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REFORM OF THE FEDERAL CRIMINAL LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SECOND CONGRESS

SECOND SESSION

MARCH 21, 22 AND 23, 1972

PART III
SUBPART B
POLICY QUESTIONS

Printed for the use of the Committee on the Judiciary

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REFORM OF FEDERAL CRIMINAL LAWS

Part III—Subpart B

Policy Questions

TUESDAY, MARCH 21, 1972

U.S. Senate,
Subcommittee on Criminal Laws and Procedures
of the Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2228 New Senate Office Building, Senator Roman L. Hruska presiding.

Also present: G. Robert Blakey, chief counsel, Malcolm D. Hawk, minority counsel; Robert H. Joost and Kenneth A. Lazarus, assistant counsels; and Mabel A. Downey, clerk.

Senator Hruska. The hearing will come to order.

This morning the Subcommittee on Criminals Laws and Procedures meets to continue hearings on the third phase of its inquiry into revision of the Federal criminal laws.

The hearing today and those which will follow are addressed to the policy questions presented by the proposed code prepared by the National Commission on Reform of the Federal Criminal Laws.

We have a distinguished list of witnesses this morning. I regret to announce, however, that the press of Senate business this afternoon regarding the equal rights amendment will require us to complete these hearings this morning, but this acting chairman will be willing to sit as late as a quarter to one, if necessary, to get that job done. We have several very excellent witnesses, but only about two and a half hours. I must therefore ask that each presentation, including questions, be limited to one-half hour per witness. There is, of course, no limit to the length of the written statements that may be inserted into the record. I am sure, also, that questions raised may be pursued by correspondence and, if necessary, exchange of more than one letter each way.

I must also regretfully announce that the 2 days of hearings that were to follow this morning may have to be postponed until another date. The hearings that the full committee are holding on the ITT matter and the Kleindienst nomination, may make it impossible for the subcommittee to sit. The date for the postponed hearings will be announced as soon as possible.

However, there is some chance that we may be able to sit tomorrow. The information I got earlier this morning is that we will

not have a resumption of the full committee session tomorrow morning. We shall have to see how that situation develops.

I have been asked to extend the greetings and the regrets of Senator McClellan, the chairman of the subcommittee. He is absent on official business, and very necessary business, and asked me to take the duties of chairman under my care for the day.

Our first witness this morning will be Mr. Vincent Broderick, appearing in behalf of the New York County Lawyers Association. Mr. Broderick, you have submitted a statement to the subcommittee, and the statement will be put in the record in its entirety. You may proceed now as you wish to present the evidence, either by outline or highlighting, or reading as far as you can get within 30 minutes.

(Prepared statement of Vincent L. Broderick follows:)

STATEMENT OF VINCENT L. BRODERICK

My name is Vincent L. Broderick. I am Chairman of the Committee on Federal Legislation of the New York County Lawyers Association. I submit herewith, and request that there be included in the record of this hearing, a report prepared by the Committee on Federal Legislation with respect to the proposed new Federal Criminal Code.

This morning I should like to discuss briefly certain of the comments in the committee report I am submitting. In this discussion, I shall draw upon my background, which includes past service in both federal and municipal law enforcement contexts—as Chief Assistant United States Attorney for the Southern District of New York and, briefly, as United States Attorney for that District; and as Deputy Police Commissioner and Police Commissioner of the City of New York.

We strongly support the recodification of the Federal criminal law. The process of recodification mandates a thorough review of the entire pattern of the federal criminal law. Such a review is valuable: the federal criminal law, like all legislatively enacted law, has had a tendency simply to grow, as Congress has moved to deal with particular problems, and imbalances and inequities have inevitably appeared. Such a review makes it possible, among other things, to consider the basic functions of the federal criminal law, and to require that the provisions of the revised federal criminal code conform to those basic functions.

Thus the Committee on Federal Legislation of the New York County Lawyers Association applauds the efforts of the National Commission on Reform of Federal Criminal Laws and, with certain reservations, the product of those efforts. We are happy that the subcommittee on Criminal Law and Procedures of the Committee on the Judiciary is holding these hearings and is giving such careful thought and attention to the proposed new Code.

We believe that there are certain serious problems with the Code as proposed. These problems have been delineated in the report which we have submitted: through careful draftsmanship they can be eliminated, and we urge that they should be eliminated.

Let us first consider the basic purpose to be served by the federal criminal law. It is not the preservation of municipal tranquility: this is a function of local law enforcement, operating under local or state law. The basic purpose of federal criminal law is, it seems to me, a) to protect the public in those areas where local or state law by its very nature cannot or does not reach; and b) to maintain the integrity of the processes by which federal law, where applicable, has its effect.

Thus federal law is necessary to protect the public against fraud where mails or interstate facilities are used; to prevent fraud and unfair practices in the securities markets; to protect the national security; to protect foreign relations against harmful activities; to prohibit the dissemination to the public of impure food and drug products, and to prevent the unregulated distribution of dangerous drugs; and finally, to protect the public against criminal activities which are not limited in their scope to local political areas, i.e., organized crime. It is necessary that, in providing adequate protection to the public in these areas, the processes of federal law enforcement also be

safeguarded by adequate and effective laws—for example, laws against tampering with the administration of criminal justice.

The basic problem which I see with the revision of the federal criminal code as proposed by the National Commission on Reform of Federal Criminal Laws is that it appears to have been drafted with continued reference to state penal laws, which have their roots in the problems of municipal law enforcement, and thus many of the recommendations for a revised federal criminal code are predicated upon inappropriate premises.

Whether or not I am correct as to the misplaced emphasis upon predicates in the municipal law enforcement area, many invaluable and necessary legislative provisions which facilitate effective federal law enforcement under present conditions would disappear, or be materially, and undesirably, altered under the proposed revised code. Among these would be the federal conspiracy statute (18 U.S.C. § 371), the false statement statute (18 U.S.C. § 1001), the mail fraud statute (18 U.S.C. § 1341), the obstruction of justice statutes (18 U.S.C. § 1503), and the criminal extortion statute (18 U.S.C. § 1951).

Conspiracy

Section 1004 of the proposed Code is a general conspiracy statute, and it would replace 18 U.S.C. § 371. If we read section 1004 correctly, however, we do not find in it any language which would prohibit conspiracies "to defraud the United States or any agency thereof in any manner or for any purpose."

In my judgment this sort of a provision, broad in reach, will continue to be essential if perpetrators of presently unanticipated fraudulent schemes against the United States or various of the agencies are successfully to be prosecuted in the future.

False statements

Section 1001 of Title 18 presently provides that "whoever in any matter within the jurisdiction of any department or agency of the United States . . . makes any false . . . statements or representations" is guilty of a crime.

This statute has proved, in the past, to be an important safeguard against fraud upon the Government. Under it, false statements could be successfully prosecuted, even if not in writing or under oath, and, certainly in the Second Circuit, materiality has not been an essential element of proof. Thus a violation of Section 1001 of Title 18 involves 1) a statement, 2) the falsity of that statement, 3) the fact that the false statement was made knowingly and willfully, and 4) the fact that the statement was made in a "matter within the jurisdiction of any department or agency of the United Sates." (See, *United States* v. *Marchisio*, 344 F.2d 653, 666 (2d Cir. 1965). But see *Gonzales* v. *United States*, 286 F.2d 118 (10th Cir. 1960) holding that materiality is an essential element.)

Under the proposed new Code (Section 1352), a false written statement in a Government matter is a misdemeanor, if the statement is material and the defendant does not believe it to be true. If not in writing, it is apparently not a violation under the proposed Code, unless made under oath, in which case materiality is not an element but only a misdemeanor is still involved.

Section 1001 of Title 18 has been an important provision of federal criminal law in the protection of the public. It seems to us that the effect of the proposed new Code will be to dilute this protection. For example, if a conspiracy against the Government were charged which entailed the making of false statements, under the proposed new Code this would constitute only a misdemeanor (Sections 1352 1004(6), 1001(3)).

We strongly recommend that the full reach of the present Section 1001 of Title 18 should be continued in the new Code.

Mail fraud

The mail fraud provision in Title 18 presently provides that "whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office . . ., any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing . . ." shall be guilty of a crime. (§ 1341).

Section 1343 of Title 18 provides a similar criminal sanction with respect to transmission by means of "wire, radio or telephone communication in interstate or foreign commerce." Both of these sections, as every federal prosecutor and law enforcement officer knows, have been invaluable in the prosecution of fraud, particularly fraud which might not be reachable through local law enforcement efforts. Under the proposed new Code, both would disappear.

In their stead would be Section 1732 of the proposed new Code, which deals with theft.

In our judgment the theft provisions of the proposed Code are, from a point of view of effective federal law enforcement, no satisfactory substitute for the broad reach of the mail fraud and wire fraud provisions of present law. These provisions have provided effective sanctions which could be invoked in frauds against consumers: I do not see how criminal provisions which sound in theft (or attempted theft under the proposed Section 1001) can be an adequate substitute therefor. I would strongly urge that the provisions of present law with respect to mail and wire fraud be retained.

Section 1732 of the proposed Code provides, *inter alia*, that a person is guilty of theft if he "knowingly obtains the property of another by deception . . . with intent to deprive the owner thereof, or intentionally deprives another of his property by deception . . .". "Deception" is defined in Section 1741 as excluding "falsifications as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed." "Puffing" in turn is defined as "an exaggerated commendation of wares in communications addressed to the public or to a class or group."

Here, we submit, the necessary protection of the public would be dangerously curtailed. Most frauds involve exploitation of the susceptible: the "puffing" exception would seem to remove protection from this group. We find, in the commentaries to the proposed Code, and in the working papers, no justification for a lessening of the protection to the public in the mail and wire fraud areas which present law affords. We would also note that today the effort should be to strengthen, rather than relax, the protections available to the consumer.

Obstruction of justice

Section 1503 of Title 18 provides that anyone who "corruptly or by threats or force, . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice" is guilty of a crime.

This is a broad section which has made it possible to uphold, by application of criminal sanctions, the integrity of federal criminal processes.

The proposed Code, it seems to us, dangerously dilutes the broad thrust of Section 1503.

The proposed section 1301 declares it to be a Class A misdemeanor "by physical interference or obstacle," intentionally to obstruct the administration of law. The proposed section 1321 makes it a Class C felony to use force, ithreat, deception or bribery with the intent of influencing another's testimony, or to cause another to withhold testimony or information; to tamper with physical evidence; to avoid process or to absent himself from a legal proceeding. Under the proposed section 1322 it would be a Class C felony to deceive another, or use force, threat or bribery, with the intention of hindering, delaying or preventing the communication by that person of information with respect to an offense. The proposed section 1323 makes it a crime to alter. destroy or remove documents, in the belief that an official proceeding is pending or in the offing, or that process has been or is about to be issued. If the defendant "substantially obstructs" prosecution for a felony the crime is a Class C felony; otherwise it is a Class A misdemeanor (and thus the grade of the crime turns not only on the grade of the underlying crime, but also on the success of the actor in accomplishing his purpose). Under the proposed section 1324, *ex parte* communication with a juror with the intent to influence him is made a Class A misdemeanor. The proposed section 1327 requires that a person employed to influence a public servant with respect to a prosecution or sentence disclose his employment. A threat to a public official with intent to influence his official action is a Class C felony under the proposed Section 1366.

It is respectfully submitted that the statutory network entailed in the above must necessarily result in a lessening of the protection to the Federal criminal process presently afforded by section 1503 of Title 18. Because inevitably the situation will arise which is not anticipated by the above, but which would have been covered by the broader, more encompassing provisions of section 1503.

Extortion

Section 1951 of Title 18 protects the public against extortion in situations involving interstate commerce: "Whoever in any way or degree obstructs,

delays or affects commerce . . . by . . . extortion or attempts or conspires so to do . . ." is guilty of a crime.

This section is abolished by the proposed Code, and the substitutes therefor are the theft (Section 1732) and robbery (Section 1721) sections therein.

Our problem with this change is that the clarity and simplicity and definitiveness of Section 1951 is lost. Thus we are disturbed on the one hand by the breadth of the definition of "threat" in proposed Section 1741(k), and on the other by the narrowing effect of proposed Section 1001 in conjunction with Sections 1721 and 1732, with respect to "criminal attempt." We fear that no substitute for the deterrent effect of the present extortion statute will be available as a protection to the public.

On the one hand, if a consumer threatens to report to public authorities the sales techniques used by a vendor, unless the vendor takes back goods he has sold to the consumer and returns the sales price, this would seem to be a "threat" as defined in Section 1741(k), and hence a threat under Section 1732(b). On the other hand, if a racketeer threatens to kill a person unless he pays him a certain amount of money, but then does nothing to effectuate his threat because his prospective victim immediately reports the matter to the authorities, substantial questions would be raised as to whether a "criminal attempt" has been made under the proposed Section 1001.

We strongly recommend that the proposed Code be revised to include the broad reach of Section 1951 of Title 18.

Classification of crimes outside the proposed code

Section 3006 of the proposed Code provides that all federal offenses under provisions of law outside of the Code are to be misdemeanors. The comment under the proposed Section 1006, pertaining to "Regulatory Offenses," suggests a declaration of policy to be included in the proposed Code which would provide that "no purely regulatory offense shall be punishable as a felony."

Our problem here is that some conduct covered by regulatory prohibitions is very serious indeed in its impact on the public. Before all violations of "penal regulations" are downgraded to the status of Class A or Class B misdemeanors (see proposed Code, § 1006), with corresponding maximum sentences of $1,000 or one year (Class A) and 30 days or $500 (Class B) respectively (see proposed Code, §§ 3201, 3301), each of them should first be carefully reviewed.

In 1970 Congress passed the Financial Recordkeeping and Currency and Foreign Transactions Reporting Act (84 Stat. 1114, P.L. 91–508), authorizing the Secretary of the Treasury to require by regulation disclosure of information from banks, institutions and persons engaged in, among other things, transferring funds or credits domestically or internationally, dealing in foreign currencies or credits, etc. (Title 12, U.S.C. § 1730d, § 1829b, § 1951–3). A willful violation of any regulation thereunder carries a criminal penalty up to $1,000 fine or 1 year imprisonment, or both (Title 12, U.S.C., § 1956). But if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, the violation of Title 12 carries a criminal penalty of a fine up to $10,000 and imprisonment up to five years, or both (Title 12, U.S.C. § 1957).

Obviously Congress, in enacting this legislation, weighed carefully the seriousness of the conduct proscribed. It would be unfortunate if the enactment of the proposed new criminal code were to change, without full and careful consideration, the legislative decisions already made in this and other areas. It is respectfully submitted that the prescribed penalties charted by Congress should not cavalierly* be reduced to the status of Class A misdemeanors, with maximum penalties of one year imprisonment or $1,000 fine.

CONCLUSION

The objective of this subcommittee is, I know, the enactment of a new Federal criminal code which will facilitate the fair and effective administration of criminal justice. I hope that the considerations I have raised will assist this subcommittee in moving toward that objective.

---

*See Comment to § 1772 of the Proposed Code, re violations under the Securities Act of 1934: "With respect to the 1934 Act, the policy of the Code is not to incorporate most offenses as Class C felonies. There the present maximum two-year penalty represents a view of the relative seriousness of the violations as being closer to classification as a Class A misdemeanor than as a Class C felony . . ."

Report on the Proposed New Federal Criminal Code, New York County Lawyers' Association Committee on Federal Legislation

The Final Report of the National Commission on Reform of Criminal Laws, proposing a new Federal Criminal Code, is now before Congress and the public for consideration.

While the proposed Code contains a number of valuable reforms, its adoption without significant changes could create serious difficulties in protection of the public against consumer frauds and organized criminal activities. We believe that the Code can be revised to meet this problem.

In large part the proposed Code adopts an approach derived from *state* law, and it reflects current thinking concerning what a modern *state* criminal code should contain, with a few additional provisions dealing with bases for federal jurisdiction.

It is essential that the functions served by federal law in the protection of the public should receive further attention in the course of legislative consideration of the Code.

Historically, federal law has grown to meet gaps in the protection of the public by state law, due both to the inadequacies of state statutes in various fields and the difficulties of dealing with nationwide problems on a local basis.

The very fact that nationwide problems have been dealt with by Congress on a national basis has led to a de facto division of functions which has held back the growth of state criminal law in certain areas. What is therefore needed is a specifically *Federal* Criminal Code designed to meet the responsibilities of federal law, as historically evolved, rather than chiefly a borrowing from State Codes.

The interests protected by federal law as it has developed historically include such matters as—

Protection of the public against consumer fraud where the mails or interstate facilities are used;

Protection of the securities markets against fraud and unfair practices;

Protection of foreign relations against harmful activities;

Protection of the public against impure or improperly prepared foods and drugs;

Safeguards against unregulated distribution of dangerous drugs;

Protection of the public against organized crime; and

Protection of national security.

These kinds of interests are inadequately protected by the proposed Code. The proposed Code does not attempt to revise existing law to correct problems that have arisen in the Federal context which affect the public, defendants or prosecutors: it attempts, rather, to use current thinking about state penal laws as the basis for federal criminal law.

Furthermore, the importance of protection of the *processes* of federal judicial action, designed to vindicate these important federal interests, is inadequately recognized in the proposed Code, as exemplified by the weakening of safeguards against obstruction of justice. In short, the fact that there is and should be something properly known as a "Federal case", colloquially as well as literally, is not recognized.

Many of the changes made by the Code are desirable and could be adopted without accepting portions of the draft which would seriously weaken existing protection of the public. These improvements include adoption of certain basic grounds for federal jurisdiction and consolidation of many previously separate provisions, greater flexibility in fines, and the availability of federal jurisdiction over all aspects of an offense where any aspect is a basis for federal prosecution.

Revision of the Code to correct its deficiencies will require substantial changes but can be accomplished without disturbing its essential structure of valuable reforms.

TREATMENT OF SELECTED ISSUES BY THE CODE

Federal criminal laws have frequently prohibited the perpetration of specified evils of national concern without regard to the specific means by which these evils are brought about. This has often been inevitable, because the ingenuity of those who prey upon the public through the commission of crime, organized and otherwise, is almost limitless.

Thus, current federal conspiracy statute, 18 U.S.C. § 371, provides: "If two or more persons conspire . . . to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be . . ." guilty of a crime.

The federal false statement statute, 18 U.S.C. § 1001, provides: "Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . covers up by any trick, scheme or device a material fact, or makes any false . . . statement . . ." shall be guilty of a crime.

The mail fraud statute, 18 U.S.C. § 1341, provides: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempt so to do, or places in any post office . . . any matter or thing . . . to be sent or delivered by the Post Office Department . . ." shall be guilty of a crime.

The obstruction-of-justice statute. 18 U.S.C. § 1503, punishes any one who "Corruptly or by threats or force . . . obstructs . . . or endeavors to obstruct . . . the due administration of justice . . ."

The interstate commerce extortion statute, 18 U.S.C. § 1951, provides: "Whoever in any way or degree obstructs . . . or affects commerce . . . by extortion . . ." is guilty of a crime.

These, like many other federal criminal statutes of comprehensive scope, would be abolished by the proposed new Code and replaced by more detailed but less comprehensive provisions, generally carrying far lesser penalties. A few brief examples will illustrate some of the consequences.

Consumer fraud

State criminal law has proved notoriously ineffective in dealing with fraud against the consumer, resulting both in enactment of new federal laws and greater federal enforcement of existing laws, such as the mail fraud statute, which have no counterpart either in state law or in the proposed Code. Cases brought to protect the public under the mail fraud statute are legion.*

Under the new Code there is no genuine counterpart to the mail fraud statute. The section cited in the comparative table of sections attached to the draft is proposed section 1732, dealing with theft. Section 1732 (b) provides that a person is guilty of theft if he "knowingly obtains the property of another by deception . . ." It should be noted at the outset that state statutes prohibiting larceny have been notoriously ineffective as weapons for dealing with fraud against the consumer. Furthermore, actual success of the fraud against specific persons rather than the existence of the scheme becomes the nature of the offense. This requires a decision as to whether a scheme was successful, and if not, prosecution as an attempt under section 1001 of the proposed code. The amount stolen is also made the determinant of the penalty under section 1735(2)(a).

Equally detrimental is a proposed exclusion from criminal liability for "puffing", not contained in previous law, although there is no indication that "puffing" is being improperly prosecuted under present law so as to require correction. Section 1741(a) of the Code excludes from "deception", "puffing by statements unlikely to deceive *ordinary persons in the group addressed*" (emphasis added). According to the section. "puffing" means "an exaggerated commendation of wares in communications addressed to the public or to a class or group." This means that protection of the unusually susceptible is eliminated. It is interesting that only vendors of wares are deemed worthy of this special solicitude by the drafters of the Code. Section 1741(a) of the Code also excludes "falsifications as to matters of no pecuniary significance", which would appear to withdraw protection against false statements concerning nonpecuniary matters, although such false statements might have critical consequences to the persons receiving them.

