Testimony on behalf of the

American Civil Liberties Union Of the National Capital Area

By

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Before the
Committee on the Judiciary

Of the

Council of the District of Columbia

On

Bill 16-247
"Omnibus Public Safety Act of 2005"

June 30, 2005

The ACLU of the National Capital Area has special concerns about two titles of this bill: Title IX, Anti-Gang Recruitment, Membership and Retention, and Title XXI, Prostitution Free Zones. We are also concerned about the proposals for mandatory minimum sentences that appear in several titles. The absence of any comment about other titles of the bill should not be construed as an endorsement of them.

We also wish to register our concern that the presentation of a nearly 50 page bill covering twenty-two titles may overload what can reasonably be considered in a single hearing. Matters of this complexity should not be resolved in haste.

Title IX. Anti-Gang Recruitment, Membership and Retention

The definition of "criminal street gang" (§ 902(d)) is unnecessarily broad. Subsection (d)(2) would make a group of three or more persons a "criminal street gang" if they associated to violate any criminal law or police regulation.[1] Under that definition, three friends who formed a wine-tasting club and agreed to bring a case of wine into the District from Virginia in violation of D.C. law[2] would be a "criminal street gang." If the Council decides to enact anti-gang legislation, it might consider the approach taken by California in defining "criminal street gang." That definition (Cal. Penal Code § 186.22(f)) requires that a "criminal street gang" have as a primary activity the commission of one or more of 25 listed crimes.

Criminal laws should be narrowly drawn to deal with specific and serious problems, because their violation has serious consequences. They should not be open-ended and available for use in areas not carefully considered by the Council. For the legislative branch to do otherwise would be to invite abuse of discretion.

Title XXI. Prostitution Free Zones

Under current law, an officer must have probable cause to arrest someone for soliciting for prostitution. Title XXI seeks to avoid the requirement to show probable cause for the commission of a crime by giving the police the power to sweep the streets of persons only believed to be prostitutes. There are serious problems with creating exclusion zones.

[1] The Attorney General stated that "the definition of a criminal street gang in this Act is narrowly defined." (Testimony of Robert J. Spagnoletti, Attorney General, May 31, 2005, p. 21.) We respectfully submit that this is a misreading of § 902(d)(2).
[2] D.C. Code § 25-772.

The bill (§ 2105(b)(2), (5)) would punish people for their status, i.e., who they are rather than the wrong they have done. It authorizes an officer to order someone to leave an area, if the officer believes that the person is a prostitute even though the person has not done anything illegal. It may very well be that the suspect has prostitution on her mind, but at the point when the officer orders her to leave, she has committed no offense. This is antithetical to the fundamental American principle that we are not required to prove our innocence and cannot be arrested simply because we might be *thinking* of committing a crime. Our system of law does not vary that principle depending on the citizen's résumé. *See Johnson v. City of Cincinnati*, 310 F.3d 484, 503 (6th Cir. 2002) ("The broad sweep of the Ordinance is compounded by the fact that the Ordinance metes out exclusion without any particularized finding that a person is likely to engage in recidivist drug activity in Over the Rhine.")

The Court of Appeals for the District of Columbia threw out convictions for solicitation for prostitution based on evidence that the defendants "looked and perhaps acted like prostitutes." *Ford v. U.S.*, 533 A.2d 617, 625 (DC 1987). If such evidence is insufficient to sustain a conviction, it also cannot be sufficient to justify an order that someone leave a prostitution free zone. This bill is simply an attempt to accomplish in two steps what the Court of Appeals said cannot be accomplished in one step. *See also Coleman v. Richmond*, 364 S.E.2d 239, 244 (Va. App. 1988) (striking down a statute prohibiting loitering "under circumstances manifesting the purpose of engaging in prostitution" because with

no requirement of an overt act**, "**an officer may arrest someone on mere suspicion of future criminality.")

Someone believed to be a prostitute may be in a prostitution free zone for a lawful purpose such as making change, selling lawful goods, flagging down motorists for a charitable car wash, conducting voter registration drives, soliciting contributions, or lawful panhandling. The suspect might even be in the exclusion zone just to smell the flowers. But the bill authorizes the officer to order her out on the unsubstantiated belief that she had "no other apparent lawful reason" for being in the area (§ 2105(b)(6)). Because it would prohibit lawful activities, Title XXI is unconstitutionally overbroad. *See Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."); *Johnson v. Carson*, 569 F.Supp 974 (M.D. Fla. 1983) (striking down as overbroad an ordinance prohibiting loitering "under circumstances manifesting the purpose of . . . prostitution" because the specific conduct described in the statute is consistent with innocent conduct); *ACLU v. Alexandria*, 747 F.Supp. 324 (E.D. Va. 1990) (city ordinance prohibiting loitering for the purpose of engaging in unlawful drug transactions was unconstitutionally overbroad because it criminalized a substantial amount of constitutionally protected activities).

Because Title XXI vests open-ended discretion in the police to order someone to leave a prostitution free zone without evidence of wrongdoing, the proposal is also unconstitutionally vague. *See Chicago v. Morales*, 527 U.S. 41,

56 (1999) (gang loitering ordinance was unconstitutionally vague because it "may authorize and even encourage arbitrary and discriminatory enforcement."); *Akron v. Rowland*, 618 N.E.2d 138, 145 (Ohio 1993) (drug loitering ordinance was unconstitutionally vague "because it does not give people of ordinary intelligence a reasonable opportunity to know what conduct is prohibited"); *Louisiana v. Muschkat*, 706 So.2d 429 (Louisiana 1999); *Wyche v. Florida*, 619 So.2d 231 (Florida 1993).

