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FEDERAL YOUTH CORRECTIONS ACT: THE CONTINUING CHARADE

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No one will ever know, at least with any certainty, whether more harm than good has been done by the Federal Youth Corrections Act.[1] The Act was enacted by Congress in 1950[2] upon the recommendation of a committee of the Judicial Conference of the United States.[3] The youth offenders who have benefited under YCA are those who have committed the most serious crimes, such as murder, robbery, and rape,[4] and those with the longest records of serious criminal conduct. Because of the YCA, some of these dangerous offenders have received less severe sentences, and some have been released on parole earlier than would have been the case under regular adult sentencing.[5]

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1. 18 U.S.C. §§ 5005-26 (1976) (hereinafter referred to as YCA). All references and citations hereinafter solely by section number are to Title 18, as amended. The title number will be given only when the citation is to a Title other than 18.

2. Act of September 30, 1950, ch. 1115, 64 Stat. 1086 (1950).

3. At its October, 1940 session, the Judicial Conference resolved that the Chief Justice appoint a Committee on Punishment of Crime. Chief Justice Stone appointed the Committee, with the Honorable John J. Parker named as Chairman. A Subcommittee on Treatment of Youthful Offenders, with the Honorable Orie L. Phillips as Chairman, was thereafter named. In 1942 the Committee filed a *Report to the Judicial Conference of the Committee on Punishment for Crime* (1942), which contained both the report of the Subcommittee on Treatment of Youthful Offenders and a draft of an act to carry out the Subcommittee's recommendations.

Apparently, this report of the Committee on Punishment of Crime was not formally presented to the 1942 Judicial Conference for action. Instead, it was presented to Congress in House and Senate Hearings held in 1943. No legislation was adopted, however, because of objections made to a recommendation in the report for indeterminate sentences for adults. Thereafter, the Conference several times reaffirmed the recommendations regarding youthful offenders, and these recommendations, as approved by the Conference in September 1949, were embodied in S. 2609, which became the YCA. [1950] U.S. CODE CONG. SERV. 3983, 3984.

4. There are no YCA sentencing restrictions based on the nature of the offense. The § 3651 restriction against granting probation to a person convicted of an offense punishable by death or life imprisonment can apparently be avoided by resort to granting probation under § 5010(a).

5. The "standard" regular adult sentence is the sentence under which the prisoner is required to serve one-third of the sentence, or a maximum of ten years, before becoming

The youth offenders who have been harmed the most by the YCA are those who have committed only minor offenses, or who are first offenders, *i.e.*, the young offenders who were supposed to be benefited by the YCA. Many of these minor offenders have been given the Zip-6 sentence, as it is popularly known. Under this standard YCA confinement sentence imposed under § 5010(b), the offender is eligible for parole at any time, and under § 5017(c) he must be released on parole by the end of four years of confinement, and under § 5017(d) he must be discharged unconditionally by the end of six years.

The only other sentence authorized by the YCA that is less severe

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eligible for parole. § 4205(a). Section 4205 also authorizes other similar sentences, distinguishable only because of different parole eligibility requirements. When sentence is imposed under § 4205(b)(2), the prisoner becomes eligible for parole at any time. When the sentence is under § 4205(b)(1), the prisoner is eligible for parole after serving a minimum term of imprisonment that is less than one-third of the sentence.

For practical purposes, these statutory distinctions have been obliterated by the United States Parole Commission. Parole guidelines require the prisoner to serve the same period of confinement regardless of whether his parole eligibility is determined under subsection (a), or under (b)(2), or (b)(1) of § 4205. 28 CFR § 2.20 (1978).

However, the Parole Commission does use a different set of Guidelines for YCA (and NARA) offenders. The YCA and Adult Guidelines are the same for offenses of low severity, as well as those for low moderate severity when the salient factor is very good, good, or fair. Beginning with an offense of low moderate severity and poor salient factor, the guidelines are more favorable to YCA than to adult offenders. The two different sets of guidelines require adult offenders to serve from two months to two years longer in confinement than YCA offenders must serve for the same offense. *Id.*

There are two other principal types of adult sentences: the split sentence and the NARA sentence. Under a split sentence the defendant is confined for up to six months in a jail-type institution and then placed on probation for up to five years. The prisoner does not come under the jurisdiction of the Parole Commission. § 3651. A NARA sentence, imposable only on eligible drug addicts, is for a minimum of six months and a maximum of ten years or the maximum for the offense, whichever is the lesser. The prisoner is eligible for parole after six months, but parole can only be granted by the Parole Commission after recommendation by the Surgeon General. §§ 4251-55.

The only nonparolable long-term imprisonment sentence now authorized in the federal system is for conviction of engaging in a continuing criminal enterprise involving drugs. 21 U.S.C. § 848(c) (1976).

A sentence imposed under § 4205(c) is the maximum for the offense, but after receiving a recommendation as to sentence from the Bureau of Prisons, the court either leaves the sentence as a regular adult sentence, with parole eligibility under § 4205(a) or changes it to any other type of sentence authorized for the offense. There are no sentences peculiar to mental defectives, although there are statutes relating to their disposition §§ 4241-4248.

Juvenile delinquents, defined as persons under 18 who violate a law of the United States, are handled under special provisions, and such disposition may be as an adult. §§ 5031-5042.

than the Zip-6 is probation under § 5010(a).[6] In granting probation the court may use the confinement sentence authorized by the Split Sentence provision of § 3651, under which the offender is sentenced to serve up to six months in a jail-type institution, to be followed by up to five years probation.[7]

While denying to YCA offenders the benefit of short adult confinement sentences, § 5010(c) of the YCA allows the imposition of sentences as long as those for adults. Under a § 5010(c) sentence the offender is still eligible for parole at any time, but under § 5017(d) there is no requirement that parole be granted until he has served all but two years of the sentence imposed. Under a regular adult sentence the prisoner must be released on parole when he has served two-thirds of the sentence, unless the Parole Commission determines that he has had bad institutional conduct or is likely to commit a new offense.[8] Thus, except for the possibility of early release by the Parole Commission, the YCA § 5010(c) sentence is less favorable than an adult sentence of the same length.

The sentiments that led the Judicial Conference of the United States in 1942 to recommend adoption of the YCA were noble. Its Subcommittee on Treatment of Youthful Offenders said of the proposed act: "The underlying theory of the act is to substitute for retributive punishment, methods of training and treatment designed to correct and prevent criminal tendencies. The plan of the act departs from the merely punitive idea of dealing with youthful offenders and looks primarily to the objective idea of rehabilitation."[9] This theory was based on the subcommittee's findings that "the period in life between 16 and 23 is a focal source of crime."[10]

6. While some judicial authority denies that probation is a "sentence," the better view is that probation is a sentence. ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.3 (1967); ABA STANDARD RELATING TO PROBATION § 1.1 (1970).

7. The Bureau of Prisons considers the split sentence to be authorized under the YCA, although it once expressed doubt as to whether such sentences were authorized in the Ninth Circuit in light of the holding in United States v. Mollett, 510 F.2d 625 (9th Cir. 1975), which held that a fine cannot be imposed in connection with a YCA sentence. However, Durst v. United States, 434 U.S. 542 (1978) overrules *Mollett* on that point, and probably as regards anything said about the split sentence as well.

8. § 4205(d).

9. COMMITTEE ON PUNISHMENT FOR CRIME, REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME 35 (1942).

10. *Id.* at 31.

"Sociologists and psychiatrists tell us that special causations, which occur in the period between adolescence and manhood, produce these antisocial conduct trends."[11]

"[R]eliable statistics demonstrate with reasonable certainty that existing methods of treatment of criminally inclined youths are not solving the problem."[12] This philosophy accepted by the Judicial Conference was in the air at the time, both as to the cause of youthful crime and what to do about it.[13]

House and Senate Committee reports show that Congress accepted this philosophy fully and agreed with it.[14] And so, with laudatory motives and high aspirations, the YCA was enacted into law in 1950.

There was a substantial delay in placing the YCA into operation because of the statutory requirement prohibiting the commitment of a youth offender under the Act to the Attorney General until the Director of the Bureau of Prisons certified "that proper and adequate treatment facilities and personnel" had been provided.[15] It was not until January 19, 1954, that the Attorney General certified that such facilities for a part of the country were available.[16] But once the courts were authorized to impose and did impose YCA sentences, there was no delay in court challenges to the YCA. The

11. *Id.* at 32.

12. *Id.* at 33.

13. The Subcommittee acknowledged that it relied heavily upon a 1938 report of the Delinquency Committee of the Boys Bureau of the Community Service Society in New York and on an American Law Institute model act for establishing a youth correction authority. *Id.* at 35. It also considered a supporting Report on Federal Youthful Offenders, prepared by James V. Bennett, Director of the Bureau of Prisons. *Id.* at 41.

14. H.R. REP. No. 2979, 81st Cong., 2d Sess., reprinted in [1950] U.S. CODE CONG. SERV. 3983.

15. § 5012.

16. The certification was referred to in Memo No. 64 from the Deputy General and related to district courts in the first seven circuits, except for Texas and Louisiana districts in the Fifth Circuit. Inasmuch as the YCA is of national application and the Bureau of Prisons operates a nationwide system of prisons, it is not evident why there were YCA facilities available in seven circuits but not in the others. However this may be, another memo dated October 4, 1956, certified that YCA facilities were available for the Eighth, Ninth (except for Alaska, Hawaii, and Guam) and Tenth Circuits and the districts of Texas and Louisiana. *See* Brown v. Carlson, 431 F. Supp. 755, 758-59 (W.D. Wisc. 1977). Neither of these memos certified that YCA facilities were available for the District of Columbia. For District of Columbia problems see United States v. Alsbrook, 336 F. Supp. 973 (D.D.C. 1971).

first major challenge of large precedential value was to a YCA sentence imposed the day after the sentencing judge received notice that he was authorized to impose such a sentence.[17]

I. Application and Sentencing Structure of YCA

A. *General Application*

The YCA expressly applies to the District of Columbia,[18] but it has not been extended to the territories.[19] Under the Act, youth offender means "a person under the age of twenty-two years[20] at the time of conviction."[21] Moreover, young adult offenders, defined as persons twenty-two through twenty-five years of age, may also be sentenced under the YCA.[22]

Unless the sentencing court finds that a youth offender "will not derive benefit from treatment" under the Act, he must be sentenced under the YCA.[23] But the finding of "no benefit" does not constitute a substantive standard and "need not be accompanied by a statement of reasons."[24] As regards young adult offenders, judicial authority is seemingly unanimous that sentencing under the YCA may be rejected without making any finding of "no benefit."[25]

17. Cunningham v. United States, 256 F.2d 467, 469-70, n.2 (5th Cir. 1958). The certification for Louisiana district courts was made under date of October 4, 1956. *Supra* note 16.

18. § 5025.

19. This discrepancy has survived equal protection and due process challenges. United States v. Santiago, 576 F.2d 562 (3rd Cir. 1978).

20. *See* text *infra* beginning at note 26 for discussion regarding youth offenders who are also juveniles.