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*See, among recent appellate decisions, *United States* v. *Armantrout*, 411 F.2d 60 (2d Cir. 1969); *United States* v. *Zovluck*, 274 F. Supp. 385 (S.D.N.Y. 1967), *aff'd without opinion after conviction*, Dkt. No. 32652 (2d Cir. 4/7/69); *United States* v. *Sterngass*, Dkt. No. 32704 (2nd Cir. 12/18/68); *United States* v. *Blachly*, 380 F. 2d 665 (5th Cir. 1967); *United States* v. *Andreadis*, 366 F.2d 423 (2nd Cir. 1960), *cert. denied*, 385 U.S. 1001 (1967); *Friedman* v. *United States*, 347 F. 2d 697 (8th Cir. (1965).

No necessity for these changes which would weaken the protection of the public against fraud, is set forth in the commentaries to the Code or Working Papers.

Thus in the field of consumer fraud, the proposed Code creates new obstacles in an area where greater rather than lesser efforts are needed. The cumulative impact of these restrictions could well be serious. It would be most unfortunate for this to occur at the very time when the public is seeking greater protection against consumer fraud and the President has proposed additional measures to protect the public.

The weakening of protection of the consumer by the proposed Code is particularly ironical because the Code extends greater protection to creditors by creating a new federal crime of defrauding secured creditors (e.g. by transferring a mortgaged car) in section 1738, a matter previously left to state and local law.

One way to assure that existing law in this important field is not weakened would be to retain the existing mail fraud and wire fraud provisions in substantially their present form in addition to any new provisions incorporated into the Code dealing with thefts. If this were done, it would be important to provide expressly that the mail and wire fraud sections were not affected by the restrictive definitions contained in section 1741 of the Code.

A preferable approach would be to include a new comprehensive antifraud provision designed to cover consumer deception, also independent of the definitions in section 1741. Such a provision might read as follows:

"*Scheme to defraud within federal jurisdiction.* A person who devises, intends to devise, or joins in a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises and who, for the purpose of executing such scheme or attempting so to do, commits or causes any act bringing about circumstances upon which federal jurisdiction may be based under section 201 (a), (c), (d), (e), (f), (g), (h), (i) or (j) of this Code is guilty of a class C felony. This section shall not be limited directly or indirectly by anything contained in section 1741."

A third but less adequate alternative would be simply to amend section 1741 to delete its most restrictive definitions, leaving consumer fraud to be covered merely by "theft" prohibitions freed of the roadblocks to effective consumer protection now contained in section 1741. Of course, revision of section 1741 could also be combined with one of the other alternatives suggested.

Fraud against the government

The effect of the proposed Code on protection of the government against fraud is exemplified by the treatment of the facts in *United States* v. *Olin Mathison Chemical Corporation, et al*, 368 F. 2d 525 (2nd Cir. 1966), where kickbacks on transactions financed under the United States foreign aid program involving approximately one million dollars in pharmaceuticals were siphoned into secret Swiss bank accounts. False statements were made on certificates required to be filed to obtain the Government funds in question to the effect that no side payments or kickbacks were involved. Documents produced at the trial included secret codes for certain commissions, "confidential" letters to be destroyed on receipt, indicating that foreign aid authorities had not been told the facts, documents indicating an effort to continue the scheme even after the indictment, and records indicating that an official of one of the firms involved had received his own secret kickbacks in addition to those obtained by his employer. This case was prosecuted under 18 U.S.C. § 1001, which prohibits false statements within the jurisdiction of government agencies. Under the proposed Code, this would appear to constitute only a Class A misdemeanor. Section 1352 of the proposed Code makes it a misdemeanor for a person, in a Government matter, to make a "false written statement, when the statement is material and he does not believe it to be true." Apart from the conversion of this serious offense from a felony to a misdemeanor, the burden of proof is increased in the proposed Code by the requirement of materiality, contrary to decisions in the Court of Appeals for the Second Circuit, e.g. *United States* v. *Marchisio*, 344 F. 2d 653, 666 (2nd Cir. 1965). Oral false statements would not constitute violations at all under the proposed Code, no matter how serious the consequences or what the circumstances, unless made under oath, in which event a misdemeanor is also committed.

A scheme to defraud the Government, such as a plan to rig bids on Government contracts, today can be prosecuted under 18 U.S.C. 371. This protection for the public would be deleted under the proposed Code. For example, if a conspiracy involved false statements, only a misdemeanor would be involved under Code Sections 1004 (6) and 1001 (3).

Extortion

One of the most important federal criminal statutes is 18 U.S.C. § 1951, which protects the public against extortion in situations involving interstate commerce. This section is particularly important because the statute dealing with bribery of a union official, 29 U.S.C. § 186, provides merely a misdemeanor penalty and does not bar the defendant from continuing to hold union office in the event of conviction. The Code contains no comparable general extortion provisions; the only substitutes concern thefts, discussed previously, which refer to intentionally depriving another of his property by theft (section 1732) and robbery (section 1721).

The proposed erosion of these and other fundamental protections of the public under existing federal laws is particularly inappropriate because, except for complaints with regard to the multiplicity of different statutes and jurisdictional bases, few complaints have been made against existing federal criminal statutes. In the process of attempting to deal with the complaints that have been made, the Code as drafted would go far toward destroying the comprehensiveness of the key provision in existing law, and many serious crimes now punishable as felonies would be converted into misdemeanors. We recommend revision of the Code to restore the important protection accorded by existing law in the areas described.

ANALYSIS OF OTHER SELECTED CODE PROVISIONS

Organizational offenses

Section 402, concerning corporate criminal liability, would make it much more difficult for the federal courts to enforce federal statutes. Under the draft, corporations cannot be held responsible for the felonious acts of any person having authority delegated by the corporation to act. Instead, as a predicate for corporate responsibility, the draft requires that the Board of Directors or "an executive officer or . . . other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees," or a person who "controls" the corporation or is "responsibly involved in forming its policy," authorize, request or command the illegal conduct. This provision, in its effort to codify matters previously left to case law, is drafted in complex language of vague significance which would make it difficult for a court to instruct a jury on how to perform its duty in a criminal trial involving a corporation. This provision would likewise permit corporations to escape liability for conduct now reached by the law.

Ironically, under the proposed Code corporate misdemeanors could be reached as at present, and the Government in its proof would not have to meet the additional requirements (see comment to § 402, Final Report, p. 35).

Criminal responsibility

Section 503 of the proposed Code for the first time would enact as federal law a test for insanity, adopting language derived from the Model Penal Code, see *United States* v. *Freeman*, 357 F.2d 602 (2d Cir. 1966). This would be particularly undesirable at a time when increasing numbers of legal and psychiatric experts, including the Committee on Federal Legislation of the New York State Bar Association, have seriously questioned the desirability of continuing to recognize an insanity defense. See Committee on Federal Legislation, New York State Bar Association, "The Dilemma of Mental Issues in Criminal Trials," 41 N.Y. State B.J. 394 (1969); Goldstein & Katz, "Abolish the Insanity Defense—Why Not?," 72 Yale L.J. 853 (1963); Douglas, "Should There Be An Insanity Defense," Corrective Psych. & J. Soc. Therapy, Fall 1968, p. 129; Menninger, The Crime of Punishment (1968); Friedman, "No Psychiatry in Criminal Court" 56 A.B.A.J. 242 (1970). See also Bennett & Matthews, "Mental Disability and the Law", 54 A.B.A.J. 467 (1968); Schwartz, "Psychiatry and Criminal Law," N.Y.L.J., July 30, 1968, p. 54 Co. 7–8.

Section 503 would disregard the considerations which the Supreme Court recognized in the constitutional sphere in *Powell* v. *Texas*, 392, U.S. 514, 536 (1968) where the prevailing option noted that "nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms."

The original concept of the insanity defense was as a way of separating persons who should be committed to a mental institution from those properly dealt with through criminal penalties. In practice, the insanity defense has frequently permitted persons accused of abusing positions of responsibility, who never were committed to a mental institution, to avoid commitment or punishment for their misconduct.

Additional consideration should be given to alternatives to the insanity defense. These include limiting the use of psychiatric evidence, so that it would be admitted only for the purpose of negating the existence of the mental element required for the commission of a crime, or, in connection with sentencing for the purpose of determining the proper disposition of an offender who has been found guilty of having committed illegal acts. In the alternative, the matter should be left to further development and not frozen in the Code.

Statutes of limitations

Section 701 of the proposed Code provides a five year statute of limitations for most felonies, and three years "for all other offenses." This represents a drastic shortening of the statute of limitations for misdemeanors directed against the public, whether or not against the Government, such as violations of biological products controls, *United States* v. *Steinschreiber*, 219 F. Supp. 373 (S.D.N.Y. 1963), *aff'd*, 326 F. 2d 725 (2d Cir. 1964), *cert. denied*, 376 U.S. 962 (1964). We recommend retaining the present five-year statute for most crimes.

Conspiracy

Section 1004 of the Code is a general conspiracy statute designed to replace 18 U.S.C. § 371. As is the case with many provisions of the draft, this section is approximately four times as long as the section it replaces. However, the longer and more prolix new section does not contain the language of 18 U.S.C. § 371 prohibiting conspiracies: ". . . to defraud the United States or any agency thereof in any manner or for any purpose."

This is an important protection for the public and the taxpayers. For example, bribery of employees of military post exchanges does not seem to be clearly covered by anything in the Code. It has been prosecuted in the past under the "conspiracy to defraud the United States" portion of 18 U.S.C. § 371, deleted in the proposed Code. See *Harlow* v. *United States*, 301 F. 2d 361 (5th Cir. 1962).

"*Regulatory offenses*"

Section 1006, entitled "Regulatory Offenses," clearly reveals the serious erosion of the protection of the public by many parts of the Code. Subdivision 3. entitled "Dangerous Violations of Prophylactic Regulations," provides: "A person is guilty of a *Class A misdemeanor* if he *wilfully* violates a penal regulation and thereby creates a *substantial likelihood of harm* to *life, health*, or property or of any other harm against which the penal regulation was directed." (emphasis added).

Even a wilful violation of a regulation with penal consequences is only a Class B misdemeanor, punishable by merely 30 days imprisonment or a $500 fine under sections 10006 (2)(b), 3201(1)(e) and 3301(1)(d). This is so even though the comments to the Code indicate that to be guilty of the Class B misdemeanor the actor must actually know he is violating the law (Final Report, p. 76). These provisions are based upon a statement of policy (Final Report, p. 75–76) which recognizes possible unfairness in prosecutions for violations of penal regulations authorized by Congress, but cites no instances and fails to recognize the importance of interests often protected by such regulations. Examples are the protection of public health through blood products licensing involved in *United States* v. *Steinschreiber*, 219 F. Supp 373 (S.D.N.Y. 1963, *aff'd*. 326 F. 2d 725 (2d Cir. 1964). *cert. denied*, 376 U.S. 962 (1964) or the protection of securities markets from deceptive practices. It is not unfair to expect persons who enter these specialized fields to know and conform to applicable congressionally-authorized regulations.

National security

Chapter 11 of the draft deals with national security offenses in a manner leaving the United States without adequate protection from deliberate attacks on critical facilities, provided they are carried on in peacetime.

Section 1102 provides no penalties for assisting in military action against the United States when the country is not engaged in international war.

Section 1103(1) only makes engaging in armed insurrection a crime if "with intent to overthrow . . . the form of the Government of the United States . . ." Armed insurrection as a form of protest would thus be legalized as far as this section is concerned if it had no specific aim of changing the form of government.

Section 1107 of the Code with cross-reference to section 1105 makes it a Class C felony to damage military equipment with intent to impair the military effectiveness of the United States only if "a loss which is, in fact, in excess of $5,000" is caused. The provision assumes that the risk to military defense of the nation depends upon the actual financial loss caused, hardly a realistic assumption.

Provisions in earlier drafts of the Code, prohibiting recruiting for service against the United States or against associated nations, have been entirely dropped in the final Code.

Foreign relations

Under section 1204 it would be a felony to violate United Nations Security Council Resolutions relating to arms embargoes, and to violate federal laws pertaining to foreign transactions, only where this is done with intent to conceal transactions from a government agency, or with knowledge that the conduct substantially obstructs administration of the statute. Proof that the defendant knew that his conduct would substantially obstruct a statute would be most difficult, since he would normally tend to minimize his acts, especially if he knew them to be illegal. The provision requires both knowledge of the law *and* knowledge that there is a serious violation, which is a new departure in criminal jurisprudence.

Protection of the judicial system and Government operations

Section 1301 covers one who "by *physical interference* . . . intentionally obstructs . . . the administration of law . . ." (emphasis added) but makes this merely a misdemeanor. Section 1301 further provides that it is a defense if the administration of the law involved was not lawful, clearly an invitation to self-help and contrary to numerous decisions which have held that the invalidity of a statute is not an excuse for a use of illegal means to subvert it.*

Section 1305 provides that bail jumping is a Class C felony if the defendant seeking to prevent the arrest of another to create "a substantial risk of bodily injury . . ." Again, it is made a defense if the public servant was not acting lawfully.

Section 1305 provide sthat bail jumping is a Class C felony if the defendant has been released on a felony charge or if the flight is after conviction, otherwise it is merely a Class A misdemeanor. This would downgrade the seriousness of bail jumping and also thereby make it more difficult for courts to release defendants. Instead of this, it might be more desirable to increase the penalties for bail jumping, so that they would at least equal the penalties to which the defendant could be subject if convicted on the underlying charge. (See testimony of William M. Tendy, Assistant United States Attorney, before the House Senate Committee on Crime, New York City, June 26, 1970). In the absence of such a provision, defendants in serious multi-defendant cases, frequently involving importation of hard narcotic drugs, jump bail before trial because they will face a lesser penalty for bail jumping than for the underlying crime, and they realize that the Government may not be in a position to try the underlying case at the time the defendant is apprehended.

Section 1323 of the Code makes it a crime to destroy documents if the actor believes that an official proceeding is pending or "about to be instituted." This

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**Dennis* v. *United States,* 384 U.S. 855, 865–67 (1966); *Kay* v. *United States,* 303 U.S. 1 (1938); *United States* v. *Kapp,* 302 U.S. 214 (1937); *United States* v. *Williams,* 341 U.S. 58, 65–69 (1951); *United States* v. *Manfredonia,* 414 F. 2d 760, 764 (2nd Cir. 1969) (invalidity of wagering tax no defense to charge of perjury committed in trial for violation of wagering tax statute); *United States* v. *Winter,* 348 F.2d 204, 208–10 (2nd Cir.), *cert. denied,* 382 U.S. 955 (1965).

would appear to place a premium on destroying documents at an early date before it could be shown that the defendant knew that the proceeding was about to be instituted. This is a further example of the dangers of removing comprehensive provisions in existing law such as 18 U.S.C. § 1503, dealing with obstructions of justice and relying on detailed description to foresee all forms and means by which illegal ends may be achieved.

Further, Section 1323 makes it a mere misdemeanor to destroy documents if the underlying offense is a misdemeanor. This is most unwise because obstruction of justice is a more serious offense than many underlying offenses—and it should be in order to protect the processes of the administration of justice. Attempts to influence jurors are also made mere misdemeanors under section 1324 of the Code. Failure to respond to a subpoena is excluded from contempt sanctions and instead made a mere misdemeanor by section 1342 of the Code. The same is true as to refusals to answer questions without lawful privilege under section 1343.

Section 1349 provides that all prosecutions for failure to appear, disobedience to court orders and the like must be based upon certification to the United States Attorney by the court involved. This places the court in a position of taking part in the institution of the prosecution, contrary to the separation of powers, and also injects an additional layer into the proceeding, which should be unnecessary in view of the requirement of proof of guilt beyond a reasonable doubt before the court in any event. This section should not be adopted. No abuses have been shown of existing authority to bring such cases before the courts without such certification. The application of such a requirement to Grand Jury contempts, which are not normally before a court in any event, is particularly inappropriate. If any certification should be required, which does not appear necessary for any valid purpose, that of the Grand Jury should suffice. Since the United States Attorney is the legal adviser to the Grand Jury, it should be his function to consider such cases and to bring them before the court in the appropriate instances without prior judicial participation in his decision.

Civil rights

All civil rights offenses under the draft Code are misdemeanors, eliminating the protection of the felony provisions of present 18 U.S.C. § 241, prohibiting conspiracies to injure citizens in the exercise of federal rights. Similarly, section 1632 does not fully cover what is dealt with in existing laws as to slavery and peonage (18 U.S.C. § 1581–88).

Section 1617, dealing with criminal coercion, establishes a new crime, making it a violation for any person "with intent to compel another to engage in or refrain from conduct," to threaten, among other things, to accuse anyone of a crime (truthfully or otherwise), to "expose a secret or publicize an asserted fact, whether true or false, tending to impair another's credit or business repute," or to "take or withhold action as a public servant, or cause a public servant to take or withhold official action." The section paints with a very broad brush in a way which is quite ironic, given the deletion in the Code of many of the comprehensive protections of the public under existing law (e.g. 18 U.S.C. §§ 371, 1001, 1341, 1951).

The section as drafted might well make it a crime for a consumer to threaten to report a businessman to a governmental official if the businessman did not lift a garnishment—even if improperly obtained—from the consumer's salary. It might also make it a crime for an official of the Securities and Exchange Commission to indicate that an investigation would be necessary if certain practices were continued. Similarly, it might make it a violation for a person to threaten to reveal that a participant in a stock manipulation was using secret sources of funds derived from Swiss banks or the like unless the transaction was called off.

Under this section, absence of justification is not an element of the offense: any justification for what is done is an affirmative defense, *the burden of which is on the defendant.*

In order to avoid such consequences as those suggested above and others which might be difficult to foresee, it should be made an element of the offense that the actor engaged in the conduct corruptly or for personal gain.

Property offenses

Section 1702 makes it a crime intentionally to start a fire only where there is danger of death or bodily injury, where the building is the inhabited structure of another, or where there is property damage to another consti-

tuting pecuniary loss in excess of $5,000. In instances where federal jurisdiction applies this would constitute almost a blank check for persons to burn their own property, or even to burn the property of others provided that the loss did not exceed $5,000.

Under section 1721, dealing with robbery, the crime is only committed if the defendant inflicts or attempts to inflict bodily injury or "threatens . . . another with imminent bodily injury." A threat to inflict injury in a few minutes might not be covered. Yet this section is the chief substitute for the general interstate commerce extortion statute (18 U.S.C. § 1951). The latter provision might appropriately be retained.

Theft

Section 1732 concerning theft makes it a violation to receive or dispose of the property of another which has been stolen only if this is done "with intent to deprive the owner thereof." It should be sufficient if a person receives stolen property knowing it to have been stolen, without requiring proof that he intended to deprive the owner of the property.

Section 1732 is also the primary section designed as a substitute for the mail fraud and wire fraud (18 U.S.C. §§ 1341, 1343). As noted previously, it is a most inadequate substitute.

Securities and drug violations and other non-Title 18 crimes

Securities laws and federal drug laws have been the subject of intensive study. No changes in the penal structure of the securities laws have been recommended for some time, and no need for such changes have been shown. Congress has recently made a major recodification of drug laws. While decrease of penalties for marijuana has been widely advocated, no general further revision of drug laws has been widely proposed. In spite of these facts, the Code makes wholesale changes in these fields, apparently merely for the sake of theoretical consistency with other changes made by the Code, which changes in turn are based upon general penological thinking with respect to state law and not upon specifically established need for change in federal law.

Under the Code there are no penalties between Class A misdemeanor penalties (imprisonment for up to 1 year or fine of up to $1,000) and Class C felony penalties (imprisonment for up to 7 years or fine of up to $5,000). See Code sections 3201, 3301. According to one alternative proposed by the draftsmen, the Class A misdemeanor penalty would be merely 6 months. Merely to conform the provisions of existing laws to the draftsmen's ideas of what the range of penalties should be, i.e. either 7 years or 1 year and nothing in between, a rather large gulf, it is proposed drastically to alter existing law with no evidence that there has been any study of the consequences.

For example, the comments to the Code state (p. 239):

"With respect to the 1934 Securities Exchange Act, the policy of the Code is not to incorporate most offenses as Class C felonies. There the present maximum two-year penalty represents a view of the relative seriousness of the violations as being closer to classification as a Class A misdemeanor than as a Class C felony."

