

in the American Law Institute Model Penal Code. They result in serious inequities and make it even more difficult to obtain warranted convictions.

Sentencing should take into account numerous factors which vary from case to case, and the weight to be assigned to each factor should be left to the discretion of the presiding judge in each instance. The interim report of the New York State Temporary Commission on Revision of the Criminal Code, published on February 1, 1963, indicates similar misgivings about the operation of New York's habitual offender legislation.

Finally, mandatory minimums are in direct conflict with Public Law 85-752 (72 Stat. 845, approved Aug. 25, 1958) which seeks to invest the sentencing process with a full consideration of all the factors involved, an objective which that law proposes to reach through judicial institutes and indeterminate sentences.

Section 504 would amend section 22-1513 of the District of Columbia Code which deals with bribery in connection with athletic contests. Although we are not aware of the need for an amendment such as that proposed, this Department interposes no objection. However, the question is raised whether an intention "to limit the margin of victory or defeat" is necessarily a culpable intention. It may well be desirable to state the intended prohibitions in more specific terms. Also, it is noted that subsections (b) and (c) of the proposed amended section of the District of Columbia Code fail to designate the fine applicable to persons convicted thereunder.

Section 506 would amend section 22-2001 of the District of Columbia Code which relates to indecent publications. The section is similar to H.R. 4670 of the 87th Congress which was vetoed by the President on the basis of grave constitutional and other considerations posed by the legislation.

This section of the bill authorizes the issuance of an ex parte temporary restraining order prohibiting the sale or distribution of materials alleged to be obscene and restraining the use of real or personal property for such purpose. Since this is an area involving the application of the first amendment, we have serious doubt that such an ex parte proceeding would be constitutionally permissible. We are not aware of any recent decision specifically upholding such a procedure, and the strong dissenting opinions in *Kingsley Books v. Brown* (354 U.S. 436, 445, 446, 447), indicate that ex parte procedures of this type may be held unconstitutional under the first amendment. Moreover, it is our view that the provisions authorizing ex parte orders enjoining the use of real or personal property may raise due process questions.

Proposed subsection (f) of proposed section 872 provides for the forfeiture of personal property used to produce materials found to violate the statute. This provision raises a substantial constitutional question under the first amendment. While the Supreme Court has held that it is permissible for the legislature to prevent the dissemination of obscene materials through resort to the injunctive process and to provide for the seizure and destruction of materials judicially found to be obscene (*Kingsley Books, Inc. v. Brown*, 354 U.S. 436), we are not aware that it has ever been called upon to consider a statute which provided that the means of producing obscene material may be forfeited, nor are we aware of any such statute.

We recognize, of course, that in areas not involving freedom of expression the instruments of wrongdoing may be validly forfeited (*Goldsmith-Grant Co. v. United States*, 254 U.S. 505). We doubt, however, that this principle authorizes the forfeiture of the means of production of obscene materials, for example, a printing press, or the enjoining of their use so broadly as to preclude utilization for purposes protected by the first amendment. In our view, it is probable that this provision would be held by the courts to constitute an unwarranted, prior restraint on freedom of expression, prohibited by the first amendment.

The Department of Justice is appreciative of the objective of section 506. However, committee consideration of the alternative language proposed in the report of the Commissioners of the District of Columbia is recommended. The Commissioners' substitute eliminates the objectionable aspects of section 506 without sacrificing any of its effectiveness.

Section 509 would prohibit the giving of false reports or information to the Police Department with knowledge that the information is false. The Department of Justice defers to the views of the Commissioners of the District of Columbia as to the need for and desirability of this section of the bill.

It is the view of the Department of Justice that legislation directed to strengthening the law relating to crime and criminal procedure in the District of Columbia should embrace a provision imposing some degree of regulation of