticized as giving lip service to individual due process rights and turning a constitutional check on governmental authority into a mechanistic exercise, Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975), but nonetheless remains controlling when adjudicating due process challenges.

98. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

99. *See id.*

100. 692 F.2d at 678.

101. *Id.* at 676.

102. *Id.* at 676 (citing Addington v. Texas, 441 U.S. 418 (1979)).

103. 692 F.2d at 678. *See also Addington*, 441 U.S. at 429.

104. *Id.* at 677. *See* 18 U.S.C. § 3575(b) (1982).

105. 692 F.2d at 679.

106. *Id.* (citing Fullilove v. Klutznick, 448 U.S. 448, 472 (1980)).

107. Addington v. Texas, 441 U.S. 418, 423 (1979).

108. 692 F.2d at 679.

due process issue raised by Schell.[109] Balancing the interests involved, however, led the dissent to conclude that due process required, at a minimum, the use of a clear and convincing standard in a DSO proceeding.[110]

Divergence from the majority's conclusion stemmed from Judge McKay's careful characterization of the interests involved. Subjecting a defendant to an enhanced sentencing proceeding creates the possibility that the liberty interest not extinguished by the original proceeding can be lost.[111] This residual liberty interest, which is in freedom from confinement not prescribed by a criminal conviction, is an interest of "high order."[112] Consequently, due process concerns are sharply implicated when the legislature attempts to impose an enhanced sentence based on facts not adduced as part of the criminal conviction; in that situation the legislature is trying to deprive a defendant of a portion of his liberty interest not extinguished by the criminal conviction simpliciter.[113] Further, the government's interests in the DSO proceeding are not solely adversarial. The government's interests are not limited to protecting society from the effects of dangerous criminals; the government also has an interest in "protecting persons who are not dangerous from imprisonments."[114] *Both* interests are of high order.[115]

Turning to an analysis of the preponderance standard, the dissent found two serious problems. First, although the standard would advance the government's interest in protecting society, through causing overinclusive application of section 3575, overinclusiveness would generate wrongful imprisonment, thereby "undermining the 'moral force' of the criminal law."[116] Second, the preponderance standard's overinclusiveness would affect primarily those defendants not actually falling within the statute's scope, thereby magnifying the number of erroneous deprivations.[117]

Recognizing the proof problems of a reasonable doubt standard in the context of a statute requiring a subjective determination,[118] Judge McKay would have required a clear and convincing standard.[119] This standard would advance the government interests by eliminating overinclusiveness

109. *Id.* at 680 (McKay, J., dissenting).

110. *Id.* at 684.

111. *Id.* at 681. Judge McKay read the Supreme Court's sentencing decisions to draw a distinction between that portion of a defendant's liberty interest extinguished by the original conviction and the defendant's residual liberty interest. *Id. Cf.* Vitek v. Jones, 445 U.S. 480, 493 (1980) (transfer of prisoner to mental hospital implicated due process concerns because such transfer not within the range of confinement created by prison sentence).

112. 692 F.2d at 683 (McKay, J., dissenting). *Accord In re* Winship, 397 U.S. 358, 363 (1970); *In re* Gault, 387 U.S. 1, 50-51 (1967).

113. 692 F.2d at 681-82 (McKay, J., dissenting). Judge McKay limits the original deprivation to that range of confinement justified solely by the criminal conviction. Any additional confinement constituted an encroachment on a defendant's residual liberty interest. *Id.* Judge McKay's analysis does not bar the legislature from creating increased sentencing ranges, as the legislatively chosen range of sentencing for the criminal conviction simpliciter defines the residual liberty interest. *Id.* at 681.

114. *Id.* at 684.

115. *Id.*

116. *Id.*

117. *Id.* at 683.

118. *Id.* at 684.

119. *Id.*

while simultaneously providing the defendant with sufficient protection against erroneous deprivation of a residual liberty interest of fundamental importance.[120]

C. *Analysis of* Schell

Judge McKay and the majority (Judges Doyle and Logan) have separate understandings of the necessary procedural due process safeguards to be accorded. This results from their different assessments of the liberty interests at stake.[121] Before that conflict can be analyzed, however, it is necessary to consider the initial premise underlying both opinions, which is that *Specht* does not control the resolution of Schell's challenge.

1. *Specht* and Due Process at Enhanced Sentencing Proceedings

In an early decision, *Williams v. New York*,[122] the Supreme Court approved of relaxed procedural rigor in the context of ordinary sentencing proceedings. *Williams* involved an appeal from a death sentence which had been given based on background information in a presentence report.[123] The defense had no opportunity at trial to cross-examine the probation authorities or the parties relied on in developing the fatal document.[124] The Court upheld this procedure, distinguishing the finding of guilt from the imposition of punishment.[125] Adversarial protections at sentencing were deemed unnecessary because the convicted defendant did not need the protections against caprice adversarial procedures provided for the merely indicted defendant.[126] Moreover, the sentencing judge was entitled to all information regarding the defendant in order to make the most intelligent imposition of sentence.[127] Due process therefore did not require any procedural protections, at least beyond an opportunity to object to the sentence.

The next decision addressing due process requirements at sentencing was *Specht*. *Specht* involved an enhanced sentencing statute[128] similar to section 3575, in that both statutes required a finding of fact ("dangerousness") not required for conviction on the underlying criminal charge.[129] The Supreme Court held that invoking the Colorado statute involved making a new and separate criminal charge.[130] Thus, the defendant in such a proceeding was entitled to the "full panoply" of procedural protections due process deemed essential for a fair trial.[131]

120. *Id.*

121. *Compare supra* notes 100-108 and accompanying text (majority opinion) *with supra* notes 109-117 and accompanying text (dissenting opinion).