Thus merely to fit the securities laws (not in the Criminal Code at all now) into the draftsmen's scheme, the penalty for many crimes would be arbitrarily reduced to one-fourth of that now provided.

The provisions of the Code dealing with securities and drugs (sections 1772, 1821–1829) should not be adopted. The decision to leave existing non-Title 18 law as it is, except perhaps with respect to decisions concerning definitions of mental states required for culpability and the like, would likewise require deletion of section 3006 of the proposed Code, since that section at one stroke would wipe out all felony provisions outside the Code.

Sentencing provisions

The sentencing provisions of the Code contain some valuable improvements, particularly the provisions of subdivision 2 of section 3301, under which a person could be fined twice the amount of the gain obtained or loss caused in connection with the offense.

The draft further delineates factors to be considered in determining the sentence to be imposed. Section 3101(3) lists various circumstances which may militate in favor of leniency. Should not factors militating in the other direction also be delineated? Experience indicates that the factors delineated as militating toward leniency are most frequently present in the case of

offenders accused of abusing positions of responsibility in society. Exclusive attention to these factors therefore results in severe imbalance in law enforcement, whereby offenses having the greatest impact on the community are often treated most leniently.

The following additional factors, urged in a unanimous report of the Committee on Criminal Law of the Federal Bar Association of New York, New Jersey and Connecticut, might also be included: "(1) the extent to which the defendant has abused a position of responsibility entrusted to him by society, (2) the extent to which he sets an example for others because of his position, and (3) the large-scale influence which his conduct may have on others because of a pivotal relationship which he has voluntarily assumed in society and as a result of which his actions could have wide ramifications." 3 Criminal Law Bulletin 682, 683–4 (1967); Bulletin of Committee on Federal Legislation, New York State Bar Association 13 (1969).

Section 3003 provides for increased penalties for persistent misdemeanants, defined as persons convicted three times within five years. Where factors such as those mentioned in the Bar report exist and where there has been a consistent course of conduct exhibiting extreme wilfulness and characterized by extreme prejudice to the public, increased penalties for serious misdemeanors should be authorized even where there are no prior convictions. This is particularly critical if many offenses now classified as felonies are to be reclassified as misdemeanors, as would be done if the Code were adopted in its present form.

In connection with the draft's restructuring of sentencing provisions, other possibilities not contained in the draft should be considered, including:

(a) Provision for restitution to victims of an offense as part of a judgment of conviction;

(b) Injunctive relief, justified where proof is beyond a reasonable doubt inasmuch as it may ordinarily be granted in civil cases based on a preponderance of evidence;

(c) Conditions of probation designed to prevent continuation of a pattern of conduct constituting the offense or facilitating it;

(d) Authority for deferral of sentence of probation on condition that a defendant who so requests, participate in a "halfway house" or other public or private rehabilitation program where the court finds that this would effectuate the purposes of the Code;

(e) Authority for probationary periods to commence at the end of all sentences of imprisonment imposed in any cases against the defendant, to give him a basis for rehabilitation after leaving custody.

Section 3006 classifies all crimes outside the proposed new Criminal Code as Class A misdemeanors. This represents a blanket downgrading of very serious offenses against the public, such as violations of the Federal Food, Drug & Cosmetic Act (21 U.S.C. § 331), prohibiting adulteration of food in interstate commerce, and violations of the laws against illegal securities transactions. Many of these offenses are of the most serious character.

The importance of these Federal laws, enacted largely because of the inadequacies of purely local enforcement and the need for protection of the public, is treated lightly in the statement of policy contained in the comments to the Code (Final Report, p. 75), which statement dwells at length on the risks of use of penal sanctions to enforce what the writers of the comment dismiss as "purely regulatory" offenses, which, they assert, should under no circumstances be punishable as felonies. The statement of policy in fact contains no reference to the need to protect the public; it concerns itself exclusively with possible unfairness to white-collar defendants involved in cases such as illegal securities transactions or sale of adulterated foods or drugs.

The problem is that the label "regulatory offense" covers a multitude of kinds of conduct, some of them very serious to the public and others less so. Here, as in other instances, the draft paints with a very broad brush in deleting existing protections for the public.

In the recent case of *United States* v. *Reinbach*, 69 Cr. 423 (S.D.N.Y.) a defendant was sentenced on January 13, 1970 to 18 months for unlawfully introducing food prepared under unsanitary conditions. Under the proposed Code neither this sentence nor the deterrent possibility of a greater sentence could exist.

Indeed regulations against pollution, practices detrimental to the consumer such as manufacturing unlicensed and unsafe blood products (see

United States v. *Steinschreiber*, 219 F. Supp. 373 (S.D.N.Y. 1963), aff'd. 326 F.2d 759 (2d Cir. 1964), cert. denied, 376 U.S. 962 (1964) and many others would become virtual dead letters if the intention of the Final Report (§ 1006 and p. 75–76) to make even *wilful* violations Class B misdemeanors were carried out. The authorized sentence for a Class B misdemeanor is 30 days or $500 (sections 3201, 3301).

Finally, the sentencing provisions of the Code permit appellate review of all sentences without restriction (proposed 28 U.S.C. § 1291; report, p. 317). There are advantages to permitting appellate review of sentences, essentially where severity of a sentence may tend to cause the appellate court to find other grounds to reverse a conviction. However, to permit appellate review of all sentences as a routine matter would be unworkable. The tasks of handling appeals in every case, including those where pleas of guilty were entered, would be tremendous. It would not be a desirable solution to provide review of sentences only where there is an appeal on another issue, since this would encourage other appeals merely in order to bring up the sentences for appellate review. A "certiorari" procedure could be considered, whereby the Government would not be required to answer appeals from sentences, and no sentences could be disturbed, unless the appellate court, after receiving the appellant's papers, indicated that it wished to hear the issue raised by the appellant.

Whereas the Code's proposal for appellate review of sentences would expand review available on behalf of the defendant—and properly so in some cases—consideration should be given to authority for the Government to appeal from pre-judgment rulings which could affect the outcome of cases, where this would have a serious impact on the public. See Committee on Federal Legislation, New York County Lawyers' Association, Report No. F–9, in "Measures Relating to Organized Crime", Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, 91st Cong., 1st Sess. 227 (1969). At present the Government can rarely secure appellate review of pretrial rulings, and it can never obtain review of rulings at trial, because in the event of an acquittal resulting from such rulings, double jeopardy would bar further prosecution. On the other hand, the defendant if convicted can of course obtain review of all adverse rulings which might have prejudiced him. In order to deal with this situation, the Government should with the permission of the Attorney General, be allowed to appeal from pre-judgment rulings against it in critical cases. Such appeals during trials should be heard immediately; review by the Supreme Court should be postponed until the time of the defendant's appeal from any judgment of conviction.

Our 1969 report stated: "Title VII of the 'Safe Streets' Act permits appeals by the Government from decisions suppressing evidence. We believe this is sound, because the Government otherwise has no appellate review. There can obviously be no appeal after a defendant is found not guilty at a trial, since this would result in double jeopardy. The defendant's right to appellate review is fully protected because he can appeal if convicted and can raise all relevant claims at that time.

"In our view, rulings, adverse to the Government of a serious character *at or during trial*, just as much as the suppression of evidence can, unless reviewed at the time, cut off the Government's right to any appellate review of the adverse decisions affecting its case. Accordingly, Government appeals from any serious adverse decisions before or during trial should be considered."

CONCLUSIONS

While the Code makes some significant advances, further revisions are important to achieve both fair and effective enforcement of federal law.

APPENDIX—PROPOSED AMENDMENTS TO THE CODE

NOTE: New material is italic; existing language proposed to be deleted is in black brackets.

Section 402. Corporate Criminal Liability—delete this section.

*   *   *   *   *   *   *

Section 503. Mental Disease or Defect—Delete this section.

Alternative: "Section 503. *Evidence of Mental State. Evidence of mental condition of a defendant shall be admissible if it goes to the issue of the existence or possibility of existence of the culpability required for com-*

mission of the offense, and shall also be considered in connection with appropriate disposition of the defendant in the event of conviction. In an appropriate case at the time of sentence, the Court shall have power to order hospitalization of a defendant in an institution for the care of the mentally ill and suspend imposition of sentence in the criminal prosecution or make other appropriate disposition based upon the defendant's mental state. In all other respects, insanity or mental disease or defect shall not be a defense to a criminal prosecution."

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Section 602. Execution of Public Duty.

(1) Authorized by Law. Conduct engaged in by a public servant in the course of his official duties is justified when *he reasonably believes that it is* required or authorized by law.

* * * * * * *

Section 606. Use of Force in Defense of Premises and Property.

* * * * * * *

(b) the use of force is not justified to prevent or terminate a trespass if [it] *the termination of the trespass or its prevention* will expose a person [the trespasser] to substantial danger or serious bodily injury.

Section 607 (2)—Deadly Force. Delete as drafted and rely upon subsection (1) prohibiting excessive force, and upon case law.

Section 610. Mistake of Law.—Delete as drafted and leave to case law.

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Section 701. Statute of Limitations * * * (2) * * * prosecution must be commenced within the following periods after the offense: * * *

(b) *five years for all offenses except as otherwise expressly provided and except in the case of tax evasion, for which the period shall be six years.*

(Delete present subdivision (§ 2 (b) and (c))

* * * * * * *

Section 1004: Conspiracy. Add the following new sentence to subsection (1): *"A person is also guilty of conspiracy if he agrees with one or more persons to defraud the United States or any agency thereof in any manner or for any purpose, and any one or more of such persons does an act to effect the objective of the conspiracy."*

* * * * * * *

(7) Grading. *Except where statutes otherwise provide, conspiracy is a Class C felony unless the object of the conspiracy is a misdemeanor, in which event the conspiracy shall be a Class A misdemeanor.* [Conspiracy shall be subject to the penalties provided for attempt in section 1001 (4).]

* * * * * * *

Section 1006. Regulatory Offenses. Delete and leave to applicable non-Title 18 statutes.

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Alternative:

(b) * * * A person who wilfully violates a penal regulation is guilty of a Class [B] *A* misdemeanor.

(c) * * * A person is guilty of a [Class A misdemeanor] *Class C felony* if he wilfully violates a penal regulation and thereby creates a substantial likelihood of harm to life, health, or property, or any other harm against which the penal regulation was directed.

* * * * * * *

Section 1103. Armed insurrection. * * * (1) * * * A person is guilty of a Class B felony if he engages in armed insurrection [with intent to overthrow supplant or change the form of government of the United States.] * * *

* * * * * * *

Section 1105. Sabotage.

(1) Wartime *and Peacetime Sabotage; Grading.* A person is guilty of sabotage if, [in time of war and] with intent to impair the military effectiveness of the United States, he:

(a) damages or tampers with anything of direct military significance;

(b) defectively makes or repairs anything of direct military significance;

(c) delays or obstructs transportation, communications or power service of or furnished to the defense establishment. * * * Sabotage under this section is a Class A felony if it *is committed in time of war and* jeopardizes life or the success of a combat operation. Otherwise it is a Class B felony *if committed in time of war. If not committed in time of war, it is a Class C felony.* * * *

(Note: If this change is made, section 1107 should be deleted as unnecessary).

* * * * * * *

Section 1204. International Transactions.—Delete this section and leave to existing law not contained in Title 18. * * *

Section 1301. Physical Obstruction of Government Functions.

(1) Offense. A person is guilty of a [Class A misdemeanor] *Class C felony* if, by physical interference or obstacle, he intentionally obstructs, impairs or perverts the administration of law or other government function. * * *

* * * * * * *

(3) Defense that administration of the law was not lawful—delete this subsection.

* * * * * * *

Section 1302. Preventing Arrest or Discharge of Other Duties.

(1) Offense. A person is guilty of a [Class A misdemeanor] *Class C felony* if, with intent to prevent a public servant from effecting an arrest of himself or another from discharging any other official duty, he creates a substantial risk of bodily injury to the public servant or to anyone except himself, or employs means justifying or requiring substantial force to overcome resistance to effecting the arrest or the discharge of the duty. * * *

* * * * * * *

Section 1305. Failure to Appear After Release; Bail Jumping.

(2) Grading.—Delete this subsection and substitute the following: "*The offense is a Class C felony except that the offense shall be punishable in the same manner as the underlying offense with which the defendant is charged in the event that such underlying offense carries a greater penalty.*"

* * * * * * *

Section 1321. Tampering with Witnesses and Informants in Proceedings. Add a new subsection 2a as follows:

"*A person is guilty of a Class C felony if he in any other manner corruptly or by threat or force obstructs, impedes or endeavors to obstruct or impede the due administration of justice or of a law of the United States.*"

* * * * * * *

Section 1323. Tampering With Physical Evidence.

(1) Offense. A person is guilty of an offense if, believing an official proceeding is pending or [about to] *will* be instituted or believing process, demand or order has been issued or [is about to] *will* be issued, he alters, destroys, mutilates, conceals or removes a record, document or thing * * *

* * * (3) Grading. The offense is a Class C felony if the actor intentionally and intends to substantially obstructs, impairs or perverts prosecution [for a felony.] Otherwise it is a Class A misdemeanor.

Section 1324. Harassment of and Communication with Jurors. * * * A person is guilty of a [Class A misdemeanor] *Class C felony* if, within intent to influence the official action of another * * *

* * * * * * *

Sections 1341–49 (contempt)

Alternative No. 1: Delete Code sections 1341–1349 and substitute present 18 U.S.C. § 401.

Alternative No. 2: Delete merely Code § 1349.

Alternative No. 3:

Section 1349, * * * (2) * * * If the official proceeding involved is a grand jury proceeding, no person shall be prosecuted:

(a) [under section 1342 (relating to failure to appear pursuant to subpoena) unless a judge certifies the case to the appropriate United States Attorney to be considered for possible prosecution.]

[(b)] (*a*) under section 1343 * * *

* * * * * * *

Section 1352. False Statements. Delete language of the present draft section and substitute language of 18 U.S.C. § 1001 in the existing Criminal Code.

* * * * * * *

In the portion of the draft concerning civil rights add new section 1516 to contain the language of present 18 U.S.C. § 241, and add present 18 U.S.C. Chapter 77, dealing with peonage and slavery.

* * * * * * *

Section 1617. Criminal Coercion.

(1) * * * A person is guilty of a Class A misdemeanor if, *corruptly or for personal gain* and with intent to compel another to engage in or refrain from conduct, he threatens to * * *

* * * * * * *

Section 1702. Endangering by Fire or Expulsion.

(1) Offense. A person is guilty of an offense if he intentionally starts a fire or causes an explosion and thereby recklessly: * * *

(c) causes damage to property of another [constituting pecuniary loss in excess of $5,000.]

* * * * * * *

Section 1732. Theft of Property.

A person is guilty of theft if he: * * *

(c) knowingly receives, retains or disposes of property of another which has been stolen, [with intent to deprive the owner thereof.]

* * * * * * *

Section 1738. Defrauding Secured Creditors—Delete this section, which deals with a matter properly left to state or local law, and substitute: "*Extortion. Whoever delays, obstructs or affects interstate or foreign commerce in any manner by extortion shall be guilty of a Class C felony.*"

* * * * * * *

Section 1741. Definitions for Theft and Related Offenses. * * * [The term "deception" does not, however, include falsifications as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of waves in communications addressed to the public or to a class or group;]

Add new section 1742:

"*Trafficking in Illegally Obtained Securities. A person is guilty of a Class C felony if he possesses, transfers or secrets securities if they are in fact stolen or counterfeited and the actor knows that the securities were illegally obtained or produced.*"

Section 1758. Commercial Bribery. * * *

(4) *A person is guilty of a Class A misdemeanor if he is an officer or employee of a national credit institution as defined in section 213 and receives from any person who does or seeks to do business with such institution any money or thing of value, other than (a) in satisfaction of a judgment of any court, (b) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business, or (c) under circumstances under which it is clear that such payment or benefit could not influence such officer or employee in the discharge of his duties.*

(5) *a person is guilty of a Class C felony if he violates subsection (1) or (4) of this section with intent to influence the exercise of powers residing in the fiduciary, principal, employer or credit institution.*

(6) *A person is guilty of a Class A misdemeanor if he knowingly offers or gives any benefit prohibited by subsection (4) and is guilty of a Class C felony if he knowingly offers or gives any benefit under circumstances covered by subsection (5).*

* * * * * * *

Section 1761. *Use of the Mails or Interstate Facilities in Furtherance of Scheme to Defraud* (New, derived from 18 U.S.C. §§ 1341, 1343)

"*Scheme to defraud within federal jurisdiction.*

"*A person who devises, intends to devise, or joins in a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises and who, for the purpose of executing such scheme or attempting so to do, commits any act bringing about circum-*

stances upon which federal jurisdiction may be based under section 201(a), (c), (d), (e), (f), (g), (h), (i) or (j) of this Code is guilty of a class C felony This section shall not be limited by anything contained in section 1741."

Section 3001. Authorized Sentences. * * *

*   *   *   *   *   *   *

(6) *In addition to the sanctions authorized above, the court may: (a) require payment of restitution to persons injured by the commission of the offense, to be enforced in the same manner as a fine, under such circumstances as are just or (b) enter orders appropriate to prevent and restrain future violations of the statutes shown by the evidence or plea to have been violated in the case before the court. Any restitution ordered pursuant to this section shall be credited against any civil liability the defendant may have on account of the conduct constituting the offense.*

Section 3006. Classification of Crimes Outside this Code (reducing all to misdemeanors)—delete this section.

*   *   *   *   *   *   *

Section 3101(3) Factors to be considered (in sentencing)—add:

(o) *the extent to which the defendant has abused a position of responsibility entrusted to him by society, (p) the extent to which he sets an example for others because of his position, and (q) the large-scale influence which his conduct may have on others because of a pivotal relationship which he has voluntarily assumed in society and as a result of which his actions could have wide ramifications.*

Section 3103. Conditions of Probation. * * *

(n) *refrain from engaging in conduct similar to that constituting the offense or affording favorable opportunities for repeating the offense.*

Section 3104. Duration of Probation. * * * Periods of probation shall [also run concurrently with] *begin at the end of* any federal or state jail, prison or parole term *for the same or* another offense to which the defendant is or becomes subject during that period.

Add new Section 3107. *Use of Rehabilitation Programs.*

Where the defendant so requests at the time of sentence, and where the court finds that the purposes of this Code would be served, the court may postpone the imposition or place the defendant on probation subject to the additional condition, that the defendant participate in or successfully complete a program of rehabilitation supervised by an appropriate public or private agency which the court finds will assist in the rehabilitation of the defendant.

Appellate Review of Sentences *and Critical Decisions Adverse to the Prosecution of Which Review Would Otherwise Be Precluded.*

Title 28, United States Code § 1291.

* * * review shall in criminal cases include the power to review the sentence and to reduce it on the ground that it is excessive or set it aside for further proceedings, *pursuant to the following procedures: (a) a defendant seeking review of his sentence shall set forth the sentence appealed from and distinctly set forth the grounds for seeking review; (b) the government shall not be required to respond to such statement by the defendant nor shall the court of appeals reduce or set aside the sentence unless the court of appeals shall determine that the defendant's statement sets forth grounds upon which such appellate consideration of the sentence is necessary, in which event the court shall so notify the Government which shall then respond and shall so notify the District Court, which shall furnish to the court of appeals any material not a part of the public record which was pertinent to the imposition of sentence, including the presentence investigation if any.*

The courts of appeals shall also have jurisdiction to review, on appeal by the Government, any decision before or during trial in a criminal prosecution instituted by the United States, which the Attorney General certifies is likely to affect the outcome of the case and is of substantial interest to the public. Such appeal if during trial shall be heard immediately. Any decision on such appeal adverse to the defendant shall be reviewable by the Supreme Court of the United States on appeal or certiorari after any affirmance of any resulting judgment of conviction rather than by direct review of the judgment of the court of appeals entered pursuant to an appeal pursuant to this paragraph.

June 21, 1971.

STATEMENT OF VINCENT L. BRODERICK, NEW YORK COUNTY LAWYERS ASSOCIATION, CHAIRMAN, COMMITTEE ON FEDERAL LEGISLATION

Mr. BRODERICK. Well, I will try to keep it shorter than that, Senator. Thank you very much. I appreciate the opportunity to appear here.

I do appear on behalf of the Committee on Federal Legislation of the New York County Lawyers Association, and as you have mentioned, Mr. Chairman. I have submitted a written statement, and I have also submitted a report which the committee on federal legislation has prepared with respect to the proposed new Federal criminal code. In addition, I think one of the speakers who is scheduled for tomorrow, or whatever the adjournment date is, Richard Givins, is a member of our committee, and so he will be touching on some of the matters which are covered in the committee report. I would ask also, Mr. Chairman, that the committee report, in addition to my written statement, be included, if possible, in the record of the hearing.