21. § 5006(d). Conviction is defined in § 5006(g) as meaning "the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere." In spite of this seemingly clear statutory language, the District of Columbia Circuit has said that "the time of 'conviction' is the time the verdict is returned or a plea of guilty is taken." United States v. Branic, 495 F.2d 1066, 1070 (D.C. Cir. 1974). The Fourth Circuit took the same view where a jury verdict was involved. Jenkins v. United States, 555 F.2d 1188, 1190 (4th Cir. 1977).

22. § 4216.

23. § 5010(d).

24. Dorszynski v. United States, 418 U.S. 424, 441 (1974).

25. United States v. O'Neill, 573 F.2d 1186 (10th Cir. 1978); Bustillo v. United States, 573 F.2d 368 (5th Cir. 1978); Brown v. United States, 551 F.2d 619, 620 (5th Cir. 1977); Mitchell v. United States, 547 F.2d 875, 876 (5th Cir. 1977); United States v. Norton, 539 F.2d 1194, 1196 (8th Cir. 1976); United States v. Cruz, 523 F.2d 473, 474-76 (9th Cir. 1975); United States v. Gamboa-Cano, 510 F.2d 598 (5th Cir. 1975); Roddy v. United States, 509 F.2d 1145, 1146-47 (10th Cir. 1975).

B. *Juveniles*

As regards juveniles, the application of the YCA in conjunction with the Federal Juvenile Delinquency Act[26] presents a puzzle. A juvenile is defined in the latter Act as "a person who has not attained his eighteenth birthday" when he committed an act of juvenile delinquency, which is defined as an act "which would have been a crime if committed by an adult."[27] The federal government's preferred way of handling juvenile delinquents is by surrendering them to state authorities.[28] But when this is not done, the juvenile is to be proceeded against under the FJDA unless: (a) he requests in writing upon advice of counsel to be proceeded against as an adult; or (b) he is sixteen years of age or over when he commits a felony punishable by ten years imprisonment or more, in which case he may be prosecuted criminally as an adult.[29] In both of these instances, inasmuch as a juvenile is also by definition a youth offender, it would seem that he would automatically come under the provisions of the YCA.

The two situations in which the juvenile can be treated as an adult, however, are very different, and so the statute should be applied differently.

It is not apparent from the FJDA why a juvenile would want to be treated as an adult. As a juvenile he cannot be committed for a period extending beyond his twenty-first birthday, or if over nineteen, at time of disposition, for more than two years, and never for a longer period than an adult could be sentenced.[30] But for whatever reason a juvenile might request to be treated as an adult, he ought

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Even so, the Fourth Circuit takes the view that YCA sentencing cannot be denied to young adult offenders solely on the basis of the nature of the crime committed. United States v. Gallagher, 557 F.2d 1041, 1044 (4th Cir. 1977); United States v. Ingram, 530 F.2d 602 (4th Cir. 1976). The Second Circuit has a rule that is very similar, saying that the sentencing judge cannot put reliance on only one factor in a "fixed and mechanical way." United States v. Negron, 548 F.2d 1085, 1086-87 (2d Cir. 1977); United States v. Torun, 537 F.2d 661, 663, n.4 (2d Cir. 1976); United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974). The same rule is followed in the Sixth Circuit. United States v. Dinapoli, 519 F.2d 104 (6th Cir. 1975).

26. § 5031-5042. Hereinafter referred to as FJDA.

27. § 5031. For purposes of disposition the offender remains a juvenile until he becomes twenty-one.

28. § 5032.

29. § 5032.

30. § 5037(b).

not to be subjected to the harsher sentencing provisions of the YCA, under which he can be sentenced for a term of imprisonment longer than if he were an adult.

On the other hand, when the government proceeds against the juvenile as an adult because of the seriousness of the crime, he ought to be accorded the benefit of YCA sentencing, because by definition it may be more lenient than the ten years to life penalty that makes it possible to treat him as an adult in the first place.[31]

To make sense, then, YCA sentencing should be excluded when the juvenile requests to be treated as an adult, but should be included when the juvenile is being criminally prosecuted as an adult.

C. *YCA Sentencing Structure*

The YCA provides for three sentencing options under the Act and authorizes, when the Act is not used, sentencing under other regular sentencing provisions of the United States Code.

Under the Act the following types of sentences can be imposed:

1. *Probation.* Section 5010(a) authorizes probation, both by suspending imposition of sentence and by suspending execution of sentence. The provisions of the Probation Act, § 3651, are applicable to YCA probation, so that YCA probation under § 5010(a) and conditions of adult probation under § 3651, such as those relating to imposition of fines or requiring restitution, can be used in connection with YCA probation. Upon revocation of probation imposed under § 5010(a), the court is not limited to imposing another YCA sentence, but instead may impose a regular adult sentence.[32]

Under the Split-Sentence provision of § 3651, a sentence of more than six months may be imposed on the offender, with not more than six-months confinement to be in a jail-type or treatment institution, to be followed by up to five years probation.

2. *Zip-6 Sentence* (the popular terminology). Under §§ 5010(b) and 5017(c), the offender is sentenced to confinement for an indeterminate period, being eligible for parole at any time, entitled to

31. *See* text *infra* on Longer Sentences for Youths than for Adults, after footnote 42.
32. United States v. Evers, 534 F.2d 1186, 1189 (5th Cir. 1976).

conditional release before the end of four years,[33] and entitled to an unconditional discharge by the end of six years.

3. *Zip-Adult Term Sentence.* Under §§ 5010(c) and 5017(d) the sentence is the same as the Zip-6 except that it may be for any period over six years up to the maximum imposable for the offense.

4. *Adult Sentence.* Under § 5010(d) the court is authorized, if of the opinion that the offender will not derive benefit from the Zip-6 or Zip-Adult sentence, to sentence in accordance with any other applicable penalty provisions. The result is that under § 5010(d) the youth offender may be sentenced as an adult.

The Second Circuit held in *United States v. Jackson*[34] that § 5010(d) does not provide an independent basis for imposing a YCA sentence. It can be used only after a finding of no benefit has been made, but when it is used, the benefits of the YCA sentence, such as an opportunity to set aside the conviction, do not attach.[35]

The YCA sentence runs uninterruptedly from the date of conviction,[36] with conviction being defined in the Act as "the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of *nolo contendere.*"[37] Thus the YCA offender is entitled to credit against

33. It is only necessary to release the YCA offender once on parole. If parole is revoked he may be re-imprisoned for the remainder of the six-year sentence. Coats v. United States, 405 F. Supp. 1107 (W.D. Okla. 1975).

34. 550 F.2d 830 (2d Cir. 1977).

35. In *Jackson* the district court made an express finding that the youth offender would benefit from treatment under the YCA and proceeded to impose a maximum one-year sentence of confinement, under § 5010(d). The government was first denied correction of the sentence, on the theory that it was illegal under Rule 35, and then sought and was granted a writ of mandamus to direct resentencing. The Second Circuit had previously held, in United States v. Cruz, 544 F.2d 1162 (2d Cir. 1976), that the sentencing court could not, under § 5010(b), impose a maximum confinement term of two years. It now held in *Jackson* that the sentencing judge could not accomplish the same result by use of § 5010(d).

The Second Circuit took the opportunity to criticize the Parole Commission guidelines being used for the parole of YCA offenders, as well as the anomaly that results from persons given YCA sentences being treated more harshly than those with adult sentences. But the remedy lies "either in administrative reform or Congressonal action." *Id.* at 832. However, in light of Jackson's period of confinement, the court pointed out that the district judge could carry out his original purpose by using § 5010(a) and granting the defendant probation under YCA.

36. § 5017(d).

37. § 5006(g). In light of its holding in Jenkins v. United States, 555 F.2d 1188 (4th Cir. 1977), the Fourth Circuit has expressed some doubt about when the sentence starts running. Davis v. Markley, 589 F.2d 784, 785, n.3 (4th Cir. 1979).

the sentence for time spent on probation or parole, even though later revoked.[38] The YCA offender is entitled to jail-time credit, in accordance with § 3568, against service of the sentence.[39] Once judgment has been entered on the conviction, the only grounds for interrupting the running of the sentence and treating the time as inoperative are periods of time during which the offender is in an escape status,[40] under a stay of execution, as on appeal bond,[41] or has been committed for civil contempt.[42]

II. Longer Sentences for Youths Than for Adults

The most persistent challenge to the YCA, at least until the cause became hopeless in the face of solid judicial opposition, involved the imposition of longer sentences on youths sentenced under the YCA than are authorized for adults.

The first such challenge was made by the prisoner *pro se* in *Cunningham v. United States.*[43] Cunningham pleaded guilty on October 16, 1956, to an information charging him with violation of § 661, the theft on a government reservation of a radio clock valued at less than $100, so the offense was a misdemeanor carrying a maximum penalty of 1 year. On October 24, he was given a Zip-6 sentence,[44] the judge having received notice the day before of his authority to impose a YCA sentence.

38. U.S. Bureau of Prisons, Dep't of Justice, Policy Statement 7620.1, Federal Youth Correction Act, p. 1 (9-5-72); 28 CFR § 2.52(d) (1978).

39. United States v. Hamilton, 300 F. Supp. 728 (E.D.N.C. 1969).

40. Suggs v. Daggett, 522 F.2d 396 (10th Cir. 1975); Hartwell v. Jackson, 403 F. Supp. 1229 (D.D.C. 1975); 28 CFR § 2.10(c)(2) (1978).

41. Frye v. Moran, 302 F. Supp. 1291, 1294 (W.D. Tex.), *aff'd*, 417 F.2d 315 (5th Cir. 1969); 28 CFR § 2.10(c)(2) (1978). However, a youth offender whose probation is revoked and sentence of confinement is stayed is entitled to sentence credit during the stay of the confinement sentence. Davis v. Markley, 589 F.2d 784, 785, n.3 (4th Cir. 1979).

42. *In re* Grand Jury Proceedings (Marshall), 532 F.2d 410 (5th Cir. 1976).

43. 256 F.2d 467 (5th Cir. 1958). The court said it was cited to no federal case and it had found none involving the federal YCA or otherwise dealing with the precise questions presented. *Id.* at 472.

44. The court explained its reasoning in imposing the sentence as follows:

> Mr. Cunningham, you have been in some trouble before, but not too serious. Apparently, the principal trouble with you is that you have been considerably mixed up as to the attitude you ought to have toward life. I think you also are in need of psychiatric treatment. I hope you will take advantage of the treatment afforded you.

Id. at 469-70, n.2.