122. 337 U.S. 241 (1949).

123. *Id.* at 244.

124. *Id.* at 244-45.

125. *Id.* at 246.

126. *See id.* at 247.

127. *See id.* at 249-51.

128. COLO. REV. STAT. §§ 39-19-1 to -10 (1963), *repealed*, Act of May 21, 1972, § 8, 1972, Colo. Sess. Laws p. 268.

129. *See* COLO. REV. STAT. § 39-19-1 (1963), *repealed*, Act of May 21, 1972, § 8, 1972, Colo. Sess. Laws p.268; 18 U.S.C. § 3575(f) (1982).

130. Specht v. Patterson, 386 U.S. 605, 610 (1967).

131. *Id.* at 609-10 (quoting Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).

An expansive reading of *Specht* would entitle those accused under section 3575 to what the Supreme Court recognizes as one of the most fundamental due process protections available for criminal defendants: the reasonable doubt standard.[132] Logically, if *Specht* incorporates the "full panoply" of due process protections, the preponderance of the evidence standard in the DSO statute is patently unconstitutional. *Specht*, however, for several reasons, has not been read so broadly.

First, *Specht* predates the cases establishing the due process balancing test, making it inappropriate to extend *Specht* without engaging in balancing analysis.[133] Additionally, while *Specht* explicitly required some procedural due process protections, the beyond the reasonable doubt standard was not mentioned.[134] Further, the fact that additional factfinding is required in an enhanced sentencing proceeding does not seem determinative, in light of the fact that *Williams* (which was explicitly reaffirmed in *Specht*)[135] permits a judge to engage in additional factfinding.[136] Finally, the Court has recognized the due process fundamentality of the reasonable doubt standard in the context of a defendant's conviction proceeding, not in the context of a post-conviction proceeding.[137] Although the foregoing clearly does not settle the question, until the Supreme Court actually decides the issue it appears that both the majority and the dissent properly rejected *Specht* and *Williams* as controlling precedent.[138]

2. Weighing the Interests

It is apparent that the defendant in a DSO proceeding has a substantial liberty interest: his residual freedom.[139] In evaluating the degree of proof required, it is important to remember Justice Brennan's statement that "[t]he procedure by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule to be applied. And the more important the rights at stake the more important must be the

132. *See In re* Winship, 397 U.S. 358 (1967).

133. *Cf.* 692 F.2d at 680 (McKay, J., dissenting) (Supreme Court has developed "more disciplined method of due process analysis" since *Specht*).

134. *Specht* required a hearing, assistance of counsel, compulsory process, cross-examination of adverse witnesses, written findings of fact, and appeal from an adverse decision. 386 U.S. at 610. These protections are all included in a DSO proceeding. *See* 18 U.S.C. § 3575(b) (1982). It should be noted, however, that the evidentiary standard question was not before the Court in *Specht*. *See supra* note 96.

135. *Specht*, 386 U.S. at 608.

136. *See generally* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356 (1975).

137. *See In re* Winship, 397 U.S. 358 (1967). *Winship*'s concern with due process at the original conviction stage of the criminal justice process is demonstrated by its citation to that portion of *In re* Gault, 387 U.S. 1 (1967), which held that due process rights are invoked in a proceeding leading to confinement. *See Winship*, 397 U.S. at 365-66 (citing *Gault*, 387 U.S. at 50-51). *Winship* did not cite *Specht*, perhaps indicating that the Court perceives a distinction between post-conviction and pre-conviction proceedings. Additionally, note that *Williams* drew the pre-/post-conviction distinction. 337 U.S. at 246.

138. *Cf.* Note, *supra* note 136, at 373 (precise answers to due process requirements at enhanced sentencing proceedings not deducible from Court's decisions "as a matter of pure logic").

139. *See supra* notes 111-13 and accompanying text.

procedural safeguards surrounding those rights."[140]

The selection of a burden of proof depends on the societal interests which are pitted in certain types of litigation. For instance, the preponderance standard (more probable than not) is used in civil cases, where the law considers plaintiffs and defendants equal, and considers the possibility of an erroneous verdict without grave consequences.[141] When moral issues are involved in a civil proceeding, such as libel, the Court requires a standard which is stricter than the preponderance standard—clear and convincing evidence.[142] In deportation, denaturalization, and expatriation cases, where fundamental interests are at stake, the more exacting, clear, unequivocal and convincing evidence standard is also utilized.[143] Thus, the clear and convincing standard generally applies in situations where "[t]he various interests of society are pitted against restrictions on the liberty of the individual."[144] Finally, in criminal proceedings, which involve immense interests, the beyond a reasonable doubt standard is required.[145]

From this recitation, it is obvious that the defendant's residual freedoms can be classified as significant, throwing doubt on the propriety of section 3575's preponderance standard. It would be virtually impossible to prove an individual "dangerous" beyond a reasonable doubt, however. The most reasonable solution to the dilemma was articulated by Judge Friendly in *Hollis v. Smith*.[146]

Hollis involved an enhanced sentencing proceeding not unlike that in *Specht*. Following a cursory psychiatric examination the judge found Hollis dangerous to society and sentenced him to an indeterminate term.[147] The appellate court recognized that a finding of "dangerousness" based on psychiatric evidence is both onerous and uncertain; given Hollis' significant liberty interest, the judge should have used a "clear, unequivocal and convincing" standard.[148] The dissent in *Schell* cites *Hollis* and, echoing *Hollis'* concern for a defendant's liberty interest, found the clear and convincing evidence standard necessary in DSO proceedings.[149] Given the defendant's fundamental interest, and the fact that the preponderance standard's overinclusiveness causes the risk of erroneous deprivation to fall most significantly on the "non-dangerous" defendant, the dissent's position more properly recognizes the due process protections required by the DSO proceeding.