In the comments which I have made in my written statements I have drawn not only on the expertise of our committee, but also on my own background which includes both Federal and municipal law enforcement. I was, for a period of years, the chief assistant U.S. attorney for the southern district of New York, and I was also the police commissioner of New York City, so I have had experience in active law enforcement on both a Federal level and on a State level.

I would like to say that our committee welcomes the reconstruction and recodification of the Federal Criminal Code. We think it is a very necessary thing, and we think the very process of recodification is a very healthy thing at this time in the history of the country, because it makes us look with a new eye at accretions of 180 or 200 years, and I think that it is very important that this committee, in its deliberations, do just that, that it not take merely the written recodification that has been submitted by the National Commission, but that it take this opportunity to take a new look at laws that have been on the books for some time to decide whether they are necessary, whether they are necessary in the way they are presently cast, and whether the new cast which the National Commission has proposed for them is an appropriate cast.

Comments in my written statement and the comments in the report of the committee on federal legislation are largely critical. They are critical because we felt that the most useful contribution we could make was to point out areas where we thought that the new proposed code was going in the wrong direction. I do not want this to be interpreted as a general criticism of the work of the National Commission, which I think has been very fine work, but just a start.

I would like to just mention briefly some of the criticism we have, underlying again the caveat that there is a great deal else in the work of the National Commission which we have not criticized and which we endorse. Our basic criticism, I think, is one of approach.

We think that the new proposed code relies too much on State and municipal precedents. We think that the purpose of the Federal criminal law is a very different one than that of municipal law, and we question whether in many areas municipal law is an adequate predicate for Federal criminal legislation. In our judgment, Federal criminal legislation is designed to cover areas that the normal municipal criminal housekeeping function has either overlooked or is unable to cope with. But we need Federal criminal law to protect against fraud in the area of interstate commerce, in the area of mail, wire facilities, in the area of the securities market. We need it to protect the national security, to protect foreign relations, to prohibit the dissemination of impure foods, and impure or illegal drugs to the public, and to protect the public against criminal activities which are not limited in their scope.

It is also important, since Federal criminal law is necessary to protect the public in these areas, that the processes of Federal law enforcement be adequately protected by effective laws, and I refer here, for example, to laws against tampering with the administration of criminal justice. There are some of the proposals of the proposed new code, some of the proposed provisions of the proposed new code which we believe drop or dilute some of the necessary safeguards which Federal criminal law presently has. And I would like just briefly to discuss a few of these areas.

One is the area of the Federal conspiracy statute which is section 371 in title 18, and which would be replaced by section 1004 of the proposed code. Section 371, as it presently appears in the law, has a substantive prohibition against conspiracies to defraud the United States. We do not find this provision, we do not find this prohibition in the new code. We think it is a very important prohibition to protect the United States and the functioning of the United States, and we would urge very strongly that it be restored before the new code is adopted.

Mr. Blakey. Excuse me, Mr. Broderick. Could that objection be met by the inclusion of a substantive defrauding provision in the code?

Mr. Broderick. It could.

Mr. Blakey. It would not be necessary then to do as the present code does, I take it—having only a conspiracy to defraud provision?

Mr. Broderick. No. I think it could be broader than that. I think it could be broader than that, but I do have a problem, Mr. Blakey, with delineating too precisely the conduct you are prohibiting. Let me just give an example of that. There is a prohibition in the proposed new code which prohibits you, if you have been retained, from going to a public official or a judicial official without informing him that you have been retained, and intervening in a matter. Now, this is a proposal which has obviously been drafted with specific reference to cases that have been tried, and the notes under that section indicate the *Kahaner* case in New York, where, in fact, this happened. A man made a representation to public officials without disclosing that he was retained to do that, and he was prosecuted, and the public officials were prosecuted, under section 1503, the obstruction of justice provision, and they were convicted.

Now, I just do not understand the utility of drafting a specific provision to cover a criminal activity, which you know, by the very fact that there has been a conviction under that sort of set of facts, is very adequately covered by present law. Beyond that, I think there is a danger in the language because I think when you particularize, you are suggesting that unless a specific set of facts is covered by your particularization, it does not offend the law.

Section 1001 of title 18 makes any false statement in a matter within the jurisdiction of a department or agency of the United States a crime. Now, under present law, certainly present law as it is construed in the Second Circuit Court of Appeals, section 1001 will be violated if there is a statement, if the statement is false, if it was made knowingly and willfully, and if it was within the jurisdiction of an agency or department of the United States.

Section 1352 of the proposed new code would change this. If this statement is a written statement in a Government matter, it is a misdemeanor. It is, that is, if it is material, and if the declarer does not believe it to be true. If it is not a written statement and is not under oath, it apparently is not a crime at all. (If it is under oath, it need not be material.) I think all of us who have been involved in Federal law enforcement know that section 1001 of title 18 is a very important provision for protecting the interest of the United States, and I would not like to see it diluted, and I would recommend that the full reach of the present section 1001 be retained in the new code.

We feel similarly that the mail fraud provision in title 18, section 1341, and the wire provision in title 18, section 1343 are going to be lost under the new code. We do not see them under the new code. We see substituted for them section 1732, which deals with theft. Now, the mail fraud and the wire fraud provisions of title 18 have had broad application in any number of different criminal prosecutions, and they have proved to be a very effective means of presenting action to a jury for the jury to determine whether that action is criminal or not. We urge very strongly that the provisions of present law with respect to mail and wire fraud be maintained. Putting this in terms of theft seems to us creates all sorts of problems. In the first place you are reaching into municipal law for your predicate, and then you are putting in definitions which really dilute the full thrust of what you are trying to get into your statute. A person under section 1732 of the proposed code is guilty of theft if he knowingly obtains the property of another by deception, with intent to deprive the owner thereof. Deception is defined, and it excludes falsification as to matters having no pecuniary significance. It also excludes puffing by statements unlikely to deceive ordinary persons in the group addressed, and puffing is defined as an exaggerated commendation of wares and communications addressed to the public or to a class or group.

Now, we submit that these definitions, thrown into the definition of theft and substituted for the mail fraud and the wire fraud provisions, really remove the protection of the federal government from large groups of people. Most frauds involve, not exploitation of the entire public, but exploitation of the susceptible within the public

group. And as we read the "puffing" exception, it would seem to remove protection from this group. We do not see any justification for lessening of the protection to the public in the mail and wire fraud areas, and we believe today there should be an effort to increase rather than to relax the protections for the consumer.

I have already referred to the obstruction of justice section. Section 1503 of title 18 presently rather broadly provides that anyone who corruptly or by threats or force influences, obstructs, or impedes the due administrations of justice is guilty of a crime. Now, this has covered all sorts of situations. It has been, it seems to me, a very important protection for the processes of the Federal Government. And as we read the proposed code, and the variety of definitions of particular situations in the proposed code, we believe it will dilute the broad thrust of section 1503, and we consider this undesirable.

One last section which I would like to refer to is section 1951 of the present title 18 which protects the public against extortion in situations involving interstate commerce. Here again, rather broad language, whoever in any way or degree obstructs, delays, or effects commerce by extortion or attempts to conspire to do so is guilty of a crime. That section again is abolished in the proposed code, and the substitutes for it are the theft section, section 1732, and the robbery section, section 1721. Here again we see clarity and simplicity and protection being lost. We are disturbed by the breadth of the definition of a threat in section 1741(k) on one side, and on the other side we are disturbed by the narrowing effect of the proposed section 1001 in conjunction with the theft and the robbery sections, sections 1721 and 1732, with respect to criminal attempt. We fear that there will be, under the proposed code, no substitute for the deterrent effect of the present extortion statute as a protection to the public.

We are also disturbed by the rather cavalier treatment of Federal offenses outside of the proposed code. These have, it is true, been reviewed by the National Commission, and the National Commission has made a value judgment that some of them should be actually mentioned within the code so that they can be considered felonies, and some of them have been left outside of it. Some of those that have been left outside, it seems to us, are very important protections for the public against improper activities, and we would urge very strongly that before this code is adopted this subcommittee review very carefully each of the provisions of law with criminal sanctions outside of the code to make sure that the thrust of the code will not be to downgrade rather serious crimes to the status of class A or class B misdemeanors.

In my statement I refer to one such piece of legislation which was passed after considerable consideration by Congress in 1970, the Financial Record Keeping and Currency and Foreign Transactions Reporting Act. That is in title 12. Now, this was legislation which was passed, as I remember, because of the concern Congress had about the transfers of funds from the United States to other countries, to Swiss banks, and it required record keeping and reporting in accordance with regulations that the Secretary of the

Treasury may pass, and it provided criminal sanctions. A willful violation of any regulation carries criminal penalties up to a $1,000 fine or 1 year imprisonment or both.

Now, so far so good. This would fit, I believe, within the class A misdemeanor category under the proposed code. But, if the violation under those provisions of title 12 is committed in furtherance of the commission of any other violation of Federal law, punishment by imprisonment for more than 1 year, the violation of title 12 by the terms of title 12 carries a criminal penalty of a fine up to $10,000 and imprisonment up to 5 years or both. Now Congress, when it passed this, passed it after giving a lot of thought to it, and there was a very good reason why there was a 5-year prison maximum and a $10,000 fine maximum put in the statute. This certainly should not be eliminated without giving very careful thought, and this is a tremendous burden for this committee, but I think the committee has to undertake this burden as to whether the overall purposes of the Federal criminal law are being served by downgrading crimes such as this.

Senator HRUSKA. On that point, Mr. Broderick, one of the difficulties in that regard is encountered when Congress would abdicate and endorse over to a regulatory agency the power to proscribe certain conduct, violation of which would be punishable as a felony. That is pretty serious business. We like to think, many of us in the Congress that that business should be limited to the Legislature itself, and if we simply say that we are going to give powers to regulatory agencies to legislate criminal laws with felony sanctions, that is pretty serious for the public. It is serious for everybody concerned, considering first of all that the regulations are not promulgated as plainly and as advisedly as statutes are, as the law itself is.

Now, I agree with you that we should review carefully those regulations, but if the regulations are of sufficient importance, and if the violations of those regulations are so serious, then that particular regulation should graduate into the status of a statute. That is our general thinking. What comment would you have on that?

Mr. BRODERICK. I think I may agree with your general thinking, but I think that distinctions have to be made, Senator.

Senator HRUSKA. Yes.

Mr. BRODERICK. You, as a Senator, are a generalist, and in the specific cases I have cited of title 12 with respect to financial reporting, you as a Senator, and the Congressmen as legislators, have made a value judgment, and have enacted into law that reporting is necessary in this area, and that a failure to report where report is called for is a crime. Now, you certainly are not in a position to decide what shall be reported, or how often it shall be reported. This is a technical matter which I do not think you should be concerned with. But, you have passed on the basic penal question, is this sufficiently serious, is information in this area sufficiently necessary that the failure to keep the records, or the failure to make the records when called for should be a crime, and if so, how much of a crime.

Now, let us move over to another area. Let us move over to the area of food and drugs. Certainly the Congress should not make a decision on what particular drug is pure and what particular drug

is impure. You do not have the expertise, and you would not have the expertise even if you held hearings 365 days a year. But, you do know that you do not want members of the public to be sold or purveyed imperfect drugs or imperfect food, so you make a law, and you decide what the penalty should be for impure drugs or food, and then you leave it to the Food and Drug Administration to decide what specific drugs are pure and what specific drugs are impure, really a technician's question and not a legislator's question. And I have no trouble with that.

Senator HRUSKA. Well, that is a problem. We try to deal with it as best we can. We will try to deal with it as best we can, but we do have that outer limit, where we do not feel we can give too much power to the regulatory agencies because they are not representatives of the people. They live forever, and they are not subject to the checks that people who win elections by popular consent are. Do you not see that that is part of the problem?

Mr. BRODERICK. That certainly is true, and I think really what you are underlining, Senator, is the requirement that the legislature be vigilant, and be careful on what it does delegate and be careful that what it does delegate is not a power to, not something for which it is answerable to the people.

Senator HRUSKA. Thank you very much for your testimony. We know that you have served as the commissioner of police in New York. You are a former U.S. attorney, are you not?

Mr. BRODERICK. That is correct.

Senator HRUSKA. So, we know when you speak you speak with that background, that will, of course, induce us to give very serious consideration to the suggestions you make.

Mr. BRODERICK. Thank you very much, Senator. Thank you for the opportunity to be here.

Senator HRUSKA. Our next witness is Mr. Frank N. Jones. He is executive director of the National Legal Aid and Defenders Association.

Mr. Jones, you have furnished us with an interim statement of the National Legal Aid and Defenders Association. It will be inserted in the record at this point.

(The statement follows:)

STATEMENT OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

Mr. Chairman and members of the Subcommittee, my name is Frank N. Jones. I am the Executive Director of the National Legal Aid and Defender Association. Appearing with me today is Mr. Terence MacCarthy, Executive Director, Federal Defender Program for the Northern District Illinois.

The purpose of this statement is to place before this Subcommittee the official views of the National Legal Aid and Defender Association (NLADA) with respect to the Proposed Federal Criminal Code. Formed in 1911, NLADA is the only national, non-profit corporation representing those organizations providing legal services for the poor. It counts as members throughout the United States approximately 900 offices engaged in civil practice and 350 offices engaged in the defense of the criminal accused. The NLADA member offices include all the various organizational forms of legal aid and defender services—public, private, and mixed—and its Board of Directors and Executive Committee are composed of leaders of the Bar from every section of the country.

The proposed legislation is the result of a most careful and thoughtful analysis of existing law, for which the National Commission on Reform of

Federal Criminal Laws should be commended. The organization of the federal criminal laws into a single compilation provides essential integration and lends itself to more efficient use. A comprehensive scheme of the nature proposed should be adopted by Congress.

PART A—GENERAL PROVISIONS

Chapter 1. Preliminary Provisions

Section 103. Proof and presumptions

Although the requirement of proof beyond a reasonable doubt is said to be retained in section 103(1), there is a change in the Code from the traditional "presumption of innocence" to the phrase "assumption of innocence," which affects more than semantics. According to Professor Wigmore, the "presumption of innocence" is fixed in our law. The purpose of retaining the expression, he states, is to emphasize that it is for the prosecution to adduce evidence. The presumption implies "that the accused (like every other person on whom the burden of proof does not lie) may remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e., to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it.

"However, in a criminal case the term does not convey a special and perhaps useful hint over and above the other form of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced. In other words, the rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence*, i.e., no surmises based on the present situation of the accused. This caution is particularly needed in criminal cases." (9 Wigmore, Evidence § 2511 (3d Ed., 1940), emphasis in original.)

In section 103(2) another change in the law is proposed concerning the amount of evidence necessary to raise a defense. While the majority of circuits permit the defendant to raise a defense by presenting "some," "slight," or "any" evidence, the new section would require the accused to produce evidence "sufficient to raise a reasonable doubt on the issue." We oppose this change, as the burden of proof belongs to the prosecution. It is a violation of due process to convict the accused except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (*In re Winship*, 397 U.S. 358 (1970).) It is for the same reason that we oppose the creation of a new category called "affirmative defenses" in section 103(3) which would shift the burden of proof to the defendant.

Chapter 2. Federal Penal Jurisdiction

Section 201. Common jurisdictional bases

No comment is offered upon the jurisdictional sections at this time, as we are studying the effect of these provisions.

Chapter 3. Basis of Criminal Liability; Culpability; Causation

Section 301. Basis of liability for offenses

While section 301 properly requires that mere status should not be the basis for criminal liability, the section is deficient in another respect. In this section, liability for action and for the failure to take action is established without regard to whether the action, or omission was voluntary. We oppose that portion of this provision creating criminal liability without the prerequisite mens rea. This is in accordance with the Model Penal Code, § 2.01, which provides that, "A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act. . .".

Section 302. Requirements of culpability

Section 302, which establishes the general mental element for specific crimes, is defective as it is applied to certain specific offenses. For example, the offense of attempt is traditionally a specific offense crime which re-

quires the specific intent to commit the substantive crime (see Perkins on Criminal Law (2d Ed., 1969) at 573). However, the Code provision dealing with attempt (§ 1001) fails to require that the actor have the specific intent to commit the crime. Instead, it merely requires that he intentionally perform the act which constituted a substantial step toward the commission of the crime. This is particularly dangerous because criminal attempt as defined in the Code is an offense of the same class as the completed offense. Under the Code provision, therefore, an accused may be convicted for a crime that has not occurred in spite of the fact that he did not intend to commit a crime.

Chapter 4. Complicity

Section 401. Accomplices

Section 401, dealing with accomplices, imposes liability for the commission of a crime upon one who "fail(s) to make proper effort" to prevent it. We oppose the notion of placing the onus on a nonparticipant, and further suggest that the words "proper effort" are unconstitutionally vague, as they do not afford sufficient notice of what acts would constitute "proper effort." The liability of a nonparticipant is particularly heinous where, as in this provision, he is treated as a principal.

Chapter 6. Defenses Involving Justification and Excuse

Section 607. Limits on the use of force; excessive force; deadly force

Section 607(2)(d), which provides a justification for the use of deadly force by a public servant, would condone summary execution of persons who have not themselves employed force. While the Study Draft specified that the defense would apply only where the fleeing felon had attempted to commit a Class A or Class B felony involving violence, the Final Draft allows the defense to be used where the fleeing felon is accused of committing any type of "felony involving violence." The term, "felony involving violence" is nowhere defined in the Code. The Study Draft version would, at least, have eliminated the defense in instances where the deceased was attempting a Class C felony involving very little risk of jeopardy to human life.

Section 607(2)(f), which justifies the use of deadly force in the course of a riot, would apply to the situation where a looter is shot by an officer. The ideological impact of a federal law justifying such a broad use of deadly force against citizens would be most undesirable. Moreover, such a rule at the federal level would be likely to stimulate similar legislation at the state level. We recommend that these provisions be limited to instances where human life is seriously and imminently threatened by the accused felon.

Chapter 7. Temporal and Other Restraints on Prosecution

Section 701. Statute of limitations

There are two serious defects which we see in the proposed Statute of Limitations section (§ 701). We would oppose the easy defeat of the limitations period by the filing of a complaint, and automatic waiver upon failure of counsel to raise the statute as a bar.

Section 707. Former Prosecution in Another Jurisdiction: When a Bar

While the notions of a compulsory joinder (§ 703) and absolute bar against subsequent prosecution (§ 708) embodied in the Code deserve our commendation, we believe that section 707 tends to violate the constitutional proscription against double jeopardy. The requirement that all of the charges against a defendant growing out of a single criminal episode be joined at one trial would be circumvented by granting the federal prosecutor the right to proceed subsequent to a state prosecution. We would strongly oppose subsequent prosecution by the federal government of a matter already litigated in the state courts.

PART B. SPECIFIC OFFENSES

At this time we are not able to set forth our comments on the many specific offenses contained in the proposed Code, but we are working with our staff and committees to develop a section-by-section analysis and commentary. Recently enacted federal criminal legislation, wherever possible, should be incorporated into the new Code. The recent compilation of drug offenses (PL 91-513) should be assimilated into the new Code, but we would strongly urge the adoption of the lower penalties suggested in the final draft.

PART C. THE SENTENCING SYSTEM

The two most notable and progressive achievements in the Proposed Federal Criminal Code, which we would strongly urge Congress to adopt, are the abolition of the death penalty (§ 3601) and the legislation which would permit appellate review of sentencing (proposed 28 U.S.C. 1291).

Chapter 30. General Sentencing Provisions

Section 3001. Authorized sentences

In section 3001 a minority of the Commission suggested a provision authorizing the district court to reduce the class of the offense. A district court should have the discretion to lower the punishment if such a plan would aid in the rehabilitation of the offender. However, we would suggest that this provision be broadened to grant the court the power to reduce the class to whatever class the district court finds to be in the interests of justice.

Section 3003. Persistent misdemeanants

The imposition of a sentence of up to 5 years for a misdemeanant after his third conviction for a Class A misdemeanor, as proposed in Section 3003, is an ill advised deviation from the present law. The argument that a misdemeanant who has received two prior sentences ranging from 30 days to one year should be incapacitated for as many as 5 years is based primarily upon the supposition that society needs to be protected from the petty offender. Given the present capabilities of our institutions for truly rehabilitative programs as compared with their potential harmful effects upon the petty offender, the rehabilitative-incapacitative program is certain to misfire.