Title XXI will also be challenged as legally inadequate for failure to explicitly require specific intent (*mens rea*) as an element of the offense. *See NAACP v. Annapolis*, 133 F.Supp. 2d 795 (D. Md. 2001).

In addition, there are problems of interpreting and applying Title XXI. The offense described in § 2105(a) is premised on there being "a group of 2 or more persons." Does that mean that the persons are functioning as a "group"? Is the problem cured if the suspects keep their distance from each other?

Similarly, what constitutes a failure to obey an order to disperse? Is the recipient of such an order in violation if he returns within the next hour? *See. Morales*, 527 U.S. at 59 (the ordinance "provides that the officer 'shall order all such persons to disperse and remove themselves from the area.' . . . This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again?")

The courts have also required the proponents of exclusion zones to demonstrate that there is no less onerous remedy. *See Johnson v. City of Cincinnati*, 310 F.3d at 505. ("But without some affirmative evidence that there is no less severe alternative [to the drug exclusion zone], we cannot conclude that the Ordinance, in its present form, survives constitutional scrutiny.")

Presumably, the proponents of Title XXI will argue that they are at their wits end in dealing with the problem of prostitution, and that they need the additional tool of an exclusion zone. But apart from whether that will satisfy a court, the Council should inquire as to what will be the effect of setting up a "prostitution free zone." Won't driving prostitutes from one area simply cause them to move elsewhere and then to return to the exclusion zone at the first opportunity?[3] On its face, Title XXI is a prescription for street games with little to show at the end of the day.

Mandatory Minimum Sentences

Mandating minimum sentences is a bad idea. The ACLU is in good company in reaching this conclusion. The American Bar Association at the 2004 meeting of its House of Delegates called for the repeal of these statutes. In urging Congress to reject mandatory minimum sentences in the "Gang

[3] The Attorney General argued that prostitution free zones would be effective as are drug free zones. The evidence cited for this is that in FY 2004, only three persons were charged with a violation of the Drug Free Zone Act in the 140 zones. "Would be drug trade participants left the drug free zones." But this fails to address the displacement effect. Why are we to suppose that the displaced drug dealers didn't take their business to the next block? Attorney General Testimony at 36, note 19.

Deterrence and Community Protection Act of 2005," the ABA said that it opposed such sentences because they "thwart justice" and in many cases "do not create the uniformity of punishment they were designed to achieve." Minorities are "more likely to be subjected to mandatory minimum sentences than white defendants."[4] Chief Justice Rehnquist has described mandatory minimum sentencing as "a good example of the law of unintended consequences."[5] Justice Kennedy called mandatory minimum sentences "unfair, unjust, unwise."[6] All 12 federal judicial circuits have urged repeal of mandatory minimum sentences.[7] Bill 16-247 prescribes them in Titles 1, 5, and 13.

The essential argument for mandatory minimum sentences is that because they provide certainty in the punishment that follows conviction, they will deter crime. But this may be illusory, as in the claims made on behalf of Project Exile cited in the Attorney General's testimony.[8] "In their evaluation of Project Exile, Raphael and Ludwig (2003) found that the decline in Richmond firearm-related homicides would have been likely to occur even in the absence of the program."[9]

The critical question is whether courts are competent to decide appropriate levels of sentences. Is a one-size-fits-all approach to sentencing

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[4] May 11, 2005 letter from ABA Director of Government Affairs Robert Evans to members of the House.
[5] Remarks of Chief Justice William H. Rehnquist, National Symposium on Drugs and Violence in America, June 18, 1993.
[6] Reported in *The Third Branch*, Newsletter of the Federal Courts, Vol. 36, No. 4, April 2004.
[7] The Judicial Conference of the United States in an April 25, 2005 letter to the Chairman of the House Committee on the Judiciary reiterated its longstanding opposition to mandatory minimum sentences.
[8] Attorney General Testimony at 6.
[9] *Firearms and Violence, A Critical Review,* Charles F. Wellford, John V. Pepper, and Carol V. Petrie, eds. National Research Council of the National Academies, The National Academies Press, Washington, D.C. (2004), p. 225.

appropriate or should sentencing be based on a court's assessment with the assistance of expert staff of the defendant's likelihood to recidivate? Should factors such as the defendant's prior criminal record, age, employability be taken into account in making that assessment? Should a court have the authority to differentiate among a group of defendants according to their level of culpability for the offense? Mandatory minimum sentencing deprives the public of the best judgment of its experts in responding to crime.

In addition, mandatory minimum sentencing effectively transfers the authority for sentencing from neutral judges to adversarial prosecutors. With the authority to charge a defendant with a crime carrying the possibility of a severe mandatory minimum sentence, prosecutors are able to induce defendants to plead guilty to a lesser offense. Out of fear of a lengthy prison sentence, innocent persons may agree to serve a lesser sentence.

Another consequence of mandatory minimum sentencing is overcrowding of our prisons. When this happens, the choice may be to build more prisons or to release persons prior to the completion of their sentences. Neither outcome is to be desired.

Thank you for your consideration.