---

140. Speiser v. Randall, 357 U.S. 513, 520-21 (1958).

141. *See supra* notes 101-03 and accompanying text.

142. *See* Addington v. Texas, 441 U.S. 418, 423-24 (1979). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 333-32 (1974) (libel requires proof by clear and convincing standard); 9 WIGMORE, EVIDENCE, § 2498, p. 329 (3d. ed. 1940) (fraud and undue influence should be proven by clear and convincing amount of evidence).

143. *See, e.g.*, Woodby v. INS, 385 U.S. 276 (1966); Baumgartner v. United States, 322 U.S. 665 (1944).

144. *In re* Ballay, 482 F.2d 648, 662 (D.C. Cir. 1973).

145. *In re* Winship, 397 U.S. 358 (1970).

146. 571 F.2d 685 (2d Cir. 1978).

147. *Id.* at 688-89.

148. *Id.* at 695-96.

149. 692 F.2d at 684-85 (McKay, J., dissenting).

III. THE MENS REA REQUIREMENT FOR FOOD STAMP FRAUD

In *United States v. O'Brien*[150] the Tenth Circuit, in a case of first impression,[151] set forth the elements necessary for conviction under 7 U.S.C. § 2024(b),[152] the criminal fraud provision of the Food Stamp Act.[153] Section 2024(b) provides that "whoever knowingly . . . acquires [food stamp] coupons" in any unauthorized manner has committed a felony.[154] The issue on appeal was whether this section required proof that the defendant knew that the manner of acquisition was not authorized by the Food Stamp Act.[155] The Tenth Circuit agreed with the defendants' contention that to support a conviction, the trial court must instruct the jury that the defendant knew the manner in which the food stamps were acquired was not authorized by the statute.[156]

A. *The Facts*

Bonnie Sue O'Brien was contacted by a friend who asked Mrs. O'Brien if she wanted to purchase some food stamps.[157] Unknown to Mrs. O'Brien, her friend (Clark) was acting as an informant.[158] Mrs. O'Brien eventually gave Clark and her companion (an undercover agent) $220 in exchange for $500 of food coupons.[159] This conduct resulted in the first charge against Bonnie O'Brien.[160]

Several weeks later, Clark and the undercover agent contacted Paul O'Brien (Bonnie's husband) and asked whether he would exchange twenty tablets of phenmetrazine for $500 in food stamps.[161] O'Brien agreed; after obtaining the drugs, the proposed transaction was made.[162] Although the undercover agent stated that Bonnie O'Brien actually effectuated the exchange, charges were brought against both O'Briens.[163]

At the trial the jury could not reach a verdict on the first count, and the judge declared a mistrial.[164] The same jury, however, returned with a guilty verdict against Mr. and Mrs. O'Brien on the second count.[165] As noted above, the O'Briens then appealed the adequacy of the jury instructions.

---

150. 686 F.2d 850 (10th Cir. 1982).

151. *Id.* at 852.

152. 7 U.S.C. § 2024(b) (1982). This section reads in relevant part: "[W]hoever knowingly . . . acquires [food stamp] coupons . . . in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons . . . are of a value of $100 or more, be guilty of a felony. . . ." *Id.* § 2024(b)(1).

153. 7 U.S.C. §§ 2011-2029 (1982).

154. *See supra* note 152.

155. 686 F.2d at 852. The appeal arose from the trial court's failure to instruct the jury that an element of the crime was knowledge of the unauthorized manner of acquisition. *Id.*

156. *Id.*

157. *Id.* at 851.

158. *Id.*

159. *Id.*

160. *Id.* This charge resulted in a mistrial.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

B. *The Holding*

The Tenth Circuit examined the language of the statute and found that it was ambiguous because the adverb "knowingly" could be read to modify either the word "acquire" or the phrase "acquire in a manner not authorized."[166] Judge McWilliams, who wrote the opinion, first examined the legislative history of section 2024(b) and found it unhelpful because the issue of knowledge of unauthorized acquisition was never discussed.[167] Similarly, earlier versions of the Food Stamp Act did not prove to be of assistance in clarifying the statute.[168] Lacking helpful legislative history, the Tenth Circuit applied the maxim of statutory construction that criminal statutes should be construed against the government and in favor of the accused.[169] Additionally, because the offense involved a felony, the court read the statute as requiring criminal intent.[170]

Utilizing these rules, the panel held that reversible error was committed when the trial court failed to instruct the jury that knowledge that the manner of acquisition was in violation of statute or regulation constituted an essential element of the crime.[171] The significance of the *O'Brien* decision is that it is the first reported decision to delineate the mens rea element of section 2024(b).

IV. THE NECESSITY DEFENSE AND POLITICAL PROTEST: ROCKY FLATS SIT-IN CASE

In *United States v. Seward*,[172] the court considered the requisite showing of justification necessary to sustain the defense of "necessity" or "choice of evils" in the political protest context.