Section 3005. Resentences

Section 3005, which permits a court to impose a more severe sentence upon resentencing, is contrary to the ABA's Minimum Standards for Criminal Justice. Section 3.8 of the *Standards Relating to Sentencing Alternatives and Procedures* (Approved Draft, 1968) provides that, "where a conviction of sentence has been set aside on direct or collateral attack, the legislature should prohibit a new sentence for the same offense which is more severe than the prior sentence less time already served." Adoption of the Commission's minority alternative, which conforms to the ABA Standards, would avoid the appearance that the defendant was penalized for exercising his right to an appeal. Conduct occurring after the time of the original sentencing, if criminal, should be made the basis for a separate prosecution, wherein the state must bear the customary burden of proving the misconduct beyond a reasonable doubt.

Chapter 31. Probation and Unconditional Discharge

Section 3102. Incidents of probation

Section 3102, as proposed, would remove the discretion which the court presently has to fix an initial term of probation for a felon which is less than 5 years. While we do not oppose the time limits set for felonies, misdemeanors, and infractions, we believe these time limits ought to be maximums, allowing the court to impose shorter periods of probation in their discretion.

Chapter 32. Imprisonment

Sections 3201 and 3202. Sentence for imprisonment: incidents; upper-range imprisonment for dangerous felons

While the range of sentencing alternatives provided in Chapter 31 is most encouraging, Chapter 32 contains a number of regressive features. The maximum terms of imprisonment created by sections 3201 and 3202 are excessively long. Moreover, we would suggest a provision for a good time allowance (cf. 18 U.S.C. § 4161), and a credit for educational improvements.

Section 3101 would enable the court to set a minimum term of one-third of the sentence. The court's imposition of minimum terms hampers the rehabilitative process and removes needed discretion from the parole board.

The classification for a dangerous felon, as in section 3202, is of doubtful validity, but if found necessary should be no more inclusive than the existing treatment of dangerous special offenders. Both Title X of the Omnibus Crime Control Act of 1970 and Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 restrict such treatment to the situations described in subsections (a), (b), and (d) of this section.

Chapter 33. Fines

Section 3304. Response to nonpayment

Section 3304, by requiring that an individual failing to pay a fine must show cause why he should not be imprisoned for nonpayment, runs afoul of the U.S. Constitution. First, the statute violates the Due Process Clause of the Fifth Amendment, which has been held to require that the prosecution bear the burden of proving guilt beyond a reasonable doubt. (*In re Winship*, 397 U.S. 358 (1970).) Secondly, the section should be revised to make it clear that a defendant would not be incarcerated by virtue of his indigency (cf. *Tate v. Short*, 401 U.S. 395 (1971)), in violation of the Equal Protection Clause.

Chapter 34. Parole

Section 3401. Parole eligibility; consideration

While section 3401 expresses the progressive view that a prisoner should be eligible for parole at any time, it fails to adequately provide for the person who is serving only a one-year sentence. Subsection (2) ought to be amended to provide a parole hearing within three months of confinement for such a person; his first opportunity for parole should not be delayed until 60 days prior to the expiration of the year.

Section 3402. Timing of parole; criteria

The prohibition created in section 3402 on releasing a prisoner who is serving a long sentence during the first year of his imprisonment would serve to retard effective rehabilitation of such prisoners. The Model Sentencing Act provides for immediate parole eligibility, even for the most serious of offenders. The remainder of the section reflects a progressive attitude, which places a great deal of discretionary authority in the parole board. The board should be structured and financed so as to carry out the intent of these modern provisions.

The possibility of being released on parole, however, should not remain the only motive for good behavior. Repeated denials of parole would remove incentive if no provision is made to allow credit for good-time. Thus, we would recommend inclusive of a provision similar to that in the Working Papers, section 3407, to provide good-time credit.

Section 3406. Finality of parole determinations

Section 3406, which would shield the decisions of the parole board from review by the federal courts, changes the present law (see *Arciniega v. Freeman*, 92 S. Ct 22 (1971)). Such a provision would permit the parole board to take arbitrary action, protected from public scrutiny. Granting unreviewable discretion to the parole board violates the principle that administrative agencies should be subject to a check upon abuse of discretion. (Davis, Administrative Law (1965) at 526.)

This concludes our interim statement. There are many sections of the Code which we have not yet studied adequately. We would like to comment on those sections as well as expand upon the remarks which we have made here this morning at a later time in a more complete statement. The National Commission on Reform of Federal Criminal Laws deserves high praise for the careful job they have done on this massive task. We want to thank the Subcommittee for the opportunity to present our views before you today.

STATEMENT OF FRANK N. JONES, EXECUTIVE DIRECTOR OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION; ACCOMPANIED BY TERENCE MacCARTHY, EXECUTIVE DIRECTOR OF FEDERAL DEFENDER PROGRAM FOR THE NORTHERN DISTRICT OF ILLINOIS

Mr. JONES. Mr. Chairman, my name is Frank Jones, and I am executive director of the National Legal Aid and Defenders Association.

Mr. R. A. Green, was unable to come, and I believe this was transmitted to the committee some time ago. I am here, therefore, in his

stead. Also appearing with me, is Mr. Terence MacCarthy, who is the executive director of the Federal defender program for the northern district of Illinois. He is also the chairman of the Federal Defender Committee for National Legal Aid Defenders Association, and he will supplement some of my remarks, and will touch on some areas that are not covered in my interim statement.

The National Legal Aid and Defenders Association represents some 900 civil offices providing legal services in every State in the Union, and some 350 defender offices, including Federal defender programs throughout the United States. We also have programs at the Virgin Islands, Puerto Rico, and Micronesia.

Now, my statement this morning was prepared by the National Legal Aid and Defender Association staff in conjunction with the Federal defenders. However, we regard this only as an interim statement, and we are in the process of preparing a section by section analysis of the proposed code which we will present to the committee within the next few weeks.

Senator HRUSKA. That will be fine, and when you do, you transmit it to Mr. Blakey and he will see that it is handled properly.

Mr. JONES. Yes, sir.

On the whole, we regard the proposed legislation as a most important and far-reaching step toward providing an integrated uniform body of criminal laws. We believe the committee has done a fine job in the preparation of this draft.

I should like here to simply highlight some of the concerns which we at the NLADA consider particularly important. First with regard to the general provisions of Chapter 1, Proof and Presumptions, we believe that the concept of the presumption of innocence is fundamental. We think it is a bedrock upon which not only emotional attitudes but complete patterns of thought regarding our justice system have been predicated, and we are concerned that elimination of this concept will not only cause great confusion in the minds of the lay jury, for example, but will also ultimately undermine the rights of the accused.

We, therefore, feel that unless this committee is very careful in developing and controlling the meaning of the new proposed concept of assumed to be innocent that we run the risk of eroding the meaning of presumption of innocence. and that is one concern that the National Legal Aid and Defender Association and its affiliated member organizations throughout the country have voiced.

We have not yet formulated a position on the proposed common jurisdictional bases provided for under section 201. but we believe it to be a most important issue.

Now, our final statement, as I have indicated, will treat it in some detail. However, Mr. MacCarthy will make some observations with regard to this common jurisdictional question in his remarks.

Looking then to chapter 6, section 607 which limits the use of force, excessive and deadly force, we are concerned as a result of our experiences during periods of civil disorders such as the disorders and disruption throughout the country in 1967 and 1968, Chicago, Detroit, Newark, et cetera. During these periods there is tremendous confusion, and honest citizens, hardworking people very

often find themselves in the vicinity of disturbances where windows are being broken, and consumer goods are there for the taking, as it were. The Commission on Civil Disorders reported that a large percentage, the exact number of which we do not have, but a large percentage of people arrested for looting were, in fact, people who had no previous trouble with the police and who worked every day. The provision with regard to the use of deadly force, as it relates to burglary (and I use burglary because in looting cases, people are usually charged with burglary) would make it, would create a situation wherein these people to whom I refer might very well find themselves the victims of deadly force.

Section 607(2)(f) would permit the use of deadly force in this situation. Given the confusion that exists during these periods, police officers, we believe, should not be encouraged to use deadly force, and we think that certainly more clearly defined standards to be followed by those public servants who will issue the order to use deadly force should be stated.

An alternative for eliminating this problem might be to strike the word burglary from the list of crimes in which deadly force might be justified, or to specifically exempt certain kinds of acts during periods such as civil disorders.

Now, I am mindful that the section refers to deadly force for the prevention of crimes, but I would suggest that it is written in such a way as to encourage the use of deadly force to stop so-called fleeing felons. I am reminded of the interpretation given the statement of the mayor of one of our large cities after a riot, the interpretation of his statement which very closely approximates this provision in the Code, was that he was advocating the use of deadly force to stop people who had, in fact, picked up these consumer goods to which I referred. And one way of eliminating the possibility of deadly force in this situation might be to exclude the word burglary.

Regarding the fines in chapter 33, section 3304, we believe that this section should be strongly worded to make it clear that the principles established in *Tate* v. *Short* [1] are applicable here, and that the poor should not be incarcerated simply because they are without the funds to pay the fine. We do not think that the comments or that the provision itself states that principle clearly enough.

Finally, the NLADA wholeheartedly supports chapter 36, section 3601 as the alternative to capital punishment. We are opposed to the provisional chapter 36 which retains the death penalty. The delegate assembly of the National Legal Aid Defenders Association, at its annual meeting, on November 5 through 8, 1971, passed a resolution opposing the death penalty.

Mr. BLAKEY. May I ask you one question at that point? On the assumption that the Supreme Court sustains it as constitutional, and Congress decides to retain the death penalty, would you favor the bifurcated trial and a separate hearing for the penalty stage of the trial?

Mr. JONES. Yes, yes, we would.

I very much appreciate this opportunity to highlight some of our views with regard to this proposed code, and Mr. MacCarthy will make certain observations.

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[1] *Tate* v. *Short*, 401 U.S. 395 (1971).

Mr. MacCarthy. Senator Hruska, I might join with Mr. Jones in commending the effort put forth and more importantly the results achieved by the National Commission on reform of the Federal criminal laws. In my opinion, if the draft report were adopted as written now, whatever its shortcomings might be, it would substantially improve the overall administration of criminal justice and the courts.

I might explain briefly the reason for my appearance. I appear solely in an individual capacity, and by no way do I speak on behalf of those involved in Federal defender work. As a matter of fact, it is my understanding, Senator, that those involved in Federal defender work are now in the process of assimilating their comments based upon a more in depth review of the various provisions of the act. These will be forwarded shortly. I have been asked, as chairman of a subcommittee of the National Legal Aid and Defender Association, to comment and be prepared to answer questions on its interim statement which I received last week.

In the main, I am in agreement personally with most of the observations made in the interim statement, however, not necessarily all. I would like, however, to again stress, and I think Mr. Jones did a very excellent job in this regard, that this is but an interim report and something more significant should be forthcoming in the immediate future.

I might offer two general comments not contained in this report, and one additional specific comment which might be helpful to the committee.

First of all, I might sound what is probably an unaccustomed voice in favor of the jurisdiction provision of the bill, and more specifically in favor of the piggyback jurisdictional provision in section 201(b). In voicing support of jurisdiction provision, I am not unmindful of the suggested inadequacies of some of the terms or language of § 201(b)—i.e., the terms "in the course of committing" and "in immediate flight from the commission of any other offense." Appreciating, however, the frailties of our language, the section does as fine a job as possible in semantically setting forth the section's jurisdictional criteria.

My favoritism of this jurisdiction aspect of the bill is based on several basic points.

First, I think the broad jurisdiction provisions of the bill recognize the problems of judicial economy. We are ofttimes faced with the situation of having a defendant at one and at the same time facing charges in both the State and Federal courts, charges arising from the same act, or the same series of acts.

Second, the board jurisdictional base of the section facilitates the prosecution of the multistate type of crime, particularly syndicated or organized crime.

Third, I think the jurisdictional provision relieves the Federal courts from the inequities limitations which presently attain. I have reference, of course, to the most recent situation where a union leader was shot, and of course, the persons accused could not be prosecuted on murder charges in the Federal court. Similarly I

have reference to the limitations jurisdictionally imposed on the prosecution of those accused of murdering civil rights workers.

Fourth, and of particular interest to me as a defender, is the potential made possible by the broad jurisdictional provision of permitting a downgrading of offenses which might otherwise carry more severe penalties.

In voicing my comments, I am not unmindful of the potential for abuse made possible by this piggyback provision. I acknowledge the possibility that there could be an invasion of areas of primary State concern. I would hope this would not occur. Realistically, however, I think that practical considerations and past history urge against unnecessary fears. This point I might explain in some detail.

Frankly I suggest that the present jurisdictional basis of our Federal criminal law is quite broad. I have reference particularly, to the mail fraud statutes and to section 1951 and 1952 of title 18, the Anti-Racketeering statutes. Imaginative U.S. attorneys can and have extended the breadth of Federal jurisdiction to most any crime where they really desire to prosecute.

Notwithstanding the present scope of Federal jurisdiction, I personally perceive a trend, and I might add a salutary one, in favor of declinations by Federal prosecutors in favor of State prosecution where the charges involve the "garden variety" of common law crimes. Particularly, I notice in our own district the U.S. attorney very seldom prosecutes Dyer Act violations, except of course where he feels there is an organized crime involvement.

Lastly I think we should not lose sight of the obvious manpower limitations of our Federal investigatory agencies and, of course, our Federal prosecutors' office. For these reasons I am optimistic and I believe realistic—in not being fearful of the creation, by the piggyback provision, of a Federal police state.

The second comment I offer is my own strong support for what I read to be the majority recommendation in favor of firearm legislation. I specifically have reference, of course, to the banning of all handguns, save for the few exceptions relative to police officers and those in law enforcement work. Admittedly this involves an area of primary State responsibility. There can be no question as to the State's priority. The fact of the matter is, however, that States have not indicated and apparently will not in the foreseeable future indicate, a willingness to enact necessary gun legislation. It then remains then for this legislative body, our U.S. Congress, to bring forth meaningful and most necessary gun legislation.

I might add one final observation. Since the comments were written that there has been a slight change or if you will, further development, of the law relative to double jeopardy. These developments place in issue the accuracy of one of the committee's comments. I call attention to section 704, one of the provisions dealing with double jeopardy.

Senator Hruska. What page is that?

Mr. MacCarthy. That is page 214, Senator. In the comment to section 704, the commission suggests that they are in effect restating Federal case law, and secondly they indicated that they are incorporating in section 704 the doctrines of *res judicata* and collateral estoppel.

As to the latter of these observations, the suggestion that the Commission is incorporating the doctrine of collateral estoppel in section 704 is, I respectively suggest, somewhat inaccurate. It would appear the Commission had reference to the Supreme Court decision in *Ashe* v. *Swenson*.[1] However, the fact remains that the initial paragraph of section 704 limits its application to those circumstances where there has been a violation of the same statute.

Now, although the same statute was involved in *Ashe* v. *Swenson*, the fact of the matter remains that the more pervasive concern of the collateral estoppel doctrine is the situation where out of the same set of facts the defendant has been charged with violations of more than one statute. Some thought might be given to deleting from section 704 the qualifying terms "* * * if it is for violation of the same statute * * *."

Dropping down to section 704(d), this subsection in effect sets various exceptions where jeopardy shall not attach. The third such exception—they are not further enumerated save that this is the second exception listed under the (ii) designation—talks in terms of there being an exception where "* * * there was a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law." I respectfully suggest that this exception does not now receive the approbation of the courts. I respectfully call attention to the case of *United States ex rel Somerville* v. *Illinois*.[2] This is a 1971 opinion written by the late Judge Major. The case raises the very issue contemplated by the above stated exception—i.e., the situation where the prosecutor returns what later turns out to be a faulty or fatally effective indictment but nonetheless proceeds to the point of establishing jeopardy, by impaneling the jury, and thereafter moves for a mistrial. The seventh circuit held that jeopardy did in fact attach. Under section 704(d) a sit now reads jeopardy would not attach. I should point out that *Somerville* was remanded to the seventh circuit court of appeals by the Supreme Court for reconsideration (401 U.S. 1007), after the seventh circuit had initially (429 F. 2d 1335) concluded the law as stated in section 704(d). Finally, a petition for certiorari, filed by the State of Illinois, is now pending.

Senator HRUSKA. Mr. MacCarthy, there are several Supreme Court decisions in this area that pretty well set out the law now. do they not? And the Supreme Court is engaged in further decision-making and writing further opinions on this subject. What would you think of eliminating section 704 altogether and relying upon the Supreme Court decisions as opposed to an effort to broaden, correct, or modify in some way the present language of this proposal?

Mr. MACCARTHY. Personally, Senator, I would be in favor of eliminating the provisions altogether and deferring instead to the U.S. Supreme Court—with one notable exception. Section 707 precludes, "* * * unless the Attorney General of the United States certifies that the interests of the United States would be unduly harmed * * *." Federal prosecution where the conduct gives rise to the offense is initially prosecuted by another sovereign. This section

[1] *Ashe* v. *Swenson*, 397 U.S. 436 (1970).
[2] *United States ex rel Somerville* v. *Illinois*, 447 F. 2d 733 (7th Cir. 1971).

does much to avoid the potentially unequitious circumstance which might arise from dual prosecutions as now permitted or given judicial approbation in *Abbata* v. *United States*.[1] Generally, however, I would agree with the Senator's comment, I would think these sections. relative to double jeopardy issue, could be eliminated and we could instead defer to the decisions of the Court.

Senator HRUSKA. Thank you very much. Thank you both for appearing and we will await the later material.

Mr. JONES. Thank you so much, Senator.

Senator HRUSKA. Our next witnesses will be Mr. Melvin Wulf and Mr. Edward Ennis of the American Civil Liberties Union. A third man is at the table, and will you identify him for the record, please?

STATEMENT OF EDWARD J. ENNIS, CHAIRMAN, BOARD OF DIRECTORS, AMERICAN CIVIL LIBERTIES UNION, ACCOMPANIED BY MELVIN L. WULF, LEGAL DIRECTOR, AMERICAN CIVIL LIBERTIES UNION; AND DAVID RUDOSKY, ATTORNEY AT LAW, PHILADELPHIA, PA.

Mr. ENNIS. Yes. Good morning, Mr. Chairman. My name is Edward J. Ennis and I am the chairman of the American Civil Liberties Union and on my right is Mr. Melvin Wulf, who is the legal director of the American Civil Liberties Union, and on my left is Mr. David Rudosky, who is a private attorney in Philadelphia who prepared the draft of the 144-page statement on the proposed code, which we have submitted to the committee and which we would request be made a part of this record.

Senator HRUSKA. It will be done.

(The statement of Mr. Ennis and 144-page report follow:)

STATEMENT OF EDWARD J. ENNIS, CHAIRMAN, BOARD OF DIRECTORS, AMERICAN CIVIL LIBERTIES UNION, NEW YORK, N.Y.

Mr. Chairman. my name is Edward J. Ennis. I am Chairman of the Board of Directors of the American Civil Liberties Union. I served in the Justice Department from 1932–1946 in various positions including the Office of the Solicitor General and Assistant U.S. Attorney in the Southern District of New York. I was General Counsel of the Immigation and Naturalization Service and Director of Alien Enemy Control during World War II. I have been in the private practice of law since my government service.

The federal criminal code proposed by the National Commission on Reform of Federal Criminal Laws is a major event in American criminal law. As described by the Commission Chairman, Edmund G. Brown, the Report aspires towards being "a logical framework for a twentieth century penal code." We think the proposed Code goes a long way towards reaching its goal.

One of the common interests of civil libertarians—though not one which is exclusively theirs—is to have the criminal law set out clearly, coherently, and uniformly. A compilation of the criminal law with those characteristics serves two purposes. First, it helps to assure that the public understands the conduct which society has forbidden. Second, and more importantly, it helps to assure that those responsible for enforcement of the law have the least possible opportunity to construe the law favorably for their friends and unfavorably for their enemies.

The second objective will surely always be elusive. It is as plain as can be that the man with friends in high places has a distinct advantage over a friend-

[1] 359 U.S. 187 (1959).

less prospective defendant; and it is equally clear that the best code of criminal laws will be applied more "clearly, coherently and uniformly" to the poor as a class than to the rich. But we persist in our hope that a well drafted criminal code will have some tangible effect on reducing the law's inequalities.

This proposed Code is distinctly a step in the right direction because it tries to deal coherently with the whole of the substantive criminal law. It is not perfect, otherwise we would not have one hundred and fifty pages of criticism. A model code drafted by the ACLU would look quite different from this one. Though it would not be perfect either, we like to think it would be a better approximation of perfection.

We do not comment on all the provisions in the proposed Code. Those which we do not touch on did not, in our judgment, raise important, or more often *any*, civil liberties issues, at least by the ACLU's definition. On the other hand, we have tried to note at least in passing those proposals which we believe serve civil liberties principles.