After completing service of one year in prison, Cunningham challenged the YCA sentence[45] on the ground that the YCA did not apply to misdemeanors and that the imposition of more severe sentences on youth offenders than on adults was a cruel and unusual punishment, or, by implication, a denial of equal protection. His claims were rejected, primarily on the basis of state cases embodying the then prevalent "treatment" theory.[46]

In 1962, the Court of Appeals for the District of Columbia considered the same question in *Carter v. United States.*[47] Carter, aged twenty, was charged in a four-count indictment with housebreaking and grand larceny. On June 19, 1961, he withdrew his plea of not guilty and pleaded guilty to two counts of petty larceny, a misdemeanor carrying a maximum sentence of one year. At sentencing, Carter protested the imposition of a Zip-6 sentence, preferring instead to serve the "conventional one year misdemeanor sentence at Occoquan prison."[48] He appealed *in forma pauperis.*

In an opinion by Circuit Judge Burger, now Chief Justice, the District of Columbia Court of Appeals accepted as correct the *Cunningham* interpretation of the YCA under which a Zip-6 sentence can "constitutionally and legally be imposed for a misdemeanor carrying a one year penalty."[49] Referring to the statute, the court said:

> This language is silent with respect to limiting the number of years under the Act to the term ordinarily ordered for the particular crime in question. Actual confinement under the Youth Corrections Act may be greater or may be less depending on many facts we cannot know or anticipate. But the basic theory of that Act is rehabilitative and in a sense this rehabilitation may be regarded as comprising the

45. He sought relief under both FED. R. CIV. P. 35 and 28 U.S.C. § 2255 (1976).

46. There was a dissent on the ground that the YCA, although constitutional, was being unconstitutionally applied because, before pleading guilty and even before sentencing, Cunningham had not been informed of the sentence imposable under YCA, and he had neither assented to the sentence nor waived his right to counsel when pleading guilty to an offense that could result in a sentence of the length of the Zip-6. *Id.* at 473-74

47. 306 F.2d 283 (D.C. Cir. 1962).

48. *Id.* at 285. The opinion is not clear as to whether Carter expected under a regular sentence to serve only one year under two concurrent sentences, or whether he was prepared to serve two years under two consecutive sentences of one year each.

49. *Id.*

> *quid pro quo* for a longer confinement but under different conditions and terms than a defendant would undergo in an ordinary prison.[50]

In further support of the *quid pro quo* argument the court, quoting from *Cunningham,* said that the YCA provides "not heavier penalties and punishment than are imposed upon adult offenders, but the opportunity to escape from the physical and psychological shocks and traumas attendant upon serving an ordinary penal sentence while obtaining the benefits of corrective treatment, looking to rehabilitation and social redemption and restoration."[51]

Carter was in a much different position than Cunningham. Whereas Cunningham was never charged with anything more than a misdemeanor, Carter not only was charged with felonies, but probably could have been convicted. Even in pleading guilty to petty larceny, Carter admitted "I broke into the house . . . ."[52] The maximum penalties for the offenses with which Carter was charged were as much as fifteen years.[53] Insofar as Carter was concerned, the YCA Zip-6 sentence was more severe only as regards the offense to which he pleaded guilty, and not as compared with the penalty imposable for the offense of which he probably could have been convicted. On the other hand, Cunningham was relatively an "innocent."

Thus, in these two early cases the YCA was interpreted as permitting harsher sentencing for the relatively minor youth offender than for an adult, while at the same time dealing more leniently with the more serious youthful offender than if he were an adult.

The imposition of the more severe YCA sentence has even been upheld where the defendant had already been held in confinement a length of time so that, if an adult, he would walk out of court a free person. In *United States v. Lewis*[54] the defendant was tried on two counts of second-degree burglary, an offense carrying a penalty

50. *Id.*

51. *Id.* While sustaining this type of YCA sentence the court did vacate and remand to permit the defendant to move to withdraw his guilty plea on the ground that he had not been fully informed of the consequences of the plea.

52. *Id.* at 284, n.1.

53. Housebreaking is punishable by a sentence of two to fifteen years. D.C. CODE ENCYCL. § 22-1801(b) (West, 1967). Grand larceny is punishable by a sentence of one to ten years. D.C. CODE ENCYCL. § 22-2201 (West 1967).

54. 447 F.2d 1262 (D.C. Cir. 1971).

of two to fifteen years. He was found guilty of the lesser-included offense of unlawful entry, a misdemeanor punishable by a maximum jail term of six months. By the time of sentencing Lewis had already been in jail seven months, and so he argued that he had already completed an adult sentence and could not be sentenced under the YCA. The Court of Appeals responded that the YCA sentence could be imposed, using as the reason the flimsy ground that under § 3568 only the Attorney General can "later" allow jail time, and so at the time of sentencing the court could not recognize a jail-time credit.[55] It appears obvious that Lewis was given the longer YCA sentence as punishment for the offenses of which he had not been convicted and for his other troubles with the law.[56] However, the imposition of the longer YCA sentence simply because the sentencing judge thinks the maximum for the offense is "insufficient punishment" was held improper by the Fifth Circuit in *United States v. Hartford.*[57]

Other youthful offenders challenging their longer YCA sentences have been met with a solid phalanx of judicial opinion so concerned for their benefit that the longer sentences have been uniformly upheld.[58]

55. Presumably the same rule should apply to adults, but if so the adult would be required to spend in confinement more time than the maximum allowable for the offense.

56. Originally released on bond, he had been arrested on other charges. Even though these new charges were dismissed and he was released on bond again, this bond was revoked before he was brought to trial. 447 F.2d at 1264, n.3.

57. 489 F.2d 652, 654-55 (5th Cir. 1974). The court remanded for resentencing under the regular penalty provision.

58. Misdemeanor Offenses: Guidry v. United States, 433 F.2d 968 (5th Cir. 1970) (1 year maximum under 26 U.S.C. § 5674); Brisco v. United States, 368 F.2d 214 (3d Cir. 1966) (6 months maximum under § 1701); Eller v. United States, 327 F.2d 639 (9th Cir. 1964) (1 year maximum under § 752).

Felonies: McGann v. United States, 440 F.2d 1065 (5th Cir. 1971) (5 years maximum under the Dyer Act, § 2312); Satchfield v. United States, 450 F.2d 284 (5th Cir. 1970) (Dyer Act); Cladwell v. United States, 435 F.2d 1079 (10th Cir. 1970) (Dyer Act); Abernathy v. United States, 418 F.2d 288 (5th Cir. 1969) (Dyer Act); United States v. Rehfield, 416 F.2d 273 (9th Cir. 1969), *cert. denied,* 397 U.S. 996 (1970) (5 years maximum for Selective Service offense, 50 U.S.C. App. § 462(b)); United States v. Dancis, 406 F.2d 729 (2d Cir. 1969) (5 years maximum for Selective Service offense, 50 U.S.C. App. § 462(b)); Foston v. United States, 389 F.2d 86 (8th Cir. 1968), *cert. denied,* 392 U.S. 940 (1968) (5 years maximum for mail theft, § 1708); Johnson v. United States, 374 F.2d 966 (4th Cir. 1967) (Dyer Act); Kotz v. United States, 353 F.2d 312 (8th Cir. 1965) (Dyer Act); Rogers v. United States, 326 F.2d 56 (10th Cir. 1963) (3 years maximum under § 1072); United States v. Vaught, 355 F. Supp. 1348

YCA confinement sentences imposed under § 5010(b) for a period of less than six years have been held to be illegal.[59] As such, they are subject to correction at any time by increasing the sentence to six years, without violation of the Double Jeopardy Clause.[60]

The Bureau of Prisons has made no official statement of the action it will take when it receives a YCA commitment under § 5010(b) for a period of less than six years. There are several possibilities. It may notify the appropriate United States Attorney so that, so advised, he may seek to have the sentence corrected. Absent such correction, on motion of the United States Attorney, or perhaps the court's own motion, the Bureau has two alternatives: either compute the sentence with the shorter confinement term, or compute the sentence as though a Zip-6 sentence had been formally imposed. Bureau action will probably depend upon the exact language of the sentence and the whole factual picture.

The problem is graphically illustrated by *United States v. Cruz*.[61] Cruz was an alien convicted of an offense carrying a maximum

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(W.D. Mo. 1972) (2 years maximum under 1202(a)(1)).

Contempt: United States v. Fort, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971) (§ 5010(e) commitment for observation).

59. There is one judicially recognized exception, where the sentence is imposed for an Assimilative Crimes Act offense. *See* text after footnote 65 *infra*.

The split sentence under which a confinement term of up to six months in a jail-type institution can be imposed is based on the Probation Act § 5010(a), incorporating § 3651.

60. Burns v. United States, 552 F.2d 828 (8th Cir. 1977) (three-year YCA sentence corrected by court on its own motion under FED. R. CIV. P. 35); United States v. Cruz, 544 F.2d 1162 (2d Cir. 1976) (Bureau of Prisons computed two-year YCA sentence as though it were Zip-6).

United States v. Marron, 564 F.2d 867 (9th Cir. 1977), involved a YCA sentence that is unusually mixed up. The twenty-year old youth pleaded quilty to a single charge of forgery, in violation of § 495, which carries a maximum penalty of ten years. The court, on April 2, 1976, found that he would benefit from YCA treatment and proceeded to sentence him under §§ 3651 and 5010(b) to a term of three years on condition that he spend a period of thirty days, consisting of 48-hour weekends, in a jail-type institution, with the rest of the confinement suspended and placed on probation for the balance of the term. On March 3, 1977, probation was revoked on account of a violation of state law committed on February 3, and a Zip-6 sentence was imposed.

A majority of the court upheld the sentence, holding the original sentence was illegal and the court had a right to resentence, regardless of the legality of the probation revocation. A dissenting judge took a more realistic view of the YCA and would have held the increase of sentence from three to six years to be invalid. For further discussion *see* text *infra* after note 151.

61. 544 F.2d 1162 (2d Cir. 1976).

penalty of five years.[62] The district court apparently thought that a two-year confinement sentence was appropriate, but also wanted to give Cruz the benefit of the YCA provision authorizing the setting aside of the conviction in order that Cruz might be able to avoid deportation.[63] Accordingly, a two-year YCA sentence was imposed under 5010(b).

However, under parole guidelines used by the Parole Commission, Cruz would not be released on parole until after service of 21 months. The result would have been, if the Parole Commission adhered to its guidelines and other rules, a virtual impossibility for Cruz to obtain an unconditional discharge within the two-year term of the sentence so as to have his conviction set aside. In this situation, the Bureau computed the sentence as though it were a regular Zip-6, and the Parole Commission notified Cruz he would have to serve 21 months. Cruz thereupon sought a reduction of sentence, which was denied. On appeal the original sentence of two years was found to be illegal, and the case was remanded for resentencing.

On remand, the district court could have reimposed a Zip-6 sentence giving Cruz the benefit of the YCA setting aside of the conviction provision; or it could have given him an adult sentence of two years, shortening the potential period of confinement to a little more than nineteen months,[64] but denying to him the benefit of the YCA provision. Inasmuch as Cruz had by the time of the re-sentencing served a substantial amount of time, the purpose sought in the original sentence could best be obtained by using § 5010(a) to grant probation and then use § 5021(b) to grant an unconditional discharge. This is what the sentencing judge did.[65]

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62. §§ 371, 659, conspiracy to steal goods from an interstate shipment.

63. *See* text after note 76, *infra*.

64. Under this sentence, Cruz would have received six days of good time per month and so have been entitled to mandatory release after service of one year, seven months and six days. §§ 4161, 4163.

65. The Docket Sheets kindly supplied by the Clerk show that the district court resentenced Cruz on November 24, 1976, using § 5010(a) to impose a two-year sentence of confinement, which was suspended, and the defendant was placed on probation for two years.