A. *The Facts*

Several thousand people were permitted to use an isolated ten-acre portion of the Rocky Flats Nuclear Plant site in Jefferson County, Colorado on April 28, 1979 for a peaceful and orderly demonstration during which no arrests occurred.[173] On the next day, three groups of protestors returned; 283 members of these groups were arrested when they crossed a painted line at the east access gate of the plant, which indicated the area of restricted access to the government property.[174] The protesters were symbolically resisting

166. *Id.* at 851-52 & n.3. *See also* W. LA FAVE & A. SCOTT, *supra* note 3, at § 27 (discussing, in an analogous situation under "blue sky" laws, problem of determining which clauses were modified by adverb "knowingly").

167. 686 F.2d at 852.

168. *Id.* at 852-53.

169. *Id.* at 853. This is a markedly different approach than that taken by the Tenth Circuit in construing 18 U.S.C. § 2113(b) (1982), the Federal Bank Crimes statute. *See supra* notes 1-19 and accompanying text.

170. 686 F.2d at 853.

171. *Id.* at 853-54.

172. 687 F.2d 1270 (10th Cir. 1982), *cert. denied sub nom.* Ahrendt v. United States, 103 S. Ct. 789 (1983).

173. *Id.* at 1271-72.

174. *Id.* at 1272. The defendants were charged with trespass on an installation of the Nuclear Regulatory Commission in violation of 42 U.S.C. § 2278a (1976) and 10 C.F.R. §§ 860.1-

the presence of the plant, which they considered a threat to community health and well-being because of the nuclear research and development activities performed there.[175]

Following arraignment on trespass charges, the prosecution filed a motion in limine seeking to prevent the defendants from presenting evidence at trial supporting common-law "necessity" defenses including justification, self-defense, defense of others, and defense of property.[176] At the hearing on this motion the trial court ordered the defense to submit written offers of proof substantiating the common law defenses sought to be excluded by the prosecution.[177] Numerous offers were presented, the defendants proffering expert testimony on the effects of radiation, the risk of leaking radioactive material, the existing levels of soil contamination around the Rocky Flats Plant, and the lack of viable relief through the political system.[178]

On June 7, 1979, all of the trial judges assigned to the cases[179] joined in an order placing strict requirements on the use of the common-law necessity defenses. The trial judges' order stated that to use the necessity defenses, the defendant had to make an acceptable offer of proof at trial.[180] The offer had to show: 1) a direct causal relationship between the defendant's actions and the cessation of the harmful activity; 2) the defendants were preventing criminal conduct by the government; 3) the government's criminal act was occurring in the defendants presence; and 4) no alternative short of criminal activity was available to halt the objectionable activity at Rocky Flats.[181] Although made in accordance with this order, the offers of proof were uniformly denied.[182] On appeal, the defendants challenged this action.[183]

B. *The Decision*

The Tenth Circuit Court of Appeals affirmed the trial courts' assault on the necessity defenses, finding that several essential elements were not satisfied by the offers of proof.[184] The court defined the elements of the defense as 1) the absence of a legal alternative to criminal conduct; 2) imminence of harm, and 3) proof of a causal relationship between the criminal conduct

.8 (1983). 687 F.2d at 1271. For a discussion of an administrative law challenge to the trespass convictions, see *Administrative Law, Tenth Annual Tenth Circuit Survey*, 61 DEN. L.J. 109, 110-17 (1984).

175. 687 F.2d at 1274, 1276.

176. *Id.* at 1273. It is not clear whether all the defenses were properly termed "necessity"; the defenses of necessity are similar to duress defenses but conceptually distinct. *See* W. LAFAVE & A. SCOTT, *supra* note 3, at § 50, at 383.

177. 687 F.2d at 1273.

178. *Id.*

179. The defendants were divided into several groups of 15 to 20 for trial; on appeal, the appellants were similarly grouped. *Id.* at 1272.

180. *Id.* at 1273.

181. *Id.* at 1273-74. The trial court supported its order by citing United States v. The Diana, 74 U.S. (7 Wall.) 354 (1869); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972); United States v. Cullen, 454 F.2d 386 (7th Cir. 1971); and United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969).

182. 687 F.2d at 1274.

183. *Id.*

184. *Id.* at 1275.

and avoidance of the imminent harm.[185] The appellate court saw the availability of another, legal course of action—political action—as the primary impediment to the necessity defenses.[186] The Tenth Circuit reasoned that the necessity defense is based on a real emergency confronting an individual who then has no choice but to perform a criminal act.[187] In the *Seward* case this "indispensable element" was absent.[188] Therefore, the trial court did not abuse its discretion in denying the defense.

C. *The "Necessity" Defense and Political Protests*

The application of the necessity defense involves an examination of the utility of the two acts confronting the defendant: the criminal act is weighed against the harm avoided.[189] In the eyes of the *Seward* defendants, the negative effects of criminal trespass were weighed against the effect of radioactive materials on the persons and environment near the plant. Given this balance, the *Seward* defendants felt impelled to break the law. The cases and commentators, however, stress that the availability of a third course of action will preclude the defense when that third course of action provides an effective means of preventing the criminal harm without the necessity of lawbreaking. The *Seward* court assumed that an effective course of action was available in the political mechanism. Of course, this reflects a judgment on the severity and immediacy of the harm to persons and the environment which might result *while* the defendants pursue a political course of action. It is probably more appropriate for the court to look to the element of causation as justification for precluding the defense: the defendants' trespass on a small corner of the property did not significantly alter the course of plant operation. This more objective criterion is preferable because courts deal with causation on a daily basis. The effect of nuclear research on persons and the environment is far more speculative.