One which deserves special recognition is the decriminalization of homosexual activity between consenting adults, an objective which the ACLU has advocated for many years.

Unforunately, the Code does not decriminalize other acts which the ACLU believes should be beyond the reach of the criminal law. For example, the Code would still make criminal mere advocacy of the desirability or necessity of armed insurrection, thereby perpetuating the Smith Act with basically insignificant changes, and it also retains, although in substantially improved form, the interstate riot act, the offense out of which the notorious Chicago conspiracy trial arose.

The crimes which are of main interest to the ACLU—those involving "national security" offenses (Chapter 11), the conspiracy provision (Sec. 1004), and wiretapping (Sec. 1561)—are basically unchanged and present the most serious defects in the proposed Code.

Most of the "national security" offenses, such as treason, advocacy of armed insurrection, espionage, obstruction of recruitment, and the classified information provisions, involve serious First Amendment problems of free speech and assembly, and in most of them the Code comes down on the wrong side. Unwilling to take the risks that a free society demands, the draftsmen have too often opted for security over freedom.

That the bulk of our comments upon the Code are critical rather than flattering is to be expected. The principal function of the ACLU is to be in opposition, and there will be more than enough people to say either that the Code as drawn is perfect, or that it is too liberal. In any case, it is largely an improvement over existing statutes, but we think it can be improved even further.

For the purposes of my present testimony, I would like to highlight—very briefly—those sections of the Code which we believe present the most serious defects from a civil liberties point of view.

Section 1003. Criminal Solicitation.—The ACLU believes that a serious civil liberty issue is presented by this section with respect to its application in First Amendment contexts. We do not think that the proposed statute adequately protects against the danger of a jury finding that legitimate discussion or agitation of an extreme or inflammatory nature was solicitation to crime. Advocacy and rhetoric in behalf of an unpopular cause may be construed as solicitation to others to violate the law, rather than protected speech under the First Amendment designed to foster political change. It has been recognized in many contexts that, particularly where criticism by minority groups is concerned, the language used must be extreme in order for it to be politically audible and effective.

Section 1004. Criminal Conspiracy.—This is one of the most defective provisions of the Code for it does little to avoid or even minimize the gross invasions of constitutional rights and liberties produced by conspiracy prosecutions. A few of these abuses might be remedied by the section, but the overwhelming number remain unaffected.

Conspiracy laws and prosecutions threaten First Amendment and due process liberties in at least the following three ways:

(1) Heavy criminal penalties are possible for conduct which goes little beyond idle talk and in fact poses no substantial danger to the community.

(2) Such liability for non-dangerous conduct can be imposed on all joint activity, and will often be based primarily on speech, thus impairing fundamental First Amendment freedoms of speech and association.

(3) The procedures by which conspiracy cases are tried seem also designed to make it impossible for any individual defendant to defend himself adequately. Exceptions to hearsay and relevancy rules, the dangers of a multiparty trial, venue problems—all these are left for another day.

The proposed conspiracy section embodies the classic dangers to free speech and association that have been manifest in recurring conspiracy trials. In substantive terms this section authorizes prosecution and conviction for advocacy by anyone in a group that harmlessly agreed, for example, to effect resistance to the draft and who in support of these goals made speeches attacking conscription and urging others not to comply with the Selective Service Act. The objective is illegal: non-compliance with the Selective Service Act; and the overt act is present: the speech. Thus a conviction may be had for nothing more than an open agreement between two persons to do the illegal act and the commission of an overt act by either person which may, independent of the agreement, be constitutionally protected speech. Not even a "clear and present" danger limitation is applicable to this statute. The statute converts free speech (e.g., advocacy of draft resistance) into criminal conduct merely because two or more persons engage in the advocacy.

If one man may discuss and advocate, there should be no less freedom for a number of men to discuss and advocate together. Conspiracy for an unlawful purpose may not be punished until there arises a clear and present danger of an unlawful act—in other words, until steps are taken not merely to advocate but actually to plan and carry out an unlawful act.

Chapter 11. National Security.—Throughout this chapter, the commission of a criminal act is made dependent upon the United States being engaged in "war." We believe that whenever an offense turns on whether the United States is at war, the Code should be amended to require that the war be one declared by Congress.

Section 1101. Treason.—The ACLU strongly objects to the proposed section on treason. As drafted the proposal could, for example, subject thousands of Americans to prosecution and a sentence of life imprisonment for the speech and conduct in which they presently are engaged in opposing the Vietnam war. The section is pregnant with possibility for misuse and could lead to prosecutions intended to punish dissenting speech.

Under the present treason statute, speech which severely criticizes the Government's operation of a war, and which gives aid and comfort to the enemy is apparently protected unless it also was done with an intent to betray and adhere to the enemy. *Chandler, supra* at 938; *Cramer v. United States*, 325 U.S. 1. 29. However, under the proposed Code the prohibited conduct is punishable if done with the intent *either* to aid the enemy or prevent or obstruct a victory of the United States. Thus, it is certainly arguable under this section that the mere speech, if convincing enough to encourage the enemy to persevere in their efforts, will be punishable as treason. Speech in this area must continue to be protected. Even in the course of normal activities of political opposition, the expression of criticism and statements as to what is best for the country must not be fettered by fear of a jury's finding of a traitorous purpose in the passion and tumult of a subsequent prosecution for treason.

Section 1103. Armed Insurrection.—The ACLU always has opposed statutes such as the Smith Act, which makes it a crime to engage in some political speech, and we oppose its modification embodied in this section. The fundamental objection to these kinds of statutes is that they offend the central notion of the First Amendment that the most unpopular or dangerous speech is entitled to the same freedom as the most pious and harmless cliches. Section 1103(3) should be dropped entirely. Even with the cosmetic surgery which this section performs on the Smith Act, it still contains grave civil liberties defects. For example, as written, the proposal offends current Supreme Court doctrine relating to advocacy as set down in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). As held there, advocacy can be made criminal only where it is directed "to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. Section 1103(3)(a) should comply at least with that standard.

Section 1104. Para-Military Activities.—The ACLU believes that this section is potentially one of the most dangerous proposals in the Code. It seems clear that the intent of the section is to provide a ground for prosecution of groups like the Black Panthers or the Minutemen where none other exists.

The prohibition in this section is against "acquisition, caching, use, or training in the use, of weapons for political purposes by or on behalf of the association of ten or more persons." The term "political purposes" is so overly broad, vague and ambiguous that it will, by self operation, foster selective political prosecutions. It may mean the National Rifle Association or the Boy Scouts to one administration and the Panthers and SDS to another. This wide latitude given to executive and judicial agencies as to what constitutes "political purposes" violates the most basic notions of due process and necessarily makes any prosecution under the section rest on a subjective determination of what is political, and on what are good or bad political purposes.

Section 1112. Espionage; Section 1113. Mishandling National Security Information; Section 1114. Misuse of Classified Communications Information; Section 1115. Communication of Classified Information by Public Servant.—These sections of the proposed Code prohibit communication, publication, or use of "national security information" (Sections 1112–1113), "classified communications information" (Section 1114), or "classified information" (Section 1115). However, no defense of faulty or impermissible classification is provided. (*Comment*, Section 1115.) It is on this single but critical issue that the ACLU disagrees with the Code and we urge that the defense of faulty or improper classification be provided because we think it required by the purposes servide by the First Amendment. The great controversy last summer around the Vietnam Papers posed the problem in the most dramatic possible way. Simply put, to criminalize the communication of information whose classified status is unreviewable, empowers the government to withhold information from the public which it has every right to know, both as a matter of public policy and as a matter of law under the First Amendment.

Chapter 15. Civil Rights and Elections.—Generally, the Code adopts present law on these subjects, i.e., 18 U.S.C. Secs. 241 and 242, and the Civil Rights Act of 1968, and we of course support these provisions as well as their strict enforcement. We have only a few comments to make about these provisions.

We oppose inclusion of "economic coercion" in sections 1511 and 1512 as another specie of injury or intimidation forbidden by the Code. Though we oppose the application of economic sanctions as retribution for the exercise of one's civil rights, or for supporting racial equality, we also recognize that boycotts of commercial establishments which discriminate on the basis of race, color, religion or national origin, embody substantial elements of free speech and assembly which cannot constitutionally be prohibited. The other side of that coin would allow those opposed to racial equality, for example, to seek to make their point of view effective by engaging in similar boycotts. A principled construction of the First Amendment must, of course, allow both kinds of political activity to exist side by side.

We also urge that section 1512 be expanded to apply to discrimination based upon sex. Discrimination based on sex has, of course, been prohibited in employment under Title VII, as recognition of the fact that sex, like race or color, is an invidious classification which results in intolerable acts against women. That recognition should be given substance in Sec. 1512.

Section 1561. Interception of Wire or Oral Communications.—The ACLU opposes all wiretapping. This provision, however, would adopt all the noxious provisions of the Omnibus Crime Control and Safe Streets Act of 1968 which authorize electronic snooping.

It may be well to reiterate at this point the basis for the ACLU's opposition to the legitimation of electronic surveillance, as embodied in 18 U.S.C. § 2510–12.

An essential difference between the totalitarian state and the free society is that the totalitarian state seeks to deprive the citizen of his privacy by trying to observe all his movements, words and even thoughts. Fear and insecurity permeate every aspect of life and the pursuit of happiness is merely a phrase.

Recognizing this, as Mr. Justice Brandeis has said:

"The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred

as against the Government, the right to be let alone—the most comprehensive of the rights of man and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. at 478.

The ACLU believes that all such types of electronic eavesdropping violate the fundamental rights protected by the Fourth Amendment to the Constitution. The founders of our nation established the protections of the Fourth Amendment because they had seen their homes subjected to unlimited invasions and searches by the authority of general warrants and writs of assistance; they sought to ensure that such unlimited searches and general warrants would never be repeated. Government officials were to be allowed only specific warrants, particularly describing, in the words of the Fourth Amendment, the "place to be searched" and the "thing to be seized." Electronic eavesdropping cannot be limited. Any authorization for such practices is necessarily a general, rather than a specific warrant limited to specific objects and places, for it necessarily permits a general exploratory search for evidence in aid of prosecution. This is because such devices inevitably pick up all conversations on the wire tapped or room scrutinized, and nothing can be done about this. We urge the subcommittee to recommend repeal of the present wiretap law.

Chapter 36. Sentence of Death or Life Imprisonment.—The Code proposes the abolition of capital punishment. We agree. The arguments against capital punishment cannot usefully be condensed and we have submitted a copy of our *amicus* brief submitted to the Supreme Court this term in the capital punishment cases which describes in detail the basis for our opposition.

Testimony of The American Civil Liberties Union

Preface

In January 1971, the National Commission on Reform of Federal Criminal Laws, established by Act of Congress in November 1966, issued its Proposed New Federal Criminal Code. Publication of the proposed Code is a major event in American criminal law. It brings together all federal felonies, it codifies common defenses it establishes standard principles of criminal liability and standard meanings for terms employed in the definitions of offenses and defenses, and completely overhauls the sentencing system. As described by the Commission Chairman, Edmund G. Brown, former Governor of California, the Report aspires towards being "a logical framework for a twentieth century penal code." We think the proposed Code goes a long way towards reaching its goal.

One of the common interests of civil libertarians—though not one which is exclusively their's—is to have the criminal law set out clearly, coherently, and uniformly. A compilation of the criminal law with those characteristics serves two purposes. First, it helps to assure that the public understands the conduct which society has forbidden. Second, and more importantly, it helps to assure that those responsible for enforcement of the law have the least possible opportunity to construe the law favorably for their friends and unfavorably for their enemies.

The second objective will surely always be elusive. It is as plain as the nose on our face that the man with friends in high places has a distinct advantage over a friendless prospective defendant; and it is equally clear that the best code of criminal laws will be applied more "clearly, coherently and uniformly" to the poor as a class than to the rich. But we persist in our hope that a well-drafted criminal code will have some tangible effect on reducing the law's inequalities.

This proposed Code is distinctly a step in the right direction because it tries to deal coherently with the whole of the substantive criminal law. It is not perfect, otherwise we would not have more than a hundred pages of criticism. A model code drafted by the ACLU would look quite different than this one. Though it would not be perfect either, we like to think it would be a better approximation of perfection.

Though we could not match the four years and $850,000 which the Commission spent in producing its Final Report, the contest is not as unfair as those figures might seem to indicate. The ACLU has been criticising, for many years, most of the issues raised by the Code, and we were not entirely unprepared to bring together in one place attitudes towards the criminal law which we had expressed in other places at other times.

We cannot claim that our analysis of the proposed Code is exhaustive. Since it was prepared specifically for submission to the Senate Subcommittee on Criminal Laws and Procedure, which is charged with holding hearings on the Code, we had to choose between being exhaustive, and thereby unread, or dealing relatively briefly with most of the issues which we thought raised significant civil liberties issues, and anticipating that we would be read. We chose the second alternative.

We do not comment on all the provisions in the proposed Code. Those which we do not touch on did not, in our judgment, raise important, or more often *any*, civil liberties issues, at least by ACLU's definition. On the other hand we have tried to note at least in passing those proposals which we believe serve civil liberties principles.

One which deserves special recognition is the decriminalization of homosexual activity between consenting adults, an objective which the ACLU has advocated for many years.

Unfortunately, the Code does not decriminalize other acts which the ACLU believes should go beyond the reach of the criminal law. For example, the Code would still make criminal mere advocacy of the desirability or necessity of armed insurrection, thereby perpetuating the Smith Act with basically insignificant changes, and it also retains, although in substantially improved form, the interstate riot act, the offense out of which the notorious Chicago conspiracy trial arose.

The crimes which are of main interest to the ACLU—those involving "national security" offenses (Chapter 11), the conspiracy provision (Sec. 1004), and wiretapping (Sec. 1561)—are basically unchanged and present the most serious defects in the proposed Code.

Most of the "national security" offenses, such as treason, advocacy of armed insurrection, espionage, obstruction of recruitment, and the classified information provisions, involve serious First Amendment problems of free speech and assembly, and in most of them the Code comes down on the wrong side. Unwilling to take the risks that a free society demands, the draftsmen have too often opted for security over freedom.

Finally, the Code proposes that capital punishment be abolished. We agree. The arguments against capital punishment cannot usefully be condensed and we have not tried to do so in this paper. But we have submitted to the Subcommittee a copy of the ACLU *amicus curiae* brief filed in the capital punishment cases now pending before the Supreme Court in *Aikens v. California*, which describes in detail the basis for our opposition to capital punishment.

That the bulk of our comments upon the Code are critical rather than flattering is to be expected. The principal function of the ACLU is to be in opposition, and there will be more than enough people to say either that the Code as drawn is perfect, or that it is too liberal. In any case, it is largely an improvement over existing statutes, but we think it can be improved even further—as we point out in the succeeding pages.

MELVIN L. WULF, *Legal Director,*
American Civil Liberties Union.

MARCH 21, 1972.

Section 103. Proof and Presumptions

(1) This section substitutes the word "assumed" for "presumed" in defining the status of innocence until conviction. According to the Comment and Working Papers, I at 14, this was done because "presumption" has a special definition under § 103(4) which allows proof of a presumed fact by establishment of a basic fact. A presumption under § 103(4) must be supported by empirical evidence and unless there is a rational connection between the fact proved and the ultimate fact presumed the "presumption" is unconstitutional. See, e.g., *Tot v. United States*, 319 U.S. 463 (1963).

However, *Tot* and similar cases, e.g., *United States v. Gainey*, 380 U.S. 63 (1965) and *United States v. Romano*, 382 U.S. 131 (1965), involve only presumptions of criminal conduct. The "presumption of innocence," though not constitutionally explicit, is an integral part of the accusatorial system of criminal justice. In conjunction with the burden of the Government to prove guilt beyond a reasonable doubt, the presumption forms the basis for the operation of the system on both procedural and substantive levels. In this context, "presumption" is not given a legal meaning or definition by trial judges in their charge to the jury and is only used in the context of its every-

day usage—that is something that is accepted as true until proof of the contrary is shown (Webster's New World Dictionary, p. 1154). The "presumption" of innocence thus is also legally correct: innocence *must* be accepted by the jury as true until guilt is proven beyond a reasonable doubt. "Assume" is subject to the same empirical criticism as "presumed" since it also can be taken to imply a factual suggestion of innocence. Since "presumption of innocence" is used in all federal criminal trials without problem, no policy reason exists on which to base this change. Any possible weakening of this important standard should be rejected.

An instruction to the jury as to presumption of innocence may also be constitutionally required. The Supreme Court has recognized that the presumption of innocence ". . . is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 454 (1895). In *In re Winship*, 397 U.S. 358, 363 (1970), the Court, citing *Coffin*, stated that the reasonable doubt standard "provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle . . ." And in *Deutch v. United States*, 367 U.S. 456, 471 (1961) the Court stated:

"One of the rightful boasts of Western Civilization is that the [prosecution] has the burden of establishing fault solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. Among these is the presumption of the defendant's innocence." (Citations omitted.)

See also, *Armstead v. United States*, 347 F.2d 806 (D.C. Cir. 1965) ; *United States v. Campbell*, 316 F.2d 7 (4th Cir. 1963).

(2) We support the codification of the language "the fact that he [the accused] has been arrested, confined, indicted for or otherwise charged with the offense gives rise to no inference of guilt at his trial," as a necessary explanation to the jury of the meaning and significance of the presumption of innocence. Some courts, using standard jury instructions, have failed to give this instruction and thereby possibly allow and encourage speculation by the jury as to the possible significance, in terms of an inference of guilt, of an arrest, detention, or indictment of a defendant.

An additional improvement is the substitution of the word "accused" for that of "defendant". This will enable the accused to receive all the intended benefits of the presumption of innocence throughout the criminal proceedings and will put the Government's burden to prove guilt in sharper perspective. The accusatorial system should designate the Government's adversary only as an accused. The term defendant is used to denigrate the presumption of innocence.

(3) Affirmative Defenses: The American Civil Liberties Union is opposed to the use of "affirmative" defenses in the Code. These defenses must be proved by the accused by a preponderance of the evidence in contradistinction to defenses (§ 103(2)) which only require the defense to introduce evidence sufficient to raise a reasonable doubt on the issue. The problem with placing the burden of proof on the defendant, of course, is that it makes substantial inroads on the due process principle that the state prove guilt and that the defendant need not prove his innocence. While *Leland v. Oregon*, 343 U.S. 790 (1952), ruled that such an allocation of proof was permissible, Mr. Justice Frankfurter's dissent is persuasive and the Court's "ordered liberty" approach in *Leland* is now without support. We think that the burden of proof of guilt must always remain with the prosecution as to each essential element of the crime. The affirmative defense approach negates that constitutional principle. Specific reasons for opposing "affirmative" defenses shall be given in our discussion of the various substantive sections.

Section 502. Intoxication

Under § 502, intoxication is a defense to a criminal charge under circumstances where, because of the intake of drugs or alcohol the defendant, "at the time of his conduct lacked substantial capacity either to appreciate its criminality or to conform his conduct to the requirements of the law." This test is the same as that which is proposed for the insanity defense (Mental Disease of Defect in § 503). In other words, the Code recognizes two "insanity" defenses: One where the cause is drugs or alcohol; the other where the underlying cause is a mental disease or defect. The American Civil Liberties Union agrees that these should both be defenses to criminal charges.

However, under § 502, intoxication is an "affirmative defense." Procedurally, therefore, the burden is placed on the defendant to prove intoxication by a preponderance of the evidence. There is no justification for making intoxication an "affirmative" defense, particularly since the Code in § 503 provides that "mental disease or defect" (insanity) is a defense. In both situaitons, by definition, a certain mental status exists rendering the actor not criminally responsible.

The submission of testimony in support of either of these defenses should, in the first instance, be the burden of the defendant. If he produces evidence sufficient to raise a reasonable doubt on the issue, the prosecution should then be required to prove beyond a reasonable doubt that the defendant was criminally responsible.

We have already stated our reasons for opposing the use of the affirmative defense doctrine. See our comment on § 103. But even assuming that affirmative defenses are appropriate in some contexts, surely this section is not one of those. The two justifications given by the authors of the Code for affirmative defenses—(1) That the facts are peculiarly in the defendant's possession and (2) That the defense does not justify a defendant's acts in a moral sense—are simply not applicable here.

First, where one is so intoxicated that he either cannot conform his conduct to the requirements of law or lacks substantial capacity to appreciate the criminal nature of his conduct, expert testimony can be expected to demonstrate that the result of the intake of drugs or alcohol, in addition to or aggravation of any underlying mental disorders, caused a condition the nature of which under the Code negates criminal responsibility. This testimony would be similar to that given in support of a defense of lack of criminal responsibility bottomed on a mental disease or defect. The facts are no more peculiarly in the defendant's grasp when he presents an intoxication defense than they are in a defense based upon mental disease or defect.