On September 7, 1978, the court unconditionally discharged Cruz from probation and issued him a certificate vacating his conviction. This was in accord with the literal language of § 5021(b), which authorizes the court to take this action "prior to the expiration of the maximum period of probation theretofore fixed by the court." It does seem probable, though, that the statute was drafted with a view to the court placing the defendant on probation at

The only situation in which a confinement sentence of less than six years has been allowed under § 5010(b) has involved application of the YCA in conjunction with the Assimilative Crimes Act.[66] In *United States v. Dunn,*[67] the youth offender was convicted of a misdemeanor, which under Colorado law carried a maximum penalty of one year. The Tenth Circuit held it to be error to impose a YCA Zip-6 sentence and said that a YCA sentence of one year would harmonize and give effect to both of the applicable statutes. The court did not make clear how effect could be given to the YCA provisions relating to conditional release, unconditional discharge, and to the setting aside of the conviction.[68]

The final decision of the court of appeals was delayed three months by an unsuccessful effort by the government to obtain a rehearing.[69] As a result, Dunn did not come up for resentencing until he had already served 494 days in custody. And so, on motion, he was granted an outright discharge from custody, no effort apparently being made to obtain an unconditional discharge and certificate vacating the conviction.[70]

The potential imposition of a YCA sentence longer than that imposable on an adult has collateral consequences: 1) the defendant must be advised of the length of the potential YCA sentence before his plea of guilty to the offenses can be accepted;[71] 2) the prosecution of misdemeanors must be by indictment;[72] 3) the petty offender may

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the time of the original sentencing, rather than on a resentencing as in *Cruz.* If the Cruz sentence was computed as running from the date of conviction, that is, when the original sentence was imposed on February 11, 1976, the sentence had expired prior to the granting of the unconditional discharge and so the discharge was unauthorized.

66. The Assimilative Crimes Act provides that the federal offender "shall be guilty of a like offense and subject to a like punishment" as is provided by the laws of the state where the offense is committed. § 13.

67. 545 F.2d 1281 (10th Cir. 1976).

68. §§ 5017, 5021.

69. The case was decided on December 20, 1976; rehearing was denied March 21, 1977. Note 67, *supra.*

70. This information is shown by the Docket Sheets, copies of which have been kindly supplied by the Clerk.

71. Chapin v. United States, 341 F.2d 900 (10th Cir. 1965); Workman v. United States, 337 F.2d 226 (1st Cir. 1964); Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963); Carter v. United States, 306 F.2d 283, 285 (D.C. Cir. 1962).

72. United States v. Neve, 357 F. Supp. 1 (W.D. Wis. 1973), *aff'd,* 492 F.2d 465 (7th Cir. 1974); United States v. Reef, 268 F. Supp. 1015 (D. Colo. 1967). *Contra,* Harvin v. United

be entitled to trial by jury;[73] and 4) after conviction of a drug offense, a special parole term cannot be added to a YCA sentence.[74]

III. The Overrated "Expungement" of the YCA Conviction

A YCA conviction under § 5021(a) is automatically set aside if the Parole Commission unconditionally discharges the offender from parole bfore expiration of the maximum sentence, which for the Zip-6 would be before the end of six years; the offender is automatically entitled to a "certificate to that effect."[75] The opportunity afforded to the YCA offender to have the conviction set aside is a benefit of the YCA sentence that is frequently referred to by the courts—but always in dictum.[76]

There are rare situations in which the provisions of § 5021 are of real and substantial benefit to a YCA offender, as when an alien is convicted of a drug offense, or a person is charged with a firearms offense. *Morera v. United States Immigration and Naturalization Service*[77] recognized the setting aside of the conviction of a YCA offender under § 5021 as eliminating the "conviction" that otherwise would have resulted in virtually automatic deportation.[78] Possession by a felon of a firearm is a federal felony.[79] Two circuits have held that a YCA offender whose conviction has been set aside is not

States, 445 F.2d 675 (D.C. Cir. 1971) (*en banc*), *cert. denied*, 404 U.S. 943 (1971).

For the confusion in the Ninth Circuit see United States v. Ramirez, 556 F.2d 909 (9th Cir. 1976), in which the original opinion was withdrawn upon rehearing after the record was augmented. *See also* United States v. Stimpson, 549 F.2d 1286 (9th Cir. 1977); and United States v. Leming, 532 F.2d 647 (9th Cir. 1975), *cert. denied*, 424 U.S. 978 (1976).

73. United States v. Davis, 430 F. Supp. 1263 (D. Hawaii 1977). The offense carried a maximum sentence of a fine of $500 and six months imprisonment.

74. United States v. Myers, 543 F.2d 721 (9th Cir. 1976).

75. When a youth offender is placed on probation under § 5010(a), the sentencing court *at any time* before expiration of probation may grant the offender an unconditional discharge from probation, which automatically sets aside the conviction and entitles the offender to a certificate to that effect.

76. Kutcher, *Looking at the Law*, 42 Fed. Probation 60, 60, n.6 (September 1978) collects cases ascribing to § 5021 a curative effect—but doing so only in dictum.

77. 462 F.2d 1030 (1st Cir. 1972).

78. Under 8 U.S.C. § 1251(a)(11) (1976) an alien who has a single conviction under any law relating to illicit possession or traffic in narcotic drugs or marijuana is to be deported. The YCA expungement provision could also be useful where deportation under 8 U.S.C. § 1251(a) (1976) is based on convictions for other offenses.

79. 18 U.S.C. App. § 1202(a) (1976).

a "felon" so as to commit a federal offense by possessing a firearm.[80] It would be an extraordinary perversion of the original purposes of the YCA if the "no prior felony conviction" theory of these cases should be extended to the recidivist, so that the two-time offender, whose first conviction has been set aside, cannot be convicted as a second offender.

Beyond this, though, the value of the YCA expungement to a YCA offender seeking a new start in the community is problematic.[81] The judicial authority is unanimous that § 5021 does not require, nor in and of itself even authorizes, expungement of the conviction, in the sense of physically expunging or sealing the records.[82] The YCA does not prevent the facts of the conviction being used in a credit report, with resulting consequences prejudicial to the YCA offender.[83] A YCA offender who answers "no" to the question of whether he has ever been convicted of a crime treads on treacherous ground. It may be he can "lawfully" give this answer in the sense that he cannot be convicted of a crime for doing so,[84] but the applicant for the bar, or similar examination, may find to his sorrow that the propounder of the question expects the literal truth.[85]

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80. United States v. Purgason, 565 F.2d 1279 (4th Cir. 1977); United States v. Fryer, 545 F.2d 11 (6th Cir. 1976). And accordingly, such a YCA offender, by denying the felony conviction, does not make a misrepresentation in violation of § 922(a)(6). *Id.*

81. See Kutcher, *Looking at the Law,* 42 FED. PROBATION 60 (September, 1978); Saperstein, *Expungement for Youth Offenders,* CASE AND COMMENT 3, (January-February, 1978); Schaeffer, *The Federal Youth Corrections Act: The Purposes and Uses of Vacating the Conviction,* 39 FED. PROBATION 31 (September, 1975).

The extent to which YCA convictions that have been set aside may be used for impeachment purposes under FED. R. EVID. 609(d) has not been resolved. See United States v. Trejo-Zambrano, 582 F.2d 460 (9th Cir. 1978); United States v. Ashley, 569 F.2d 975 (5th Cir. 1978).

82. United States v. Doe, 556 F.2d 391 (6th Cir. 1977); United States v. McMains, 540 F.2d 387 (8th Cir. 1976); United States v. Hall, 452 F. Supp. 1008 (S.D.N.Y. 1977); United States v. Heller, 435 F. Supp. 955 (N.D. Ohio 1976); United States v. Glasgow, 389 F. Supp. 217 (D.D.C. 1975).

There is authority that there is inherent equitable authority, aside from the YCA, to expunge criminal justice records. United States v. Doe, 556 F.2d at 393; United States v. Glasgow, 389 F. Supp. at 224, n.17; United States v. Hall, 452 F. Supp. at 1013; Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974).

83. Fite v. Retail Credit Co., 386 F. Supp. 1045 (D. Mont. 1975), *aff'd,* 537 F.2d 384 (9th Cir. 1976). The YCA offender lost his job when his employer learned of the theft conviction that led to the YCA sentence.

84. Kutcher, *supra,* note 81 at 61 expresses this view in reliance on United States v. Fryer, *supra,* note 80.

85. *Cf.* 21 U.S.C. § 844, providing for expunging a conviction record for a first offense of

IV. Different Criteria for Parole Than for Commitment

Although the YCA sentence was intended to be rehabilitative only, and not punitive, the United States Board of Parole never so treated it. The parole release criteria used by the Youth Corrections Division in considering YCA offenders was always the same as the Board used generally. The circumstances of the offense, prior criminal record, and institutional experience were all considered relevant factors, but it was not until publication of Parole Guidelines in the fall of 1973 that this became evident for all to see.[86]

In the Parole Commission and Reorganization Act of 1976,[87] Congress changed the criteria for granting parole to YCA offenders, but without changing the basis for commitments under the YCA. The 1976 Parole Act abolished the special Youth Correction Division, and made the criteria for parole of YCA offenders the same as the criteria for adults,[88] while also giving legislative sanction to Parole Commission use of guidelines,[89] which explicitly adopted severity of the offense as one factor.[90]

In considering whether the 1976 Parole Act could be applied retroactively to a YCA offender, the Second Circuit in *Shepard v. Taylor*[91] said: "The instant controversy arises out of the recent tendency to reject the so-called 'rehabilitative ideal' as a relic of an earlier, more optimistic, era and to return to traditional criteria of retribution and deterrence in punishing juvenile offenders."[92] To

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simple possession of drugs, and authorizing the offender thereafter to answer any inquiry regarding the matter in the negative without being liable "under any provision of any law to be guilty of perjury or otherwise giving a false statement."

86. *E.g.*, U.S. Board of Parole, Dep't of Justice, Rules of the United States Board of Parole, Effective January 1, 1971, 57 with cross-reference to 14-16 (1971). While the Rules, Effective January 1, 1965, are not quite so explicit, they still called for a consideration of "all the available facts" and analogized the treatment of YCA offenders to adults committed under § 4208(a)(2). U.S. Board of Parole, Dep't of Justice, Rules of the United States Board of Parole, Effective July 1, 1965 (1965).

Guidelines were first published in 38 Fed. Reg. 31, 942 (1973).

87. Parole Commission and Reorganization Act of 1976, Pub. L. 94-233, 90 Stat. 219 (1976) (hereinafter Parole Act of 1976). Effective date of the Act was May 14, 1976. Principal provisions of the Act are now codified at 18 U.S.C. §§ 4201-4218 (1976 & Supp. 1979).

88. This was done by amending §§ 5005 and 5017(a).

89. § 4203(a)(1).

90. § 4206(a).

91. 556 F.2d 648 (2d Cir. 1977).