V. ENTRAPMENT DEFENSE: ADMISSION OF CRIME CHARGED REMAINS A PREREQUISITE

In *United States v. Pride*,[190] the defendant Pride was convicted on all three counts of the indictment: count one, unlawfully transporting a female from New Mexico to Texas for the purpose of prostitution;[191] count two,

185. *Id.* at 1275 (citing State v. Marley, 54 Hawaii 450, 509 P.2d 1095 (1973)).

186. 687 F.2d at 1275. The offers of proof had attempted to show the futility of resort to the political process; the Tenth Circuit found those offers insufficient. "The references to attempted political action were inadequate and *only referred to attempts by other persons*." *Id.* (emphasis supplied).

187. *Id.* at 1276.

188. *Id.*

189. *See generally* W. LAFAVE & A. SCOTT, *supra* note 3, at § 50.

190. No. 80-1909 (10th Cir. Aug. 3, 1982).

191. *Id.* at 2. Pride was charged with violating the Mann Act, 18 U.S.C. § 2421 (1982), which provides in part:

> Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral

unlawful possession of cocaine with the intent to distribute;[192] and count three, unlawful distribution of cocaine to Robin Phillips.[193] The evidence showed that Pride had transported Robin Phillips, along with other prostitutes, from New Mexico to Texas for the purpose of having the women engage in prostitution. After returning to New Mexico, Phillips reported Pride's activities to the Albuquerque Police Department and agreed to act as an informant.[194] Subsequently, Phillips and Pride had a meeting where they used cocaine. At the trial the testimonies of Phillips and Pride conflicted as to who provided the cocaine, each claiming the other had furnished the controlled substance.[195] Nonetheless, Pride took the fall.

On appeal, Pride contended that his convictions on the drug charges should be reversed because the district court failed to give an instruction on entrapment.[196] Generally, entrapment is available as a defense only when the defendant admits commission of the crime.[197] Pride apparently attempted to persuade the court that his admission that he had used or possessed cocaine provided by Ms. Phillips was sufficient to fulfill this requirement.[198] He further asserted that it would be "wholly inconsistent with his testimony and generally absurd" for the defendant to be required to admit to the crimes as charged in light of his theory of defense.[199]

The Tenth Circuit, per Judge McWilliams, first noted that although several courts have departed from the general rule and permitted an accused to rely upon a defense of entrapment while denying commission of the acts constituting the charged offenses,[200] a "vast majority" of courts hold that the accused may not assert entrapment without also admitting the offense as charged.[201] Citing *United States v. Freeman*,[202] a Tenth Circuit case holding

practice. . . [s]hall be fined not more than $5,000 or imprisoned not more than five years, or both.

192. No. 80-1909, slip op. at 2. This charge related to violation of 21 U.S.C. § 841(a)(1) (1982) which provides in part: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

193. No. 80-1909, slip op. at 2. This count also charged a violation of 21 U.S.C. § 841(a)(1) (1982).

194. No. 80-1909, slip op. at 3. Phillips was given a tape recorder for the purpose of obtaining evidence. Pride could not prove he was prejudiced by the quality of the tape recording or the government's delay in delivering a copy of the tape to his attorney. The Tenth Circuit therefore found no abuse of discretion in admitting the tape. *Id.* at 5-7.

195. *Id.*

196. "Entrapment occurs when the criminal design originates with agents of the government who implant in the mind of an innocent person the disposition to commit the offense." United States v. Gusule, 522 F.2d 20, 23 (10th Cir. 1975), *cert. denied*, 425 U.S. 976 (1976). Pride did not appeal his conviction under the Mann Act.

197. *See, e.g.*, Padilla v. United States, 421 F.2d 123 (10th Cir. 1970).

198. *See* No. 80-1909, slip op. at 3.

199. Appellant's Reply Brief at 2, United States v. Pride, No. 80-1909 (10th Cir. Aug. 3, 1982).

200. No. 80-1909, slip op. at 4 n.3 (citing United States v. Greenfield, 554 F.2d 179, 182 (5th Cir. 1977), *cert. denied*, 439 U.S. 866 (1978); United States v. Demma, 523 F.2d 981, 982 (9th Cir. 1975); Hansford v. United States, 262 F.2d 68, 70 (4th Cir. 1958) (per curiam)).

201. No. 80-1909, slip op. at 4 n.3 (citing United States v. Nicoll, 664 F.2d 1308, 1314 (5th Cir. 1982); United States v. Arnese, 631 F.2d 1041, 1046 (1st Cir. 1980); United States v. Brooks, 611 F.2d 614, 618 (5th Cir. 1980); United States v. Shoup, 608 F.2d 950, 964 (3d Cir. 1979); United States v. Garcia, 562 F.2d 411, 418 (7th Cir. 1977)). Among Tenth Circuit cases holding

that the defense of entrapment was inconsistent with denial of transacting a drug sale with government agents, the court refused to depart from the majority view.[203] *Pride* therefore reaffirms that in the Tenth Circuit the defense of entrapment is not available to a defendant denying commission of the crime charged. In reaffirming its previous rule, the court eschewed comment upon the obfuscation and highly prejudicial effect a defendant's admission to the crimes charged might have upon juror consideration of the defendant's alternate theories of defense.