More important, the Code's second justification for an "affirmative defense"—where the defense does not justify a defendant's acts in a moral sense—surely should not apply here. Although the medical profession has long recognized narcotic addiction and chronic alcoholism as illnesses, the law has only recently begun to view the addict and the alcoholic as sick persons. Until the last decade the impact of narcotic addiction on criminal responsibility had been given little or no attention. Recent cases in the federal courts have, however, recognized that the addict may be not criminally responsible for some of his antisocial behavior. In other words he may be legally insane.

The argument that an addict's acts are not justified in a moral sense is based upon the supposition that whatever the state of present addiction, at some point in time this person voluntarily chose to begin drinking or using drugs and thus he should be held accountable for his addiction.

However, the voluntariness of the first use is not an established fact. In *Robinson* v. *California*, 370 U.S. 660 (1962), the Supreme Court noted that there are some addicts whose habits were formed innocently or accidentally. Given the possibility of involuntary or uninformed first use, fairness to the addict-defendant militates against a presumption of voluntariness. If first use was iatrogenically induced twenty years prior to his arrest, the burden of proof could not reasonably be placed on the defendant to show this. If first use is presumed to be voluntary, addiction should not then become characterized as a continuing crime on which the statute of limitations will not run. This characterization runs counter to Mr. Justice Harlan's argument in his *Robinson* concurrence, in which he condemned the trial court for permitting the jury to convict "on no more proof than that he was present in California while he was addicted to narcotics. . . . [T]he effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act." (370 U.S. at 678–9). If conviction on an inference of criminal use within the court's jurisdiction is foreclosed by *Robinson*, a fortiori, conviction on an inference of criminal first use at some time in the indefinite past would be foreclosed.

Furthermore, as Judge Bazelon stated in *Easter v. District of Columbia*, 361 F.2d 50, 53 (D.C. Cir. 1966), "A sick person is a sick person though he exposed himself to contagion and a person who at one time may have been voluntarily intoxicated but has become a chronic alcoholic and therefore is unable to control his use of alcoholic beverages is not to be considered voluntarily intoxicated." And the view that narcotics addiction without more may not be the sole evidence of abnormality because the law should exclude ab-

normality manifested only by repeated criminal or otherwise anti-social conduct is mistaken. This reasoning ignores the fact that addiction is more than repeated anti-social conduct.

"Addiction to narcotic drugs is usually pragmatically defined as the compulsive use of a habit-forming narcotic drug so that . . . self-control over the addiction is lost. . . . The use of a narcotic drug by itself is not addiction." Winick, *Narcotics Addiction and its Treatment*, 22 LAW & CONT. PROBS. 9, 10 (1967).

Thus, addiction is not merely the repeated use of drugs but must be defined in terms of a physical dependency. Furthermore, most narcotics addicts suffer from underlying mental disorders that predated and probably contributed to their use of narcotics. It has been suggested by investigation and research that addiction proneness may itself be a kind of mental illness.

"Psychiatric research into the personality of juvenile opiate addicts indicates that adolescents who become addicts have deep-rooted major personality disorders. These disorders were evident either in overt adjustment problems or in serious intrapsychic conflicts, usually both prior to their involvement with drugs. In terms of personality structure, one may say that the potential addict suffers from a weak ego, an inadequately functioning superego, and an inadequate masculine identification." Chein & Rosenfeld, *Juvenile Narcotics Use*, 22 LAW & CONT. PROBS. 52, 59–60 (1957).

The majority of addicts present mixtures of traits of the kind found in neuroses, personality disorders, and inadequate personalities. AMERICAN BAR FOUNDATION, NARCOTICS AND THE LAW 22 (1962). Most addicts suffer from some mental illness which can lead to a genuine psychological need for narcotics. The use of drugs does not inevitably lead to dependency unless the individual is addiction prone. The "intensity of the pleasure from opiates seems to vary with the degree to which the individual may be called a neurotic or psychopath." MAURER & VOGEL, NARCOTICS AND NARCOTIC ADDICTION 74 (2d ed. 1962). Many persons are able to use highly addicting drugs periodically over long periods of time without ever becoming addicted.

"The addiction-prone type, however, experiences much more than physical gratification from his first experience with narcotics. He develops a psychological need or craving which he is probably powerless to ignore and it is this psychological dependence, also called habituation, which renders his subsequent addiction virtually inevitable." Bowman, *Narcotic Addiction and Criminal Responsibility Under Durham*, 52 GEO. L.J. 1017, 1036 (1965).

The mental impact of prolonged addiction is substantial. The President's Advisory Commission on Drug Abuse stated:

"These drugs are psychotoxic (mind poisoning). A psychotoxic drug is any chemical substance capable of adducing mental effects which leads to abnormal behavior. They affect or alter to a substantive extent, consciousness, the ability to think, critical judgment, motivation, psycho-motor coordination, and sensory perception." THE PRESIDENT'S ADVISORY COMMISSION ON NARCOTIC AND DRUG ABUSE, FINAL REPORT 1 (1963).

Addiction and intoxication, therefore both involve a complex interaction of both psychological and physiological factors. There should be no distinction between the burden of proof for those who claim lack of criminal responsibility due to intoxication and those who claim this status by reason of a mental disease or defect. The Code's proposal would seem to unjustifiably confuse the questions of whether intoxication per se is a defense to criminal acts (it should not be), and whether intoxication which results in a condition, wherein the actor lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law should be a defense treated in the same procedural fashion as the defense of mental disease or defect.

Section 603. Self Defense

This section eliminates the right to resist an illegal arrest. Under present federal law there is a right to use such force as is absolutely necessary to resist an attempted illegal arrest, even where the defendant knows that the person making the arrest is a lawful enforcement officer. See *United States v. DiRe*, 332 U.S. 581, 594 (1948); *John Bad Elk v. United States*, 177 U.S. 529,

537 (1900). The great majority of the states recognize the right to resist an illegal arrest. The reasons for this virtual unanimity are compelling and go to the heart of the purpose of the Fourth Amendment: "to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). If a citizen chooses to exercise the right to resist an unlawful search by refusing to submit to it, is it not offensive to permit him to be convicted of "disturbing the public peace," or any other offense which is a direct result of his resistance?

The Court of Appeals of the State of New York, in *People v. Cherry*, 307 N.Y. 308, 311 (1954), a leading case upholding the right to resist an unlawful arrest, stated:

"For most people, an illegal arrest is an outrageous affront and intrusion—the more offensive because under color of law—to be resisted as energetically as a violent assault."

There is a point at which this statement becomes true of nearly every citizen. Tolerance of high-handedness may vary from person to person, but there comes a time when every person, if he values his liberty at all, will refuse to submit. To permit such a refusal to be made unlawful is to put a premium upon official arbitrariness. The more unreasonable the actions of the police, the more likely the citizen is to resist, and the easier the conviction for resisting an unlawful arrest.

It is no mere abstraction to say that to permit a criminal conviction for reasonable resistance to an unconstitutional act will encourage police abuses. If the police cannot arrest an individual except upon probable cause, their power to harass is limited. But if the police can prosecute every time their unlawful acts are resisted, they are thereby encouraged to exercise their power arbitrarily.

To permit resistance to an unlawful search or arrest to be made criminal also puts a dangerous weapon in the hands of the authorities for control of persons they believe to be undesireable. For example, if the police wish to disperse a group of people distributing political leaflets in public, they need only tell them to move on, under threat of arrest. If they refuse, they can be arrested, whether constitutionally or not, and all physical refusals to move can be made valid basis for conviction.

If it is said that a rule allowing resistance will encourage disrespect for the law, the answer is that the people consent to obey the lawful orders of government partly because they know they can refuse the unlawful orders. To permit that refusal is essential to the sense of personal liberty.

The rationale offered by those who favor eliminating the right to resist is that victims of illegal arrests have realistic and orderly legal alternatives to physical resistance. Initially, this assertion misconstrues the rationale of the right to resist. The right to resist does not exist to encourage citizens to resist, but rather to protect those provoked into resistance by unlawful arrests.

Even were one to accept the theory that other remedies may be substitutes for the right to resist, the rationale of the right is undermined unless those alternative remedies are real ones. Few critics have examined the adequacy of the alternative remedies on which they have relied, but a cursory overview suggests that each of them is seriously deficient.

Bail.—A recent survey revealed that nearly half the defendants in a sample of cases pending before the New York City courts remained in jail prior to trial. Many lose their jobs as a result. And even if an individual is released on bail, he will have been subjected to the expense of paying a bondsman and to the stigma of arrest, which, in the case of minor offenses, may have consequences as serious as those of conviction. When these considerations are combined with the great delay and congestion in urban criminal courts, bail hardly seems an adequate remedy.

Administrative remedies.—Recent studies have shown that administrative review of police abuses tends to be futile. Despite the enormous clamor over police review in the last few years, it is still true that most police departments do not have any well-developed complaint procedures. They possess neither specialized staffs nor hearing procedures for such complaints, and even in cities like New York where such procedures are long-established, most complaints are found to be unsubstantiated for lack of corroboration.

Injunction.—A civil injunction theoretically can reach systematic abuses, the very ones with which administrative complaint procedures are least able

to cope. An injunction against unlawful police action will usually not be granted, however, unless there is such a clearly provable pattern or policy that a repetition of the abuse can be expected, and except in the most extraordinary cases, no such pattern or policy can be proved.

Civil damages.—A damage action is the logical remedy for individual abuse that is not enjoinable, but it is not a remedy that will solve the problems of most people falsely arrested. The action may take several years, and the plaintiff may have a difficult time finding a lawyer willing to spend the necessary time on his case unless he has been injured badly enough to give rise to large damages.

Further, the argument that constituted authority is now sufficiently civilized that a citizen should deal with it peacefully, is negated by the vast number of instances where police action continues to be arbitrary. Policies of "aggressive patrol", involving routine and random stops in black and ghetto neighborhoods and patently unjustified stops of hippies, and dissenters and non-conformists of all types abound. Nor does the right to resist encourage illegal activity. If the arrest in fact is legal, there is no defense to the resistance. The resistance will be sanctioned only where the police officer has acted illegally, and a court so finds.

There have been suggestions that distinctions can be drawn among various patterns of police activity and arrests. However, these distinctions are not susceptible to statutory definition. Further, very few illegal arrests would be included in the category which would eliminate the right to resist. Sound public policy dictates a continuation of the right to resist an illegal arrest.

If the right to resist an illegal arrest and the execution of an illegal search warrant is eliminated, the Code should be adopted to the extent it allows resistance, by non-deadly force, of illegal stop-and-frisk, illegal searches and seizures other than authorized by warrant, and confiscations of property. The reason given in the Working Papers in support of this distinction is that the illegal arrest and execution of the illegal search warrant are subject to immediate judicial review in preliminary hearings. In the other cases of official action, prompt judicial review is not always immediately available. Thus the burden should be placed on law enforcement officials to invoke judicial authority to compel compliance with the law, rather than themselves employ force to overcome resistance.

Section 605. Use of Force by Persons with Parental, Custodial or Similar Responsibilities

Sections 605 (a) and (b) allowing for corporal punishment of school children and mental "incompetents," whether hospitalized or not, are, in the opinion of ACLU, two of the most backward proposals of the Penal Code. These proposals would virtually immunize school teachers and administrators and attendants at mental hospitals from prosecution for administering corporal punishment. The standards provided in this section are extraordinarily vague and would permit the most outrageous forms of punishment. The ACLU is opposed to any form of corporal punishment by teachers or persons responsible for the care of mental patients, particularly where, as here, the punishment may be administered under vague standards and without a semblance of due process.

1. Corporal punishment of a student by a teacher or a patient by an attendant or professional offends current standards of decency and dignity. In past times physical beatings were sanctioned in a variety of relationships. Sailors were commonly flogged by the master of a ship; today it is a crime on a United States vessel. 18 U.S.C. § 2191. A husband could beat his wife to control her; that would now contsitute an assault. *Puckett v. Puckett*, 240 Ala. 607. Servants and slaves were physically punished by their masters; the status of employee or servant no longer justifies such measures. *Tinkle v. Dunivant*, 16 Lea 503 (1866, Tenn). By the first Crime Act of the United States, whipping was part of the punishment for stealing or falsifying records or receiving stolen goods. (Act of April 30, 1970, Ch. 9, 1 Stat. 112–117.) The punishments of whipping and of standing in the pillory were abolished by the act of February 28, 1839. (Ch. 36 s. 5, 5 Stat. 322.) Nor do parents enjoy the same liberty over their children as existed in Rome, where,

". . . the father shall during his whole life, have absolute power over his legitimate children. He may imprison the son or scourge him or keep him

working in the fields in fetters or put him to death. . . ." Stephenson *History of Roman Law*, at 128 (1912)

All states but two have outlawed corporal punishment for prisoners detained in state prisons and in Arkansas, where the legislature had not prohibited corporal punishment, a federal court held that it was a violation of the prisoner's human dignity contravening the Eighth Amendment. *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.). It would be extreme irony if school children ranging in age from 6 to 18, and the mentally ill, were considered to have less human dignity than adults serving time for violating a criminal rule of the society.

Corporal punishment has not gone unchallenged in the United States. In 1853, Judge Smart of the Supreme Court of Indiana stated:

"The public seem to cling to the despotism in the government of schools which has been discarded everywhere else . . . The husband can no longer moderately chastise his wife; nor, according to the more recent authorities, the master, his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy . . . should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained." Nash, *Educational Theory*, Vol. 13, October 1963, p. 296 quoting *Cooper v. McJunkin*, Supreme Court of Indiana (1853).

Corporal punishment of students has been likened to the "method of the prison, torture, police and standing army." Parker, "Democracy and Education" (July 1891), in Rippa, ed., *Educational Ideas in America*" p. 240. A New York principal, in a statement appended to the Reports on the Committee on Education concerning Corporal Punishment in 1868 stated that corporal punishment "is a relic of medieval barbarism when study was a penance and a student an ascetic." Hunter, Thomas, statement appended to the *Reports on the Committee of Education Concerning Corporal Punishment in the Schools of the Commonwealth*, 1968, p. 21.

In 1956, the National Education Association after a thorough study concluded that corporal punishment had no effect on reducing behavior problems. (NEA Research Bulletin XXXIV, No. 2 April 1956.) In 1961 an English study concluded:

"It is notable that the schools where corporal punishment was absent had the best records of behavior and delinquency, despite being in areas with the lowest average ratable value. It is also notable that behavior deteriorates and delinquency increases as corporal punishment increases. Nash, *Corporal Punishment*, p. 301.

Certain psychologists have suggested that to be effective, physical punishment must be recurrent and sustained. (Estes and Skinner, quoted in Nash, *Corporal Punishment*, p. 302.) Research results showed that "extremely severe punishment may eliminate behavior permanently, but in order to do so the punishment must be positively terrifying and traumatic." (Symonds quoted in Nash, op. cit. p. 302.) The inescapable conclusion is that corporal punishment cannot be effective without being brutal.

2. Even if corporal punishment of some form is to be a part of the education or mental hospital system, this proposal is objectionable on other grounds. First the standards provided are too vague. What constitutes punishment that can reasonably be determined to "safeguard or promote" a child's or patient's welfare? What distinction can reasonably be drawn between degradation and "gross degradation." The mere imposition of corporal punishment amounts to extreme humiliation and degradation of the student or patient and "gross degradation" will depend inevitably on the factors such as the student's or patient's personality and the reactions of his classmates, which are almost impossible to ascertain prior to the act. The term "incompetent person" is a term whose meaning varies greatly from state to state. In most states, including New York, a person can be severely mentally ill, and even hospitalized, without being "incompetent." E.g., *Dare v. Hahn*, 440 F.2d 663 (2d Cir. 1971). And what do "proper discipline" (students) or "reasonable discipline" (patients) mean and why are the operative terms different for students and patients?

Second, neither the form of punishment nor the extent to which it may be employed is indicated. There are no written rules or regulations prescribing what conduct or misconduct will bring on a whipping or prescribing how many blows will be inflicted for a given act of misconduct. The punishment is

to be administered summarily, and whether a student or patient is to be physically punished and how much he is to be punished are in this proposal matters resting within the sole discretion of the teacher or other person administering the punishment.

The proposed code authorizes a "reasonable" degree of force to be used, even if that degree of force is not "necessary" to achieve the desired end. Except, perhaps for natural or adoptive parents no third person should ever be permitted to use physical force upon another unless absolutely necessary. In an educational institution or a mental hospital it should be a rule of thumb that unnecessary force is, per se, unreasonable.

The proposed code is remarkably similar to section 35.10(1) of New York's new Penal Law. Significantly, however, the New York law permits physical force only when it is "necessary".

Physical force, to the extent it is used as a punishment, can never be justified in mental hospitals. Even if punishment is permissible in a mental hospital, which we deny, there are non-physical punishments (denial of grounds privileges, isolation, etc.) which make physical punishment unnecessary. And dangerous behavior can be adequately controlled by tranquilizing medication.

It is not uncommon for disruptive patients to be sent down the hall for electro-shock therapy. The proposed code would condone, if not sanction, such uses of physical force.

Many persons are put in mental hospitals because they are depressed and feel they are worthless, or because they believe others are "against" them. For such patients, the use of physical force can only lessen their self-esteem and increase their fear of others. That is why almost every state mental hygiene law proscribes the use of physical force except when there is no less drastic alternative.

Section 607. Limits on the Use of Force: Excessive Force; Deadly Force

This section sets forth the draft provisions on the use of deadly and other force. After a brief, general prohibition on excessive force, the section details those situations in which deadly force is justified.

The circumstances pursuant to which public servants may use deadly force under this section are far too broad. The Code purports to allow deadly force where none is justified or needed to protect the public and places in the hands of law enforcement officials the decision in many cases to summarily execute persons who are mere criminal suspects.

Before analyzing the specific provisions, a few general comments are in order. It must be remembered that the use of deadly force always potentially involves the infringement of two constitutional safeguards: depriving a person of life without due process of law and the imposition of cruel and unusual punishment. Accordingly, rules governing the use of deadly force should be precisely drawn and should allow such force only in situations where society's interests are so profound that summary punishment and execution is deemed to be warranted.

The proposed statute falls short of these principles in two general ways. First, it authorizes the use of deadly force in far too broad a range of situations, for example, in connection with a burglary or other crimes against property. Because of the value which our society places upon human life, persons suspected of such crimes should simply not be shot. The use of deadly force should be authorized only in the following situations: (1) in self-defense or in the defense of third persons against the imminent use of deadly force, (2) to apprehend a suspect who had used deadly force and death or injury has ensued or (3) to apprehend a suspect who has threatened the use of deadly force.

Second, the proposal allows the actor far too much leeway in determining whether deadly force is justified under the substantive rules. This is accomplished by section 608 which allows the defense of mistake and defines mistake to include any belief which is not negligent or reckless. Thus, for example, a "public servant authorized to effect arrests" may use deadly force so long as he has a non-negligent belief that the suspect has "committed a felony involving violence." A "reasonable man" type standard of conduct is much too loose to govern the employment of deadly force. We submit the actor must have actually observed the events giving rise to justification, or at the very least have constitutional probable cause to believe the facts support the justification.

Finally, the element of dangerousness to innocent bystanders should alawys be a limiting principle on the use of deadly force. Whenever there is *any* risk of such danger, deadly force should not be employed.

An analysis of the specific provisions follows.

Subsection 2(d) states that deadly force is justified to effect arrests or prevent the escape from custody of a person who has committed a felony involving violence, etc. This section would allow a police officer, acting upon a mere report of a crime to shoot and kill a suspect who fit the description of the assailant and tried to avoid arrest. Thus, mere probable cause would justify the use of deadly force in a wide range of circumstances. This would unavoidably occur in some cases where the suspect in fact was not guilty of the suspected offense and more often where he was in fact not a danger to human life if he were not killed and escaped.

An example of the overbreadth of this justification is easily provided. If one has committed an aggravated assault and battery which under § 1621 is a Class E felony (five years maximum under § 3202), upon another person or police officer and then attempted to escape, he could be shot and killed. In fact, if a fight occurs, an officer arrives and is falsely told that one of the two men involved was at fault, he could employ deadly force to prevent escape or to effect an arrest. Surely this creates a situation where there will be the distinct possibility of the unnecessary sacrifice of human life.

The F.B.I. has issued the following statement of policy:

"The F.B.I. has one rule on the use of force which is an exception, administratively made, to the law on the subject. The law allows an officer to shoot a fleeing felon to prevent escape. The F.B.I. forbids it. F.B.I. agents are instructed that they may shoot in self-defense only. They are not to fire warning shots and they are not permitted to shoot a felon, either to kill or to wound, to prevent his escape. . . .