92. *Id.* at 650. The opinion was delivered by Chief Judge Irving R. Kaufman. Mr. Justice

now use the same criteria, the Second Circuit said, to determine parole release for a YCA offender, who was sentenced to treatment as is used for the hardened adult criminal constitutes a "midstream increase in punishment" that violates the constitutional prohibition against ex post facto laws.[93]

V. The Inexplicable Vagaries of the YCA Sentence

There are inexplicable vagaries in the YCA sentence, when compared with an adult sentence, even of the same length. Except with the benefit of hindsight and with reference to the facts of specific cases, it is impossible to say which is the more favorable, or lenient, sentence.

The sentence imposed under § 4205(b)(2) is the most favorable regular adult sentence insofar as the statutory terms are concerned. The Zip-6 sentence imposed under § 5010(b) is the most favorable YCA confinement sentence. Offenders serving either sentence are eligible for release at any time.[94] Both must be released by the end of four years.[95] If parole is violated the YCA offender is entitled to credit against the sentence for time on parole,[96] but the adult has a right to such time only if the violation is not for a new crime or is not for a refusal to obey commission orders.[97]

The parole guidelines used by the United States Parole Commission are all at least as favorable, and generally more favorable, to

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Tom Clark was a member of the panel.

93. *Id.* Some differences of opinion had been developing as to the appropriate criteria governing parole release of YCA offenders. A district court in Pennsylvania held that the use by the Parole Commission of guidelines, incorporating offense severity as a factor, violated the purposes of the YCA and so was illegal. Mayet v. Sigler, 403 F. Supp. 1243 (M.D. Pa. 1975). The Tenth Circuit, quite offhandedly, disagreed and sustained the use of such guidelines. Fronczak v. Warden, 553 F.2d 1219 (10th Cir. 1977). To the same effect is Robinson v. Hanberry, 442 F. Supp. 933 (E.D. Mich. 1977).

The *Shepard* view that the 1976 Act cannot be applied retroactively to a YCA offender has been followed in DePeralta v. Garrison, 575 F.2d 749 (9th Cir. 1978); Duldulao v. United States Parole Commission, 461 F. Supp. 1138 (S.D. Fla. 1978).

94. *Cf.* § 5017(a) and § 4205(b)(2).

95. *Cf.* § 5017(c) and § 4206(d), although there is a proviso on the latter.

96. Similarly the YCA offender is entitled to credit against a confinement sentence for time spent on probation.

97. *Cf.* § 5017(c) and § 4210(b) and (c).

the YCA than to the adult offender,[98] even the adult serving a § 4205(b)(2) sentence, inasmuch as the Parole Commission treats the (b)(2) sentence the same as other regular adult sentences.[99] There is no YCA advantage for offenses whose severity is rated low, nor for low moderate severity offenses with better than a "poor" salient factor. But beginning with the low moderate offense and a poor salient factor, the YCA offender is required to serve terms of confinement that are shorter than adults are required to serve by three to thirty months. The discrepancy increases directly with the severity of the offense.

The maximum term that a YCA offender can be required to serve is greater than the term that can be required of an adult. This is because the YCA offender is denied the good time to which an adult is entitled under present Bureau of Prisons policy.[100] The meager case authority tends to support the Bureau, but it is to be noted that the three principal cases considering the issue were *pro se* and were also coupled with a challenge to the length of the YCA sentences because they exceeded those imposable on adults.[101] The reason given for denying good time credit on the YCA sentence is that the sentence is not for a definite term, as required by the good time statute, § 4161.[102] But the District Court in *Foote v. United States*[103] took the trouble to compare the YCA and the (b)(2) sentence, to which good time does apply, and found they were both for a "definite term." But *Foote* nevertheless denied good time on the ground that the YCA is an integrated law and because it was thought the YCA prohibition against "commutation of sentence" is intended to exclude good time.[104] In light of the changes made by the Parole Act of 1976 in both the YCA and regular adult sentences,

98. 28 C.F.R. § 2.20 (1978). The distinctions are continued in the proposed revised guidelines. 43 Fed. Reg. 46, 859-67 (1978).

99. *Id.*

100. U.S. BUREAU OF PRISONS, DEP'T OF JUSTICE, POLICY STATEMENT 7620.1: FEDERAL YOUTH CORRECTIONS ACT (1972). For the statutes governing adult good time, *see* §§ 4161-66.

101. Staudmier v. United States, 496 F.2d 1191 (10th Cir. 1974); Hale v. United States, 307 F. Supp. 345 (W.D. Okla. 1970); Foote v. United States, 306 F. Supp. 627 (D. Nev. 1969).

102. Staudmier v. United States, 496 F.2d at 1192; Hale v. United States, 307 F. Supp. at 346.

103. Foote v. United States, 306 F. Supp. at 628.

104. *Id.* The court simply ignored the part of the section providing that commutation should be "only in accordance with rules prescribed . . ." § 5017.

particularly in narrowing the differences between the YCA and the (b)(2) sentences, it can be persuasively argued that, whatever the law may have been, since adoption of the 1976 Parole Act, YCA offenders are entitled to good time credit against computation of their maximum terms, although not against their conditional release dates.[105]

VI. THE BENEFIT-NO BENEFIT SHELL GAME

"Unless the court shall find that the youth offender will not derive benefit from treatment," a YCA sentence rather than an adult sentence must be imposed. In this indirect way, the YCA, in § 5010(d), created the "no benefit" rule for persons under the age of 22 that has been the YCA's most fruitful source of litigation—at least until the United States Supreme Court undertook to settle the rule in 1974 in *Dorszynski v. United States*.[106] The "no benefit" rule does not apply when the youth offender is placed on probation or given a split sentence. With a finding of "no benefit" the court may impose any other authorized adult sentence.[107]

The "no benefit" rule has not been extended to young adults, those twenty-two through twenty-five, who are eligible under § 4216 to be sentenced under the YCA.[108]

Before the Supreme Court decision in *Dorszynski* the circuits had split in the application of the "no benefit" rule. Some required the

105. Statutory good time under § 4161 is computed on the basis of the length of the aggregate of the sentences being served. Initially, the defendant will be credited with the full amount of statutory good time that can be earned, but later, to the extent that it has been earned, the good time can be forfeited under § 4165, although forfeited good time can also be restored under § 4166. Extra good time can be earned under § 4162 for employment in prison industries or for other meritorious service.

Good time has no effect on the parole eligibility date. But when a prisoner has been paroled and returned to confinement for a parole violation, all good time earned to that date is in effect forfeited, because a new computation is made of the good time that can be earned on the length of the sentence still to be served, although using the "rate" for the overall sentence.

106. 418 U.S. 424 (1974).

107. § 5010(d) only refers to sentences imposed under § 5010(b) and (c), and does not refer to probation sentences under § 5010(a).

108. Farries v. United States, 570 F.2d 92 (3d Cir. 1978); United States v. Barton, 566 F.2d 1106 (9th Cir. 1977); Mitchell v. United States, 547 F.2d 875 (5th Cir. 1977); Brown v. United States, 547 F.2d 821 (4th Cir. 1977); United States v. Noland, 510 F.2d 1093 (4th Cir. 1975); United States v. Schwarz, 500 F.2d 1350 (2d Cir. 1974).

district court to make an explicit finding, supported by reasons on the record, that the offender would not benefit from a YCA sentence. Other circuits held that the "no benefit" finding could be implied from the record.[109] The Court resolved the conflict by laying down the following rule: "[W]hile an express finding of no benefit must be made on the record, the Act does not require that it be accompanied by supporting reasons."[110]

Under the philosophy motivating adoption of the YCA, the "benefit-no benefit" finding undoubtedly was intended to be an honest and realistic evaluation of the offender's potential for rehabilitation. But there were inherent fallacies in the YCA philosophy, the principal one being the unproven notion that there is something peculiar about youthful age, *per se,* that makes it possible for the sentencing judge to predict more easily and more accurately than in the case of adults, which persons can or cannot be rehabilitated. The result is that the YCA does not in fact segregate impressionable first offenders from sophisticated young criminals, whose criminal records are limited only by opportunity and not by disposition. The youthful "lamb" is confined with the youthful "wolf," whose predatory disposition is perhaps enhanced rather than diminished by his youth. Moreover, Congress in 1950 was unable to spell out what kind of treatment benefits a youth sentenced under the YCA that is not of equal benefit for a youth sentenced as an adult. It has been simply impossible to develop in the real world the special forms of "treatment" mandated by the YCA in the abstract.

The "benefit-no benefit" finding has become a shell game. The "no benefit" finding may conceal a true "no benefit" finding made with reference to a truly hardened young offender who it is thought should be sentenced as an adult, or it may be made with reference to the minor misdemeanant in order that he may be given a brief period of confinement, but not the onerous Zip-6 sentence. On the other hand, the "benefit" finding may be one made with a view to giving the young offender a better break than he would receive if sentenced as an adult, or it may be a finding that means nothing more than that even the perpetrator of a heinous crime is not hope-

109. 418 U.S. at 425 n.1.
110. *Id.* at 425-26.

less and is entitled to something in the nature of a second chance. And so the "benefit-no benefit" finding may be a realistic finding or it may be nothing more than a sham.

VII. YCA IN THE SUPREME COURT: *Dorszynski* AND *Durst*

The United States Supreme Court has now interpreted the YCA in two cases, the first not being decided until a quarter-century had elapsed after the YCA was enacted: *United States v. Dorszynski,*[111] and *Durst v. United States,*[112] decided four years later.

Both cases clearly reflect the fallacious philosophy of the YCA. In order to show this, the following discussion of the two cases will undertake to show the full factual picture as completely as possible, without being limited to the rarefied legal questions presented to the Supreme Court.

A. *Dorszynski v. United States*[113]

Dorszynski pleaded guilty on February 14, 1972, to the unlawful possession of LSD in violation of 21 U.S.C. § 844(a) and 18 U.S.C. § 2. A split sentence was imposed, under which he was to serve ninety days in a jail-type institution, and then to be placed on probation for two years.[114]

While serving this ninety-day confinement sentence, Dorszynski filed a motion pursuant to § 2255 and Rule 35 of the Federal Rules of Civil Procedure. He claimed that his privilege against incrimination had been violated; that he had not been advised before acceptance of his plea of guilty of the potential six-year sentence under the YCA; that the court had made no finding that he would not benefit from a YCA sentence; and that his plea of guilty was involuntary in that it was based on a promise by a DEA agent that if he cooperated with federal authorities and pleaded guilty he would receive probation under § 5010(a). It may be inferred from these claims that

111. 418 U.S. 424 (1974).

112. 434 U.S. 542 (1978).

113. United States v. Dorszynski, 484 F.2d 849 (7th Cir. 1973); *cert. granted,* 414 U.S. 1091 (1973); *reversed,* Dorszynski v. United States, 418 U.S. 424 (1974); *proceedings on remand,* United States v. Dorszynski, 524 F.2d 190 (7th Cir. 1975).

114. 484 F.2d at 850.