VI. DISTRICT COURT PROCEDURAL FLEXIBILITY IN PROBATION PROCEEDINGS

Herzfeld v. United States District Court[204] was an appeal arising from the aftermath of the mail fraud conviction of Trenton H. Parker in connection with numerous fraudulent tax shelter investment schemes. Mr. Parker pled guilty to mail fraud under a plea agreement which required him to transfer approximately six million dollars, previously in a Bahamian bank, to the registry of the trial court.[205] This money was generated by Parker's "Gold Tax Shelter Investment Program" (Gold Program), which was the fraudulent investment program leading to Parker's mail fraud conviction.[206] The district court ordered this money paid as restitution, and appointed a receiver to administer the fund.[207] Two separate groups of plaintiffs maintaining civil fraud actions against Parker based on the Gold Program then brought suit seeking to have the receivership dissolved.[208] The United States District Court for the District of Colorado refused to invalidate the receivership and, pursuant to 28 U.S.C. § 1292,[209] certified to the Tenth Circuit the question of whether a federal district court has the power, in a criminal proceeding, to create a receivership to effect restitution.[210]

On appeal, the civil plaintiffs argued that in the absence of express authority the district court had no jurisdiction to create the receivership.[211] No specific statutory provisions prohibiting the creation of a receivership in a matter of criminal restitution were tendered to the court.[212]

The Tenth Circuit held that implicit in both a district court's statutory authority to order restitution as a condition of probation[213] and the latitude

---

the same are United States v. Smith, 629 F.2d 650, 652-53 (10th Cir.), *cert. denied*, 449 U.S. 994 (1980) and Munroe v. United States, 424 F.2d 243, 244 (10th Cir. 1970).

202. 412 F.2d 1181 (10th Cir. 1969).

203. No. 80-1909, slip op. at 4-5.

204. 699 F.2d 503 (10th Cir.), *cert. denied*, 104 S. Ct. 70 (1983).

205. *Id.* at 504.

206. *Id.*

207. *Id.*

208. *Id.* The two groups included a group of Colorado plaintiffs with a judgment against Parker and a group of New Jersey plaintiffs maintaining a class action against Parker. *Id.*

209. 28 U.S.C. § 1292 (1982). This section permits a district court to certify an interlocutory appeal to an appellate court. *Id.* § 1292(b).

210. 699 F.2d at 505.

211. *Id.*

212. *See id.*

213. *See* 18 U.S.C. § 3651 (1982), which provides in pertinent part: "While on probation and among the conditions thereof, the defendant—. . . may be required to make restitution or

provided by Fed. R. Crim. P. 57(b)[214] was the authority to take those actions necessary[215] or appropriate[216] to effect restitution. In reaching this conclusion the court relied upon two distinct analyses. The first was grounded in the premise that any legislative grant of judicial power "carries with it the right to use the means and instrumentalities necessary to the beneficial exercise of that power."[217] Because a receivership might be necessary to effect restitution to numerous unknown victims, the district court's action was not inherently void.[218] The Tenth Circuit's decision did not rest on that narrow ground, however. The court noted that Congress had never detailed the manner in which restitution could be effected, but had nonetheless granted restitutionary power.[219] Congress' legislative intent in permitting restitution must necessarily have been to create sufficient flexibility and authority to utilize practical means useful in accomplishing restitution.[220] Where large sums of money are involved, the "practical needs" of the system justify creation of a receivership.[221] The Tenth Circuit carefully limited its holding, however, by stating that because the receiver was under the control and direction of the district court there could be no suggestion that the establishment of the receivership constituted an unlawful delegation of authority to private parties.[222]

Finally, the court rejected the civil plaintiffs' contentions that they were equitably entitled to the fund because of their diligence in bringing Parker to justice and discovering the fund.[223] The receivership and restitution were an integral part of Parker's plea bargain arrangement.[224] The concern on appeal was the validity of the manner chosen to effect that arrangement, not equitable entitlement to the fund.[225] Accordingly, the lower court's power to create the receivership was affirmed.[226]

---

reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had. . . ."

214. FED. R. CRIM. P. 57(b) provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

215. 699 F.2d at 505.

216. *Id.* at 506.

217. *Id.* at 505 (citing Blue Cross Ass'n v. Harris, 622 F.2d 972, 978 (8th Cir. 1980)). *See also* Daly v. Stratton, 326 F.2d 340, 342 (7th Cir. 1964).

218. *See* 699 F.2d at 505.

219. *Id.*

220. *Id.* at 506.

221. *Id.* The court supported its conclusion by noting that unique probation orders entered under 18 U.S.C. § 3651 (1982) have been upheld by circuit courts. *Id.* (citing United States v. Lawson, 670 F.2d 923 (10th Cir. 1982); United States v. Pierce, 561 F.2d 735 (9th Cir.), *cert. denied*, 435 U.S. 923 (1977); United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975)).

222. 699 F.2d at 506.

223. *Id.* at 507.