Dorszynski felt aggrieved because he had received a ninety-day jail sentence instead of probation.[115]

By the time a hearing was held on June 2, 1972, on his motions, Dorszynski had been released from confinement on his ninety-day sentence.[116] At the hearing, the DEA agent denied making the alleged promise. Dorszynski denied that there was any inconsistency between his answers given to the court's questions at the time the plea of guilty was entered and his claim regarding the DEA agent's promise.[117]

The judge took a different view. He thought the record showed that Dorszynski must have misrepresented matters either at the plea hearing or at this later hearing, and concluded that Dorszynski had "lied outrageously." He not only denied all motions, but went further, revoking probation and commiting Dorszynski to custody. The court was particularly offended at the defendant's claim that the DEA agent had told him he would ask the court to give Dorszynski probation, and at the plea hearing Dorszynski admitted that he had "hoped" that this had been done. Defense counsel was "outraged" at the action of the court in revoking probation.[118]

Dorszynski appealed. The trial court denied bail pending appeal but the Seventh Circuit on June 5 ordered his release on bail pending appeal.[119]

The Seventh Circuit affirmed the district court's dismissal of the various motions made by Dorszynski, but held that his probation should not have been revoked. Only a conviction of perjury, the Seventh Circuit said, can suffice to constitute a violation of law that violates the conditions of probation and justifies probation revoca-

115. *Id.* There is no indication in these claims whether the failure to be given an opportunity under the YCA to have his conviction set aside under § 5021(a) was a substantial grievance.

116. Dorszynski was tried and sentenced on February 14, 1972, and immediately committed to jail. Brief for Petitioner, Appendix, 418 U.S. 424; Proceedings upon Filing Information, Arraignment, Plea and Sentence, pp. 6-14. He was released from physical confinement on May 11, 1972. *Id.* at 53.

117. Transcript of Hearing, June 2, 1972, *Id.* at 25-28.

118. *Id.* at pp. 46-51. As a result both Dorszynski and his counsel felt aggrieved at the turn the proceeding had taken and went to higher courts for redress.

119. 484 F.2d at 850.

tion.[120] Accordingly, the Seventh Circuit on July 20, 1973, reversed the order revoking Dorszynski's probation.[121]

In its affirmance, the Seventh Circuit did take the view that an adult sentence could be imposed without making any express finding of "no benefit." But considering the overall issues presented, the point was relatively minor, and it is extremely doubtful that Dorszynski himself was really seeking a YCA Zip-6 sentence in preference to his adult sentence imposing a ninety-day jail term.[122]

Dorszynski's legal position after the Seventh Circuit reversed the revocation of his probation is not clear. Did Dorszynski's probation continue to run during the appeal? Probation conditions and bail conditions are comparable in many respects, and the conditions can be made co-extensive. If so, a violation of the one will automatically be a violation of the other. Whether Dorszynski's probation ran during the appeal is never discussed in the cases. But in light of the strong possibility that it did, it is difficult to see what Dorszynski's grievance was at this point. The inference is compelling that he was only seeking the satisfaction of proving that the district court had been wrong in its handling of the whole case.

But for whatever reason, Dorszynski petitioned for certiorari and it was granted on December 10, 1973.[123] On these attenuated facts, the Supreme Court undertook to decide whether a district court must make a finding of "no benefit" before it can sentence a youth offender convicted of a misdemeanor to a regular adult sentence of not over one year.[124]

On June 26, 1974, the Supreme Court reversed the Seventh Circuit and remanded to the district court for further proceedings not

120. *Id.* at 852. In United States v. Grayson, 438 U.S. 41 (1978), the Supreme Court upheld the power of the sentencing judge to take the defendant's false testimony into consideration in setting a sentence. This holding does not quite reach the question in *Dorszynski* as to whether such false testimony can be used to revoke probation. Morrissey v. Brewer, 408 U.S. 471 (1972), indicates that in a probation revocation proceeding a different rule will be applied.

121. 484 F.2d at 852.

122. *Id.* at 851.

123. 414 U.S. 1091 (1973).

124. Dorszynski was allowed to proceed *in forma pauperis.* The American Civil Liberties Union filed an amicus curiae brief urging not only that the sentencing judge must make an express finding of "no benefit" but also must give express reasons for such a finding.

inconsistent with the opinion. By this time the case was moot, at least if probation continued to run during the appeal.[125]

According to the Seventh Circuit this is what happened after the remand to the district court:

> Upon remand the trial court affirmatively made the express finding that the defendant would not benefit from treatment under section 5010(b) or (c) of the Youth Corrections Act, but giving as the only reason for the finding 'the severe nature of his misconduct.' Although the defendant withdrew his request for a re-sentencing proceeding, the court concluded that it was obliged to re-sentence and 'the court sentences' the defendant precisely in the manner in which he was previously sentenced.[126]

What all this means is unclear. It may mean that the district court has only formally entered a new sentence, recognizing at the same time that Dorszynski had already completed service of the sentence. It could mean that Dorszynski must still serve the two years probation, which had been suspended during the appeal. But it also could mean that because of "perjury" at the motion hearing, the court has increased the sentence and Dorszynski must serve a new ninety-day jail term plus two years probation. Whatever the sentence means, it is also unclear why Dorszynski first asked for resentencing and then withdrew the request, and whether or not this had any effect on the court's imposition of the new sentence.

In any event, Dorszynski again appealed to the Seventh Circuit, re-asserting some of his original grounds, plus new ones, including one based on the Seventh Circuit's holdings that a youth offender must be proceeded against by indictment if a YCA confinement sentence is to be imposed.[127] Denying retroactive effect to that holding, the Seventh Circuit on October 15, 1975, affirmed the district

125. Dorszynski was sentenced on February 14, 1972. He was released from confinement on May 11, 1972. Consequently the two years of probation, if running during the appeal, ended on May 12, 1974, well before June 26, 1974, the date of the decision. Neither briefs nor reports of the case give any indication that the mootness point was ever raised.

126. 524 F.2d at 192.

127. United States v. Neve, 492 F.2d 465 (7th Cir. 1974), adopting the District Court opinion, 357 F. Supp. 1 (W.D. Wis. 1973).

court, and on November 10, 1975, denied rehearing and rehearing *en banc.*[128]

While Dorszynski's position on November 10, 1975 is far from clear, one thing is quite clear—Dorszynski's use of YCA had no connection, or at most a very attenuated connection, with the original purposes for which the YCA was enacted, or with the question that the Supreme Court undertook to decide in the *Dorszynski* case.

If one can attribute motives to Dorszynski and his counsel in light of this whole sorry episode, the following can be inferred: Dorszynski thought he had been miserably used—he thought he had a promise of probation for cooperation with the federal authorities and pleaded guilty. He got a jail sentence of ninety days instead. He was angry and decided to fight the government. The sentencing judge found him to be a troublemaker and thought he had lied, and to teach him a lesson improperly revoked his probation. Dorszynski's actions thereafter are hard to understand, except that he became determined to fight this to the bitter end—at no financial cost to him, inasmuch as he was proceeding *in forma pauperis.*

B. *Durst v. United States*[129]

The second case the United States Supreme Court has taken in order to interpret the YCA is *Durst v. United States.* When the facts are considered, one thing is clear—the defendants were not seeking the "treatment" benefits of the YCA, that is, unless they were all masochists.

All five youths were convicted of misdemeanors, given probation under § 5010(a), and as a condition of probation one was fined $50 and the others $100 each. Durst was fined $100 and also required to make restitution of $160.[130]

128. 524 F.2d at 190, 193.

129. 434 U.S. 542 (1978). Five separate cases in the District of Maryland were consolidated. District court proceedings, which took place in 1976, are not reported. The court of appeals affirmed without a published opinion. 549 F.2d 799 (4th Cir. 1976). Certiorari and motion to proceed *in forma pauperis* were granted by the Supreme Court on March 21, 1977. 430 U.S. 929. Information given in the reported opinions has been supplemented by use of the briefs. CRIMINAL LAW SERIES, 9 LAW REPRINTS No. 13 (1977-1978 Term).

130. Durst pleaded guilty to a violation of § 1701, obstruction of mails, which carries a maximum penalty of a $100 fine and six months imprisonment. He was sentenced on February 24, 1976, to six months imprisonment, which sentence was suspended, and was placed

The question presented to the Supreme Court for decision, as stated in the opinion of the Court, was "whether a trial judge (or designated United States Magistrate) who suspends a sentence of commitment and places a youth offender on probation pursuant to § 5010(a) of the Federal Youth Corrections Act (YCA), 18 U.S.C. § 5005 *et seq.* (1976 ed.), may impose a fine, or require restitution, or both, as conditions of probation."[131]

The relief asked for by the defendants had nothing to do with the supposed benefits of the YCA, other than simply being relieved of paying fines, and in the case of Durst, making restitution. The petitioners asked that their sentences be vacated and remanded "for resentencing with directions to strike from each sentence the requirement of payment of the fine and, in the case of Durst, restitution."[132] If the petitioners had won in the Supreme Court, and the case had been remanded for further proceedings not inconsistent, whether the district court would have been so limited is arguable. Perhaps the court could have imposed a Zip-6 sentence under § 5010(b) on the theory that such treatment was for the benefit of the defendants, and so would not constitute an increase of sentence in violation of *North Carolina v. Pearce.*[133]

As regards Durst, it appears the case as to him had become moot

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on probation for three years under § 5010(a). As a condition of probation he was fined $100 and ordered to make restitution of $160. On December 22, 1976, after probation was revoked for an unidentified violation, a "no benefit" finding was made. A regular adult sentence of three months imprisonment was then imposed. Durst was released from custody on February 26, 1977, no reason being reported for the early release.

Rice, like Durst, pleaded guilty to a violation of § 1701, and on June 2, 1976, was given a suspended six months jail term, and placed on probation under § 5010(a) for two years and fined $100. He was a young adult, and so sentence was imposed under § 4216.

Blystone pleaded guilty to a violation of § 661, theft of property worth less than $100 from a government reservation, and on February 24, 1976, was placed on two years probation under § 5010(a) and fined $100 as a condition of probation. The sentence apparently made no reference to a sentence of imprisonment or suspension of the imposition of such a sentence. The maximum penalty authorized for the offense is a $1,000 fine and a one-year imprisonment. Pinnick was convicted of the same offense and on April 5, 1976, given the same sentence, and also "was sentenced to a suspended sentence," whatever that means. Brief for Petitioners p. 3, 434 U.S. 542. Flakes similarly pleaded guilty to a violation of § 641 and on May 26, 1976, the "imposition of sentence as to imprisonment was suspended" and he was placed on probation under § 5010(a) for one year and fined $50. *Id.* at 4.

131. 434 U.S. at 543.

132. Petitioners' Brief at 12, 434 U.S. 542.

133. 395 U.S. 711 (1969).

before the Supreme Court granted certiorari. For undisclosed reasons he had violated probation under § 5010(a), his probation had been revoked, the court had made a "no benefit" finding, and he had been given a three-month adult jail term, without any fine or requirement of restitution. He had served this jail term and been released. It thus appears that as to him the fine and restitution had simply been superseded by the adult sentence.[134]

The *Durst* argument was that the YCA provides an alternative sentencing structure for YCA offenders, which is exclusive of the penalties provided for regular offenders. Inasmuch as the YCA is silent as to the imposition of fines or restitution, under this view of the exclusive nature of the YCA, a fine or restitution is unauthorized in connection with a YCA sentence, at least as to sentences imposed under § 5010(a) and (b), regardless of what may be authorized under § 5010(c). The Supreme Court thought that the legislative history was to the contrary and showed that Congress intended to continue to authorize fines in connection with YCA sentences.

The holding of the Supreme Court was that "when placing a youth offender on probation under § 5010(a), the sentencing judge may require restitution, and, when the otherwise applicable penalty provision permits, impose a fine as conditions of probation . . . ."[135] The restitution contention by Durst was abandoned by his counsel at oral argument.[136] The Court thought that both fines and restitution were "rehabilitative" and not merely punitive and that the legislative history showed that Congress intended to authorize sentencing courts to use these techniques in connection with the use of probation under § 5010(a). The point is essentially semantic—

134. As to restitution, the Durst brief recognized the mootness point, arguing against mootness on the ground that if left standing the sentence could have a detrimental consequence in that a future sentencing judge might not, for that reason, consider imposing a fine or restitution. The reasoning is far-fetched, to say the least, but even more so is the endeavor to bring the proceeding within the scope of a Rule 35 motion to correct an illegal sentence. Petitioners' Brief at 11, 434 U.S. 542. The government did not respond to this point.

Durst's brief does not discuss the point as to whether his case is not also moot as to the fine.

135. 434 U.S. at 544.

136. 434 U.S. at 550, n.11. Query whether counsel had anything to abandon. *See* text following note 133, *supra.*

people dislike "rehabilitative" fines as much as they dislike "punitive" fines.[137]

VIII. Illusory Segregation and Treatment of YCA Offender

While the United States Supreme Court has interpreted the YCA only where misdemeanants were involved, the courts of appeals have relied on the same cases in applying the YCA to the most "hardened" of youthful offenders. The saga of Conrad S. Dancy, as reported, is an extreme example.[138]

On September 23, 1971, when Dancy was under the age of twenty-two[139] and eligible for the YCA, he was convicted of a felony murder, committed in the District of Columbia in 1970. The conviction was affirmed.[140] The sentencing judge asked for a § 5010(e) observation report before imposing sentence. The report recommended an adult sentence, and accordingly the court imposed the mandatory adult

137. Counsel for Durst overlooked, as did the Supreme Court, a broader argument that can be made on the use of fines as a condition of probation.

Section 3651 states, "While on probation and among the conditions thereof, the defendant—May be required to pay a fine in one or several sums." *Durst* interprets this as though there were a period after the word "fine," thus disregarding the significance of the words "in one or several sums." *When* a fine is to be paid is not dealt with in any statutory provision; there is nothing comparable to § 3568, which sets forth an exclusive method for determining *when* a sentence of imprisonment commences to run. Section 3565 deals only with the "collection" of fines and penalties.

The Probation Act does not provide an independent basis for imposing a fine. As the Court said in *Durst*, "[A] fine may be imposed under § 3651 only if the penalty provision of the offense under which the youth is convicted so provides." 434 U.S. at 550 (footnote omitted). The Court left open the question whether a fine can be imposed under § 3651 when the statute authorizes only a term of imprisonment. *Id.*, n.12.

If this be true, then the purpose of the provision in § 3651 is simply to make the "manner of payment" of a fine the condition of probation. The court may require payment in a lump sum and fix the time, the same as when the fine is imposed in conjunction with a term of imprisonment. Or a fine may be imposed, with payment to be in installments. In either case, the nonpayment of the fine as required is a violation of the conditions of probation, and so grounds for revoking probation. On the other hand, when a fine is imposed as punishment, without being a condition of probation, there is nothing but a civil remedy for nonpayment. In this latter case, imprisonment for nonpayment would be an additional punishment and violate double jeopardy.

138. United States v. Dancy, 489 F.2d 1273 (D.C. Cir. 1974) (no published opinion), *aff'd*, United States v. Dancy, 510 F.2d 779 (D.C. Cir. 1975), *vacated and remanded sub nom*, Dancy v. Arnold, 572 F.2d 107 (3d Cir. 1978).

139. His exact age is never stated.

140. United States v. Dancy, 489 F.2d 1273 (D.C. Cir. 1974) (no published opinion).

sentence of life imprisonment, under which twenty years of service are required for parole eligibility. An appeal was taken to the court of appeals, which held the appeal pending Supreme Court action in *Dorszynski.* In light of that decision, Dancy's sentence was vacated and the case remanded for resentencing.[141]

On remand, the district court used § 5010(c) to impose a YCA sentence of twenty years. Under this sentence, instead of having to serve twenty years before becoming eligible for parole, Dancy became eligible for parole immediately and he had to be released on parole after service of eighteen years. Dancy was transferred from the Lorton Youth Center to the Federal Correctional Institute at Petersburg; because of misconduct he was then transferred to the United States Penitentiary at Lewisburg, where he was placed in the general population. He brought a habeas corpus proceeding, claiming that under the YCA he could not be confined in the general population of a federal penitentiary. The district court agreed and ordered him transferred back to Petersburg. The Third Circuit affirmed the grant of the writ, but vacated the portion requiring that Dancy be confined at Petersburg.[142] (The FCI at Petersburg is used as a place of confinement for both YCA and non-YCA offenders.)

In accepting Dancy's argument, the court relied upon the many cases justifying imposition of a longer YCA sentence on a misdemeanant than the sentence authorized for an adult, or for a youth treated as an adult.[143] The court relied heavily on the *quid pro quo* argument used by then-Judge Burger in *Carter v. United States.*[144] But inasmuch as no "longer" sentence was involved in *Dancy,* it was necessary to turn to a "conditions of confinement" approach to find the *quid pro quo.* "[I]f a youth offender serving a YCA sentence is subject to exactly the same conditions of confinement as an adult

141. United States v. Dancy, 510 F.2d 779 (D.C. Cir. 1975).

142. Dancy v. Arnold, 572 F.2d 107 (3d Cir. 1978). The Third Circuit had considered the matter of conditions of confinement of YCA offenders once before. In 1973, in a *per curiam* opinion, it remanded United States v. Lowery, 484 F.2d 457 (3d Cir. 1973), to the district court for a hearing. Apparently, the problem went away, because *Lowery* did not come up again for consideration.

The District of Columbia also considered the same question. United States v. Alsbrook, 336 F. Supp. 973 (D.D.C. 1971); and United States v. Lowery, 335 F. Supp. 519 (D.D.C. 1971). No final resolution of the question resulted from these cases.

143. *See* text beginning after note 42, *supra.*

144. 306 F.2d 283, 285 (D.C. Cir. 1962).

prisoner, the *quid pro quo* rationale is undermined and the constitutionality of the Act called into question."[145]

But the Third Circuit became lost in the underbrush when it undertook to spell out the type of confinement that was permitted under the YCA.

Dancy argued that the youth offender "must be segregated from other offenders at all times, and that confining him among adult prisoners in a federal penitentiary is contrary to the terms of his sentence."[146] On the other hand, the government argued that "YCA inmates need only be segregated from other offenders 'insofar as practical' . . . ."[147] Although the court said it accepted Dancy's construction of the YCA, in a footnote substantially contradicting the text, the court gave the government most of what it wanted. In the text of the opinion, the court said, "[P]lacing a youth offender in the general population of a federal penitentiary is contrary to [the YCA]."[148] But in the supporting footnote this was modified by saying, "A youth offender may not be placed, as petitioner has, in the general adult population of a federal penitentiary. But this would not prevent the establishment of a youth offender facility within the walls of a penitentiary if it otherwise complied with the treatment and segregation requirements of the YCA."[149]

The Bureau of Prisons apparently understands this to mean that the provision of separate sleeping quarters, by using separate housing facilities, within its regular adult institutions complies with the "treatment and segregation requirements of the YCA."[150] This has been the response of the Bureau of Prisons to the *Dancy* decision.[151]

145. 572 F.2d at 111. In support, the court cited Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975), holding that New York could not constitutionally confine, under a comparable New York act, YCA offenders with adult offenders. The New York YCA had been repealed.

146. 572 F.2d at 109.

147. *Id.*

148. *Id.* at 113.

149. *Id.* at 113, n.9.

150. *Id.*

151. *See also* Brown v. Carlson, 431 F. Supp. 755 (W.D. Wis. 1977), which ordered release of YCA offenders confined in violation of the YCA. There is no further reported developments regarding *Brown* and the case was ignored by the Third Circuit in *Dancy*.

On April 20, 1979, the United States District Court for the District of Colorado, in a suit filed by nine inmates at Englewood FCI, ruled that defendants committed under the YCA

Only one judge, and then in lonely dissent, has taken a look at the operation of the YCA since 1950 as an aid to application of the Act. This was District Judge James M. Burns of Oregon, sitting by designation in the Ninth Circuit case of *United States v. Marron.*[152] Circuit Judge James M. Carter was also on the panel, Judge Carter having come to the bench shortly before the YCA was enacted, and so was familiar with the YCA from its origin.[153]

At issue was the legality of a probation revocation, but this turned upon the legality of the original sentence. After finding that the twenty-year old offender would benefit from the YCA, the district judge had sentenced him to three-years confinement, and then, using § 3651, suspended execution on condition he spend thirty days in jail, in 48-hour stints, followed by probation for the balance of the term.

After apparently having served his time in jail, Marron was convicted of a violation of state law, and for this his probation was revoked and he was committed under a regular Zip-6 sentence.

Speaking for the court, Judge Carter found it unnecessary to determine whether probation had been properly revoked, because he found the original sentence was illegal and subject to correction by the imposition of a "legal" Zip-6 sentence. The first sentence he said, had "amounted to imposition of retributive punishment, which is not permitted under the YCA."[154]

Judge Burns rejected this sterile conclusive reasoning. While he felt bound by the Ninth Circuit precedents that required holding the original sentence illegal, he hoped they would be reconsidered by an *en banc* court.[155] But he felt free to challenge the disposition of the case and on this ground dissented. He challenged the view that the YCA is exclusively a rehabilitative sentence, pointing out,

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are entitled to special programs and to be confined separately from other inmates. The Bureau of Prisons was given until September 1, 1979, to submit a written plan of implementation and the U.S. Parole Commission was given 30 days to establish parole release dates. Federal Prison System, *Monday Morning Highlights,* May 7, 1979, p. 2.

152. 564 F.2d 867 (9th Cir. 1977).

153. *Id.* at 871, n.5.

154. *Id.* at 870. The Ninth Circuit precedents ruled imposition of a fine in connection with probation under § 5010(a) to be illegal.

155. *Id.* at 872-74.