224. *Id.*

225. *Id.*

226. *Id.*

VII. LIMITING JUDICIAL DISCRETION IN CREATIVE SENTENCING AND SYMBOLIC RESTITUTION

A. *Limiting "Creative Sentencing":* United States v. Prescon Corp.

In *United States v. Prescon Corp.*[227] the defendants Prescon Corporation (Prescon) and VSL Corporation (VSL) pled nolo contendere to charges of bid rigging to eliminate competition on commercial construction projects in Colorado and nine neighboring states,[228] and mail fraud in connection with the submission of the rigged bids.[229] The trial court sentenced Prescon and VSL to unsupervised probation and fined the defendants $252,000 and $302,000, respectively.[230] The sentence provided, however, that the execution of these fines would be suspended if the corporate defendants deposited, respectively, the sums of $50,000 and $75,000 "into the registry of the Court, to be disbursed to such community agencies as selected by the Chief Probation Officer with the approval of the Court."[231] The district court expressed its hope that the funds would be used for community programs aimed at decreasing crimes, but did not specifically require the funds be used for that purpose.[232]

The government, claiming the sentence to be illegal, appealed on the grounds that the Probation Act, 18 U.S.C. § 3651,[233] did not authorize a sentence permitting a corporation, as an alternative to paying a fine, to make contributions to persons or groups not aggrieved by the crime.[234] In the alternative, the government requested a writ of mandamus be issued to the district court.[235] The defendants vigorously objected, contending that the government had no right of appeal absent explicit statutory authority, and that mandamus was not an appropriate remedy.[236] The Tenth Circuit held that the United States had the right to appeal an assertedly illegal sentence under both the provisions of 18 U.S.C. § 3731,[237] the Criminal Ap-

227. 695 F.2d 1236 (10th Cir. 1982).

228. Defendants were charged with violating section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). 695 F.2d at 1238.

229. Defendants were charged with violating 18 U.S.C. § 1341 (1982). 695 F.2d at 1238.

230. 695 F.2d at 1238.

231. *Id.*

232. *Id.* at 1238-39.

233. 18 U.S.C. § 3651 (1982). The statute provides in pertinent part:

> Upon entering a judgment of conviction . . . any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> . . . .
>
> While on probation and among the conditions thereof, the defendant— . . . May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . .

Id.

234. 695 F.2d at 1240.

235. *Id.*

236. *Id.*

237. 18 U.S.C. § 3731 (1982), which provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

peals Act, and under 28 U.S.C. § 1291,[238] which permits an appeal of a final decision.[239]

After analyzing decisions from the Supreme Court and various circuit courts, the Tenth Circuit concluded that, notwithstanding the limiting language of section 3731,[240] this statute removed all statutory barriers to criminal appeals.[241] As a result, only constitutional constraints, such as the double jeopardy clause,[242] could preclude government appeals in criminal cases.[243] Because the government's appeal was limited to the trial court's proposed modification of the original sentences, double jeopardy concerns did not bar this appeal.[244] Appellate jurisdiction was also sustained by holding that the trial court's sentences were final decisions within the meaning of section 1291.[245] Because of its assumption of jurisdiction and decision on the merits, the Tenth Circuit did not examine the propriety of mandamus in this case.[246]

In determining the legality of the terms of the sentence imposed by the district court, the Tenth Circuit, per Judge Barrett, adhered to the narrow interpretation of the Probation Act the Tenth Circuit first embraced in *United States v. Clovis Retail Liquor Dealers Trade Association*.[247] In *Clovis*, the defendants entered pleas of nolo contendere to charges of violating the Sherman Antitrust Act[248] through conspiring to fix retail liquor prices. As a condition of probation, the trial court had directed defendants to pay $233,500 to a private group which coordinated alcoholism treatment programs.[249] The Tenth Circuit reversed the trial court's sentence because it could not conclude that the recipient of the fund, or the persons it helped or represented, were aggrieved parties within the meaning of section 3651.[250]

Similarly, the Tenth Circuit in *Prescon* could not conclude that the alternative payment option imposed by the district court conformed to any of the special conditions of probation permitted by section 3651.[251] The court noted that the enumeration of the four specific conditions of probation did not "close the door" to other conditions, and reaffirmed its holding in *Porth v.*

238. 28 U.S.C. § 1291 (1982), which provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

239. 695 F.2d at 1240.

240. The plain language of section 3731 seems to limit its scope to court orders dismissing criminal charges. *See supra* note 237.

241. 695 F.2d at 1241.

242. U.S. CONST. amend. V, cl. 2.

243. 695 F.2d at 1241.

244. *Id.*

245. *Id.*

246. *See id.* at 1240.

247. 540 F.2d 1389 (10th Cir. 1976).

248. 15 U.S.C. §§ 1-7 (1982).

249. 540 F.2d at 1390.

250. *Id. See supra* note 233.

251. The Tenth Circuit reads section 3651 to permit, in addition to a fine, four special conditions of parole: "restitution or reparation to aggrieved parties, provision for support of a person for whom a defendant is legally responsible, participation in a residential community treatment center, and participation in a community program for drug addicts." 695 F.2d at 1242. *See* 18 U.S.C. § 3651 (1982).