"A better reading of the YCA . . . is to say that any and all penal objectives may be pursued in sentencing under its provisions, so long as the means chosen to satisfy these objectives do not substantially detract from the primary goal of rehabilitation."[156]

> Then turning his attention to the operation of the YCA he said: As for rehabilitation, it is extremely doubtful that two of the chosen means of the Act—§§ 5010(b) and 5010(c)—any longer serve their purpose, if they ever did. Many, if not most, of the youths committed to custody under § 5010(b) are in exactly the same institutions, and under precisely the same conditions, as adults who have been imprisoned, regardless of whether the principal aim of the sentencing judge was deterrence, separation, retribution, or rehabilitation. We do not need scholars to tell us that rehabilitation is an uncommon product of incarceration in such large fortresses. An imaginatively designed probation sentence will usually be far more rehabilitative to a young offender than confinement for possibly four years under § 5010(b) or eight years under § 5010(c). To say that a fine or a short jail sentence imposed as condition of probation is punitive and retributive in comparison to youth offender commitment which is "rehabilitative," strikes me as jurisprudence by label and the height of unrealism . . . .
>
> The *Hayes* line of cases stands for the proposition that up to four years of total confinement in a federal prison is "rehabilitative," so long as we order it for a youth under 22 (or for that matter, a young adult under 26), but a fine or 30 days in jail or a community treatment center as a condition of probation is "punitive." I dare say that few, if any, of the youths who spend time in Lompoc would agree with this distinction. I dare say that few of the Bureau of Prison employees who keep them there would either.[157]

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156. *Id.* at 873.

157. *Id.* at 873-74 (footnotes omitted). The *Hayes* line of cases referred to are based on the precedent, United States v. Hayes, 474 F.2d 965 (9th Cir. 1973), holding that a fine cannot be coupled with a Zip-6 sentence.

In footnotes accompanying his opinion, Judge Burns made other telling points. He criticized Judge Carter's intimation that a sentencing judge can accomplish the result of imposing a short confinement sentence by using the observation provision set forth in § 5010(e) of the YCA. He also criticized district courts accomplishing the same result by using the split sentence, after a finding of no benefit, and then using Rule 35 to change the sentence to YCA under § 5010(a). Such use is to force judges to be "corner cutters."

He also quoted Bureau of Prisons statistics to the effect that 777 persons were confined at the FCI at Lompoc, of whom 297 had YCA sentences and 480 had adult sentences. Among

The conclusion to be drawn, of course, from looking at these facts is that a Zip-6 sentence is a more severe sentence than the one that Marron had originally received, and so violates the double jeopardy clause of the fifth amendment.

Given the case as presented, that Marron's sentence could not be increased by imposing a Zip-6 sentence and the original three-year sentence was "illegal," Judge Burns concluded that the only valid disposition would be resentencing to probation under § 5010(a). But this meant that there could be no penalty imposed after probation revocation, because it would be illegal and would constitute double jeopardy to impose the only legal sentence, Zip-6, that could be imposed. But it is not necessary, as Judge Burns thought, to paint the sentencing judge into such a corner. By the simple expedient of changing the "benefit" finding to a "no benefit" finding the way is cleared to correct the sentence by imposing an adult sentence of three years, which is subject to a penalty after revocation. After all, Judge Burns's own analysis of the operation of the YCA, quoted above, shows that the YCA offender receives "no benefit" under YCA confinement.

IX. CONCLUSION

The unanimity of the prestigious sponsors of the YCA—the Judicial Conference of the United States, the Executive Department as represented by the Bureau of Prisons, and the Congress—has militated against any agency of government making a realistic examination and appraisal of the actual operation of the YCA by comparing that operation to the hoped-for expectations stated by its sponsors at the time of adoption.[158]

In Congress, the need for realistic appraisal of the YCA has been lost in the continuing controversy over revising the whole federal criminal code, of which repealing of the YCA would be only a part.[159]

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the latter he thought there must be "hardened offenders" from whom YCAs are supposed to be segregated.

158. *But see* Note, *The Federal Youth Corrections Act: Past Concern in Need of Legislative Reappraisal*, 11 AM. CRIM. L. REV. 229-71 (1972). The reappraisal tends to "out-YCA" the YCA by calling for legislative changes designed to more effectively carry out the purposes of the YCA as stated by its sponsors. The writer makes a half-hearted recommendation to exclude misdemeanants from the YCA.

159. Under S. 1437, 95th Cong., 1st Sess. (1977), YCA would have been repealed by the

The Department of Justice likewise is more interested in securing adoption of the whole proposed revision of the criminal code than in seeking to change only one of its parts.

Meanwhile, the United States Supreme Court apparently remains fully conscious of the prominent part played by the judiciary in the adoption of the YCA. It interprets the YCA only in light of the noble purposes that motivated the judiciary in the 1940's when the YCA was promoted. The Court conveniently uses the cloaking mantle of the judicial process to ignore all consideration of how the YCA has operated in the real world during the last quarter century.

Both Congress and the Court ignore the fact that the YCA does not carry out the principal purposes sought by its sponsors: segregation and treatment.

YCA sponsors envisioned that the relatively innocent first offender would be segregated from the contaminating influence of the older hardened criminal. But this objective can be accomplished under the YCA only by putting the first offender on probation[160] which can also be done under the general Probation Act. Thus, the YCA adds nothing useful. YCA confinement sentences in fact result in imprisoning youthful first offenders with hardened criminals—both youthful and adult.[161] But even YCA prisoners are not necessarily young. Those sentenced under the Zip-6 may be over thirty before completing the sentence, and the YCA youth sentenced under § 5010(c) may be an old man before completing service of his sentence.

The value of separation by age may itself be illusory, and is at least open to question. There is much to be said for mixing offenders of different ages, the older offender having a steadying influence on the young, and the young perhaps having a leavening effect on the

failure to re-enact any comparable provision. The requirement that the proposed Sentencing Commission consider an offender's age in developing sentencing guidelines was seen as a satisfactory alternative to accomplishing YCA purposes. § 2302. *See* S. REP. No. 605, 95th Cong., 1st Sess. 930 (1977).

160. Whether or not segregation can in fact be accomplished on probation may also be questionable.

161. This effort at segregation is bound to be spotty, because of the difficulty—indeed impossibility—of segregating the youthful offender from so-called hardened offenders from the time of arrest, through jail, confinement, and to the completion of the sentence.

older. This very probably is a factor in the Bureau of Prisons having found it impractical to establish institutions—exclusively for YCA offenders, and the statute requires segregation only "insofar as practical."[162]

The "treatment" envisioned by YCA involves "corrective and preventive guidance and training designed to protect the public by correcting the anti-social tendencies of youth offenders."[163] Neither the Bureau of Prisons nor anyone else has found any treatment programs that are of peculiar efficacy for YCA offenders. Programs that are "good" for YCA offenders are also "good" for offenders of the same age serving adult sentences, as well as being "good" for adults as well. To expect to develop special treatment programs for a special class of offenders is simply wishful thinking.

It is not necessary to take into account the shift in the philosophy of sentencing that has occurred since 1950—the shift from rehabilitation to just desserts—to conclude that the YCA has failed. Even under a rehabilitative theory, the YCA is a failure.

X. RECOMMENDATIONS

A. *YCA Should Be Repealed, Except as Noted Below*

Proposals deriving from the report of the National Commission on Reform of Federal Criminal Laws (the Brown Commission) have included recommendations and provisions for the repeal of the YCA.[164]

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162. § 5011.

163. § 5006(f).

164. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971) authorized the sentencing judge to recommend that offenders under the age of 22 be "confined and treated in facilities . . . for the rehabilitation of youth offenders." *See* 18 U.S.C. § 3203(c) (1976), *Id.* at 291. But it is unclear in the report whether outright repeal of the YCA was being recommended or only re-enactment as a separate chapter. The comment to § 3203 is suggestive of repeal, but the Table of Disposition of Title 18 provisions refers only to § 5010(e). *Id.* at 483.

Under S. 1, 94th Cong., 1st Sess. (1975), YCA would have been repealed and no separate provision relating to youthful offenders included. *See* § 2001. The same is true of S. 1437, 95th Cong., 1st Sess. (1977). *See* § 2001.

The Report of the Judicial Committee on S. 1437 simply noted the change and commented that in formulating guidelines, the Sentencing Commission would be required to take age into consideration. *Supra* note 159.

. The Bureau of Prisons, which is responsible for administration of the YCA, likes to quote the inspirational words of the sponsors of the YCA. It then calls for outright repeal of the YCA.[165] The Bureau is chary in its criticisms of the YCA, lest it perhaps be charged with the impropriety of indirectly criticizing the judges who in judicial proceedings have found the Bureau's administration of the YCA to be wanting.

The New York Youth Corrections Act, considered by the Judicial Conference to be a progressive model for the federal YCA[166] was repealed by New York in 1974,[167] on the recommendation of the New York Department of Corrections, and for the same reasons that support the repeal of the federal YCA.[168]

With the repeal of the YCA, another "Noble Experiment" can be brought to a merciful end.

B. *More Favorable Parole Guidelines for YCA Offenders Should Be Continued*

If the YCA is repealed, any statutory basis for the United States Parole Commission applying different guidelines to YCA offenders than to adults will be eliminated.

On the assumption that the Parole Commission *does* have a basis for using different guidelines for YCA and adult offenders, other than giving the appearance that it is carrying out a mandate of Congress, the distinction should be preserved. This can easily be done by adding an amendment to Chapter 311 of the Code requiring the Commission to use different guidelines for offenders under the

165. In testimony before the Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, the Director of the Bureau of Prisons, Norman A. Carlson, on October 27, 1978, said:

> While the Youth Corrections Act was a landmark at the time of its passage, we believe that experience and changes which have taken place over the years have caused the act to outlive its usefulness. We support those provisions of the proposed legislation to revise the Federal Criminal Code which would eliminate the Youth Corrections Act. In our opinion, sentences for youthful offenders should not be longer than those given older individuals who commit similar offenses.

Federal Prisons System, *Monday Morning Highlights,* October 13, 1978, p. 2.

166. Note 13 *supra.*

167. 1974 N.Y. Laws, ch. 652, § 7.

168. Sero v. Preiser, 506 F.2d 1115, 1118-19 (2d Cir. 1974), *cert. denied,* 421 U.S. 921 (1975).

age of 22, or perhaps 26, at the time of conviction, than for adults. While this would bring within the YCA guidelines those youthful offenders serving adult sentences, the power of the Commission to go outside the guidelines in granting or denying parole gives the Commission the discretion to handle these cases.[169]

C. *An Expungement Provision Should Be Retained*

Congress should re-examine the expungement provision contained in § 5021 with a view to making it more effective. Until a broad expungement statute is developed it is easy to retain whatever benefit the present provision has by making it applicable to offenders who were under 22, or perhaps 26, at the time of conviction. The power to trigger the expungement could be left as it is, with the sentencing judge when probation is granted and with the Parole Commission on confinement sentences, or the entire authority could be given to the sentencing judge.

D. *Retroactive Application of Repeal of YCA*

With repeal of the YCA, all YCA offenders should be entitled, upon application to the sentencing court, to have their YCA sentences changed to regular sentences under § 4205(b)(2), with maximum terms no greater than the term of the YCA sentence or the term authorized for the offense, whichever is the lesser. Whether or not the sentencing judge views the change as beneficial to the applicant should be irrelevant, as long as the change asked for is one authorized by statute. Whether or not subsequent events prove the choice to have been wise or unwise should be a matter solely for the consideration of the applicant.

169. Congress might also want to consider requiring the Commission to use these different YCA guidelines for granting parole to adults serving § 4205(b) sentences. Not everyone presently thinks that the Parole Commission is carrying out the intent of Congress in treating all adult sentences alike.