Templar[252] that the conditions of parole must have "a reasonable relationship to the treatment of the accused and the protection of the public."[253] Nonetheless, the court held that the language of section 3651, which specifically permitted an order of restitution to aggrieved parties for actual injury or damages, precluded a trial court from ordering a defendant to make payments to parties who were not victims of the defendant's criminal conduct.[254] Clearly the nexus between the "aggrieved parties" and the alternative payments in *Prescon* was even less discernible than that in *Clovis*, where the dealers in alcoholic beverages were ordered to make payments to groups concerned with treating alcoholism. The Tenth Circuit therefore reversed the trial court's sentence and remanded the case for resentencing.[255]

B. *"Creative Sentencing": A Survey*

Although the Tenth Circuit Court, absent any dissent, has adhered to a strictly limited and unequivocal interpretation of a court's power under section 3651, it should not be surmised that this approach represents the only reasonable reading of the statute. Several courts have explicitly rejected the reasoning used by the Tenth Circuit and have allowed a more liberal or "progressive" construction of section 3651, in promotion of the concepts of creative sentencing and behavioral sanctions.[256] These courts have not found the enumerated conditions of probation to be exclusive, nor have they been convinced that the maxim expressio unis exclusio alterius governs,[257] as is the Tenth Circuit.[258]

Perhaps most notable of the cases validating creative sentencing is the Eighth Circuit decision *United States v. William Anderson Co.*[259] *Anderson*, like *Prescon*, was a construction bid rigging and mail fraud case.[260] The corporate defendants in *Anderson* were placed on probation with special conditions,

252. 453 F.2d 330 (10th Cir. 1971).

253. *Id.* at 333. *Accord* United States v. Lawson, 670 F.2d 923 (10th Cir. 1982).

254. 695 F.2d at 1243.

255. *Id.* at 1245.

256. "Creative sentencing" and "behavioral sanctions" are terms used to describe a sentencing approach which seeks to provide an alternative to fines or incarceration where those sanctions appear inappropriate. This approach is often used with corporations whose monetary resources eliminate the punitive effect of a fine, *e.g.* United States v. Mitsubishi Int'l Corp., 677 F.2d 785 (9th Cir. 1982), and with defendants otherwise entitled to probation but for whom additional behavioral sanctions are needed. *E.g.*, United States v. Tonry, 605 F.2d 144 (5th Cir. 1979) (former state representative convicted for violating federal election laws required to refrain from political candidacy because of representative's demonstrated propensity to abuse electoral process). *See also* United States v. William Anderson Co., 686 F.2d 911 (8th Cir. 1982) (fine suspended upon payment to charity); United States v. Arthur, 602 F.2d 660 (4th Cir. 1979) (probation required employment with charity); United States v. Wright Contracting Co., 563 F. Supp. 213 (D. Md. 1983) (requiring payment to charity); United States v. Danilow Pastry Co., 563 F. Supp. 1159 (S.D.N.Y. 1983) (requiring donation of bread to charity; distinguishing *Prescon* as involving monetary payment).

257. *See* 695 F.2d at 1245.

258. The Tenth Circuit stated in *Prescon* that a more specific provision (grant of restitutionary power towards victim) governed over a more general provision (grant of power to order probation on terms court considers best). 695 F.2d at 1243.

259. 698 F.2d 911 (8th Cir. 1982).

260. *Id.* at 911.

including installment payment of fines to charitable organizations.[261] If the corporate defendant elected to pay the fine to the charitable organization for which its officers or employees were performing community service work in fulfillment of their individual sentences, then the amount payable to the Government was reduced pro tanto.[262] Judge Urbom of the United States District Court for the District of Nebraska, who imposed the sentences, opined that "a sentence should be constructive, if possible."[263]

The Eighth Circuit upheld *Anderson* on the principle that the purpose of section 3651 is to give judges broad discretion in fashioning sentences, and that unique probationary conditions are enumerated in section 3651[264] to place their propriety beyond doubt rather than to limit a court's discretion.[265] Several courts have reached similar conclusions, stating "[i]t would be hard to use more general words than 'upon such terms and conditions as the court deems best.' "[266] These courts have recognized that the broad discretion under section 3651 permits reversal only for abuse of that discretion,[267] and refuse to eliminate the discretion to impose sentences tailored to meet the circumstances of a particular case.[268]

Creative sentences, such as those imposed in *Anderson*, are intended to effect general rehabilitation and specific deterrence against the offense committed.[269] Such sentences alert corporate decisionmakers to the dangers of violating criminal law, thereby deterring corporate criminality.[270] Courts which impose and review these sentences view the restitution not as "actual restitution" but as "symbolic restitution," designed primarily to deter future misconduct on the part of defendants and reform the principles of their industry rather than provide compensation to victims.[271] Under such a view, "symbolic restitution" can be distinguished from the "restitution" language of section 3651, and escape even the strict construction of the Act adhered to by the Tenth Circuit. Accordingly, probationary conditions need not be limited by the requirements that any restitution be only to "aggrieved parties."

Shaun C. Kaufman
Carl E. Stahl Jr.

261. *Id.* at 912.
262. *Id.*
263. *Id.*
264. *See supra* note 233.
265. 698 F.2d at 914. The Eighth Circuit explicitly noted that its decision was limited to the scope of a court's probationary (as opposed to sentencing) powers. *Id.*
266. *E.g.*, *Danilow Pastry Co.*, 563 F. Supp. at 1169 (quoting United States v. Pastore, 537 F.2d 675, 680 (2d Cir. 1976)).
267. *E.g.*, Fiore v. United States, 696 F.2d 207 (2d Cir. 1982). *See also* United States v. Pastore, 537 F.2d 675, 681 (2d Cir. 1976).
268. *See supra* note 256.
269. *See* Fisse, *Community Service as a Sanction Against Corporations*, 1981 WIS. L. REV. 970, 977.
270. *Anderson*, 698 F.2d at 913-14; *Danilow Pastry Co.*, 563 F. Supp. at 1167; *See* Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, 89 Yale L.J. 353, 370-71 (1979).
271. *See, e.g.*, *Arthur*, 602 F.2d at 664; *Danilow Pastry Co.*, 563 F. Supp. at 1169.