"While we express no opinion on the propriety of this special firearms policy for law enforcement agencies whose problems differ from our own, the policy has served the F.B.I. well. The policy leaves some little room for the escape of a criminal who might otherwise be brought in at that time, dead or alive, but such escapes are rare and they almost never result in defeating the ends of justice in the case. Operating on a national basis, with international sources of information, we are almost certain of eventual apprehension. In the meantime, we have avoided the unnecessary sacrifice of human life, either criminal or innocent by either accident or design. We see no reason why other law enforcement agencies should not be similarly limited."

The justification for the use of deadly force cuts directly against the constitutional protections of trial. Police officers are allowed to determine guilt or innocence on the street and then to subject the accused to summary, capital punishment. The justification should be limited by changing the statutory language to the conjunctive:

> . . . when used by a public servant authorized to effect arrests or prevent escapes, if such force is necessary to effect an arrest or to prevent the escape from custody of a person who has committed or attempted to commit a felony involving violence, and who is attempting to escape by the use of a deadly weapon and presents a danger to human life, or has otherwise indicated that he is likely to endanger human life or to inflict serious bodily injury unless apprehended without delay.

Subsection (e) justifies deadly force to prevent the escape of a prisoner from a detention facility unless the guard knows that the escapee is *not* such a person as described in Section (d). Since most guards have no information concerning inmates of detention facilities, they are authorized to shoot and kill virtually any person who attempts an escape from a detention facility. This would include all persons who have not made bail due to indigency, no matter how minor the charge. Thus an indigent detainee under for example $500 bail for a charge of possession of drugs, simple assault and battery, or other such minor charge, would be subject to summary, capital punishment for an escape attempt. If deadly force is to be justified in this setting, the circumstances must be extremely narrowed. This could be done by the following change in the statute:

> When used by a guard or other public servant, if such is necessary to prevent the escape of a prisoner from a detention facility only *IF* he knows that the prisoner is such a person as described in paragarph (d) above. A detention facility is any place used for the confinement, pursuant

to a court order, of a person (i) charged with or convicted of an offense, or (ii) charged with being or adjudicated a youth offender or juvenile delinquent, or (iii) held for extradition, or (iv) otherwise confined pursuant to court order;

Surely the burden should be on the actor to demonstrate that he knew of the dangerousness of the person attempting the escape. The range of offenses allegedly committed by those who are detainees awaiting trial is enormous. Detainees charged with everything from minor traffic offenses, gambling, minor drug violations, simple assault and battery and disorderly conduct to rape and murder are jailed together. The only common denominator among them is indigency not dangerousness. It would be a useless waste of life to permit indiscriminate killing of virtually anyone who attempted a prison breach.

Finally, the conditions in many county prisons, where most persons who would be subject to deadly force under the Code are incarcerated, are inhuman and brutalizing. While these factors may not offer justification for an escape, they should certainly be considered in drafting a statute as to the situations in which the use of deadly force will be authorized.

Subsection (f)(i) justifies deadly force "to prevent overt and forceful acts of treason, insurrection or sabotage." Since the crime of treason, Section 1101, as proposed, would possibly include propaganda activities on behalf of an enemy, section 607 (f) (i) would authorize deadly force on one who is merely distributing or broadcasting propaganda in an open and forceful manner. Thus, in the current context, one who openly and forcefully supports the NLF or North Vietnamese by way of speeches or distribution of propaganda material in the United States would be subject to deadly force. Deadly force should only be justified in this situation where the overt act immediately places another's life or physical well-being in danger (such as in cases of attempted murder or robbery) and where it is absolutely necessary to prevent such harm.

Finally, section (h) is somewhat incredible. It authorizes deadly force in order to administer a recognized form of medical treatment. Presumably this refers to the performance of surgery, but that should be made explicit or else the statute seems to authorize killing the patient in order to treat him.

Section 702. Entrapment

Proposed § 702 is the first federal codification of the defense of entrapment and changes existing judicially developed standards as announced in *Sorrells v. United States*, 287 U.S. 435 (1932) and *Sherman v. United States*, 356 U.S. 369 (1958). These cases provide that the defense of entrapment is established when (a) the government has engaged in activities beyond the reasonable limits of those artifices or stratagems necessary to produce evidence of criminality, and (b) the accused was not predisposed in fact or by reason of his past conduct to engage in the prohibited conduct. Two elements, inducement and lack of predisposition are, under *Sherman*, the basis for the defense.

Under the proposed section, the question of the defendant's predisposition is removed and the issue is framed in the objective terms of whether normally law abiding persons would have been encouraged by the government's actions to engage in crime they would not otherwise commit. The defense is primarily directed toward deterring police and governmental misconduct and of protecting the integrity of the courts. Under this test evidence of predisposition is irrelevant. The sole concern is whether the police conduct falls below standards governing the proper use of governmental power. The rationale behind the Code's entrapment defense is closely analogous to that which supports the exclusionary rules of evidence for illegal searches and seizures, improper lineup identifications and coerced confessions.

The statute is an improvement over the *Sherman* standard of "origin of intent" and defendant's predisposition. However, several serious shortcomings still inhere in the proposal:

(1) There is no reason to make entrapment an "affirmative defense." Entrapment should be a "defense" under § 103, thereby maintaining the burden on the Government to prove beyond a reasonable doubt that the defendant was not entrapped. Of course, as with other "defenses" under § 103, the defendant would first have to put the matter in issue by introducing evidence sufficient to raise a reasonable doubt on the question. Certainly, the principal justification provided for the use of "affirmative defenses" in the Code—that the facts are

peculiarly within the defendant's grasp—does not apply here. Like self-defense and other defenses which place in issue the acts of the complaining party, entrapment involves a situation where both the Government and the defendant have equal access to the facts. In fact, since entrapment under § 702 by definition involves the acts of governmental law enforcement personnel and persons cooperating with them, access to the facts is guaranteed to the Government. By way of comparison, the defense of lack of criminal responsibility due to mental disease or defect (§ 503) involves factual matters significantly more accessible to the defendant than to the Government, but the Code still imposes the burden of proof on the Government to prove criminal responsibility beyond a reasonable doubt.

Nor can the assertion that the entrapment does not justify a defendant's acts in a moral sense support a switch of the burden of proof. In fact, assuming entrapment, a defendant's actions can be morally justified since he has been coerced into committing an act that a normally law abiding person would not commit. Moreover, since the question of entrapment may be one for the jury (neither the Code or Comment is clear on this question) and will often be the sole issue for the jury to determine on the question of guilt or innocence, it would be disruptive of and contrary to the defendant's presumption of innocence and the requirement of the Government to prove guilt beyond a reasonable doubt to instruct the jury that the defendant has the burden of proving entrapment.

(2) The Code does not require that law enforcement officials have probable cause or reasonable suspicion that a person being solicited to commit an offense or with whom an illegal transaction is initiated is engaged in or prepared to engage in such an offense or transaction. Like a police search, however, solicitation involves an intrusion into privacy. The kinds of privacy involved are different—the privacy of one's premises in the first case, the privacy of one's will and disposition in the second case. But certainly the right to be free from official enticement into crime is no less important than the right to be free from physical encroachments aimed at detecting crime. If either right is to be invaded by the government, it must be for a substantial cause. Solicitation should be confined to those reasonably suspected of criminal conduct or design, thus limiting the invasion of privacy inherent in police solicitation to those people who could constitutionally be tried for a solicited offense. Enforcement of this restriction should not be left to the trial stage, as this approach fails entirely to protect those who do not succumb, or who cannot constitutionally be convicted, from the invasion of personal integrity that solicitation involves. An independent judgment by a magistrate prior to solicitation would avoid this pitfall. An official British report has recognized the need for safeguarding privacy and has proposed that the police be required to obtain a warrant from a magistrate before soliciting a person to commit an offense. Report of the Royal Commission on Police Powers and Procedure (Cmd. No. 3997) 42 (1920), quoted in Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1114 n.65 (1951). The Fourth Amendment would suggest a similar procedure prior to solicitation.

A Fourth Amendment standard is particularly necessary in light of the dramatic increase in police-agent inspired criminal activity in political groups. The strange case of "Tommy the Traveler" at Hobart College in New York is not an isolated event; many instances of informer and police agent caused and solicited criminality have been uncovered in active poiltical groups: SDS, the Panthers, the Resistance and several anti-war groups have reported attempts by provocateurs and agents to encourage and solicit violent and disruptive activity. The infiltration of these groups by governmental agents is extensive and the potential for entrapment of individuals within the groups is increasing. An important limitation on this kind of illegal governmental intrusion would be the interposition of a neutral judicial officer before any solicitation can be undertaken. Experience has amply demonstrated that governmental agents and informers will not be disciplined as to who and under what circumstances they will solicit criminal acts.

Encouragement and entrapment are potentially extremely dangerous vehicles through which the right to privacy can be eroded. They create risks to innocent persons. They are rooted in deliberate deception. Their purpose is to produce rather than prevent crime and, as noted by Justice Douglas, they intrude into the secret regions of man's life. To allow the government to

search out a person without cause for the purpose of encouraging him to commit a crime is at least as objectionable as searches and seizures of a person's property without probable cause. Rights to privacy, associations, speech and assembly will all be chilled under a system of unregulated governmental encouragement of criminal acts. The First Amendment concerns which emerge when infiltration of political groups is involved makes compelling the need for judicial regulation. A requirement of reasonable suspicion prior to solicitations is the minimal standard acceptable. There is in the context of our society no other way in which to adequately protect individual and associational relationships.

(3) The final substantive problem posed by the Code formulation is that the "objective test" of police conduct may work uneven results. Where the police conduct falls below the stated standard, even those predisposed to commit crime may be exonerated under § 702. As discussed above, this is a desirable result since important aims of the entrapment defense are the curbing of improper law enforcement techniques and the protection of judicial integrity. But persons who are not predisposed to commit crimes may be convicted when the police conduct is not so offensive as to violate the statutory standard for entrapment. These persons, of course, would have been exonerated under the *Sorrells* and *Sherman* "origin of intent" test.

Since it is fundamentally unfair to penalize the "innocent" person, the remedy to this problem is to provide an alternative test, which can be invoked at the discretion of the defendant, which would determine entrapment on the subjective, predisposition test. The policy of deterring police misconduct should not be implemented at the expense of the obviously entrapped individual.

(4) The Code does not explicitly provide the procedure to be followed in cases involving the entrapment defense. The following questions remain unanswered:

(a) Is entrapment a jury question or a question of law for the court?

(b) Should the court initially rule on the issue and, assuming a finding of no entrapment, should the defendant be allowed to argue the issue to the jury? Cf. *Jackson v. Denno*, 378 U.S. 368 (1964);

(c) Should evidence of a defendant's criminal record be admitted on the issue of his predisposition to commit the offense when he chooses not to testify?

Under the Code's formulation, the entrapment defense is predicated on the theory that the law should not countenance governmental wrongdoing which offends societal standards or impugns the integrity of the judicial process. It is analogous to the exclusionary rule for illegally obtained evidence. Accordingly, it could be argued that the question would most appropriately be decided by the court as a matter of law. Given the recommended additional defense based on lack of predisposition, and the requirement of probable cause or reasonable suspicion to validate any solicitation, the best approach would be for the court to decide the legal question, viz., whether probable cause existed for the solicitation, and whether the defendant had been engaged in a course of criminal conduct or was on the verge of crime. This latter requirement vindicates the due process right to be free from conviction for a solicited offense unless there was a pre-existing course of criminal conduct or criminal design. A finding by the court that no probable cause existed or that there was no pre-existing course of criminal conduct would constitute a bar to prosecution. An opposite ruling would send the case to the jury on both the question of predisposition and the issue of whether a normally law abiding person would have committed the offense by reason of the governmental inducement. Proof of prior criminal acts should not be allowed if the defendant does not testify. The fact of successful solicitation itself would be evidence of an independently existing course of criminal conduct, thus obviating the need for proof of prior crimes or bad acts.

We propose a formulation of § 702 as follows:

§ 702. *Entrapment.*

(1) Defense. It is a defense that the defendant was entrapped into committing the offense.

(2) Entrapment Defined. Entrapment occurs (i) when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law abiding persons to commit the offense; or (ii) when the criminal design originates with a law enforcement agent and he

implants in the mind of an innocent person the disposition to commit an offense and induce its commission in order that the government may prosecute; or (iii) when the law enforcement agent induces the criminal act without reasonable suspicion [probable cause] that the person being solicited to commit an offense or with whom an illegal transaction is initiated is engaged in or prepared to engage in such offense or transaction. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(3) The defense afforded by this section may be raised under a plea of not guilty. The defendant shall be entitled to have the issue of entrapment decided by the court and to have the fact that the defense has been raised and evidence introduced in support thereof kept from the attention of the jury. Evidence of the defendant's past criminal conduct is inadmissible on the entrapment issue.

(4) Law Enforcement Agent Defined. In this section "law enforcement agent" includes personnel of state and local law enforcement agencies as well as of the United States, and any person cooperating with such an agency.

Consideration should be given to the suggestion that entrapment be made a crime under the Penal Code. Given the failure of the exclusionary rule, civil remedies, and internal regulation of police misconduct to remedy continued unconstitutional police practices, strong sanctions are required. Entrapment presents more grievous and dangerous conduct than illegal searches, improper lineup procedures and coerced confessions: entrapment is designed to induce otherwise innocent and law abiding citizens to commit crimes. Under certain extreme circumstances, therefore, criminal sanctions should attach:

Entrapment:

(1) Offense. A law enforcement agent is guilty of an offense if he entraps another to commit a crime.

(2) Entrapment Defined. Entrapment as used in this statute occurs when a law enforcement agent induces the commission of an offense without probable cause [reasonable suspicion] to believe that the person being solicited to commit an offense or with whom an illegal transaction is initiated is engaged in or prepared to engage in such offense or transaction and when the persuasion or other means used to induce the commission of the offense would be likely to cause normally law abiding persons to commit the offense.

(3) Law Enforcement Agent Defined. In this section "law enforcement agent" includes personnel of state and local law enforcement agencies as well as of the United States, and any persons cooperating with such an agency.

Section 704. When Prosecution Barred by Former Prosecution for Same Offense

(d) This subsection restates present double jeopardy law in forbidding more than one prosecution after jeopardy has "attached" at a criminal trial. However, several exceptions are allowed in this section whereby re-prosecution may be initiated after termination of the first trial. While we agree that there are situations where the valued right of a defendant to have his trial completed by the particular court which sits in judgment on him may be subordinated to the public interest, the proposed circumstances provide grounds for retrial where none is warranted.

In establishing the standards for subordinating a defendant's rights, it is helpful to remember the rationale behind the double jeopardy protection.

"The Fifth Amendment's prohibition against placing a defendant 'twice in jeopardy' represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And Society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. *United States v. Jorn*, 400 U.S. 470, 91 S. Ct. 547, 554 (1971) (Harlan, J.)

Given this standard and the significant social interests advanced by the Fifth Amendment's prohibition against double jeopardy, the termination of a criminal trial prior to judgment should be a bar to prosecution except (1) as provided in (d)(i) (waiver of double jeopardy protection, but with the

added proviso that the waiver, manifested by a defendant's request for a mistrial or termination was not caused by an act of the prosecution intended to result in a termination of the proceedings), (2) where the jury is unable to agree upon a verdict or (3) where the defendant causes the other various factors discussed in (d)(ii) to occur. Thus the proposed subsection should read:

"(d) the former prosecution was terminated after the jury was impaneled and sworn or, in the case of a trial by the court, after the first witness was sworn, except that termination under the following circumstances does not bar a subsequent prosecution:

"(i) the defendant consented to the termination or waived, by motion to dismiss or otherwise, his right to object to the termination; provided that the prosecution did not cause the defendant to move for termination by intentionally creating a situation in which a motion for termination in fact was necessary to protect the defendant's rights.

"(ii) where the defendant makes it physically impossible to proceed with the trial in conformity with law; or where the defendant causes a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or where the defendant causes prejudicial conduct, in or outside the courtroom which makes it impossible to proceed with the trial without injustice to either the defendant or the government; or where the jury was unable to agree upon a verdict; or where false statements of a juror or voir dire prevented a fair trial."

Section 707. Former Prosecution in Another Jurisdiction: When a Bar

This section codifies the existing practice and policy of the Attorney General, promulgated after the decision in *Abbate v. United States*, 359 U.S. 187 (1959). In this respect it falls short of what is constitutionally required by the Fifth Amendment and what as a matter of policy should be federal law. The same limitations should exist on federal prosecutions whether they follow federal or state prosecutions.

(a) *Constitutional considerations.*—The decisions in *Abbate, supra*, and *Bartkus v. Illinois*, 359 U.S. 121 (1959) were improperly decided, and the premises upon which they are based have been eroded by recent cases in the United States Supreme Court. Both *Abbate* and *Bartkus* relied primarily on *Lanza v. United States*, 260 U.S. 377 (1922) which was the first case in which the double prosecution question was faced by the Supreme Court. However, *Lanza*, in holding that dual prosecutions were constitutional, uncritically relied upon the undoubted authority of the states and the federal government in some situations to legislate in the same area as a basis for the decision that they both could successively *prosecute* for a single act. Thus, cases dealing with federal preemption became authority to limit the reach of the double jeopardy protection. None of the cases cited in *Lanza*, *Bartkus* and *Abbate* involved double prosecutions.

Recent decisions by the Supreme Court in cognate criminal areas have made deep inroads on the separate sovereignty theory. In *Elkins v. United States*, 364 U.S. 206 (1960), the Supreme Court held that evidence seized by state officials in violation of the Fourth Amendment could not be used in federal court. Repudiating the silver platter doctrine, the Court stated: "To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215. Thus, in resolving the constitutional problem the Court was primarily concerned with the impact of the police practices on the individual. This was a significant shift from the technique used in *Bartkus*, where the Court did not view the actions of the state and the federal government as related acts.

In *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), the issue was whether a state could compel a witness whom it had immunized from prosecution under its laws to give testimony which might then be used to convict him of a crime under federal law. The law prior to that date was based upon a dual sovereignty theory: that the compelling state need only grant immunity against its own prosecution and not against the prosecutions of any other jurisdiction. If the testimony thus compelled led to a prosecution of the individual in another jurisdiction, that was perfectly proper. E.g., *Hale v. Henkel*, 201 U.S. 43 (1906). *Murphy* rejected the dual sovereignty theory and requires immunity for both state and federal prosecutions.

In *Benton v. Maryland*, 395 U.S. 784 (1969), the Supreme Court held that the double jeopardy clause served as a restriction upon the power of the states. *Benton* makes the dual sovereignty rationale even more unsupportable. It is clear that the federal government cannot prosecute a defendant a second time for a specific crime. And *Benton* makes it equally clear that a state may not re-prosecute. But somehow, the dual sovereignty theory has operated to allow the United States and a state to do together what neither one may do alone and what no two co-equal states may do together. After *Benton*, the absurdity of this result is obvious.

(b) *Policy.*—There are several policies supporting the protection against double jeopardy. Guilt should be established before a single jury and not by capitalizing on the increased probabilities of a conviction from repeated prosecutions before many juries. The prosecutor should not be allowed to continue to shop for a higher sentence once he has obtained a conviction. The criminal process should not be used as an instrument of harassment. There should be one penalty for one offense. The state should not force an individual to live in a continuing state of anxiety by the threat of continuing prosecutions. *Green v. United States*, 355 U.S. 187 (1957); *In Re Lange*, 18 Wall. 163 (1873); Note, Twice in Jeopardy, 75 Yale L.J. 262 (1965); Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L.J. 513 (1949); *United States v. Jorn*, 91 S. Ct. 547, 554 (1971).

The societal interests clearly compel the same prohibition against federal prosecutions after state prosecution as presently exists under the Fifth Amendment bar to federal re-prosecution.

Section 707 provides two major exceptions to full double jeopardy protection. First, it would allow re-prosecution where the federal law is intended to prevent a substantially different harm or evil than the state law. The major reason behind this provision is in the civil rights areas where the fear is plain that state juries will acquit white defendants accused of crimes against blacks. See *United States v. Guest*, 383 U.S. 745 (1966). It is time, however, to reject the notion that these cases are outside the ambit of the Fifth Amendment. Under § 705, for example, murder committed to violate one's civil rights could not result in two federal trials—one for murder and one for violation of civil rights. If the double jeopardy protection would bar two trials by the federal government, then certainly the interests involved compel protection against successive prosecutions by the state and federal government.

A provision could be supplied which would give the federal government the right to prosecute when the Attorney General believes that vindication of national power and policy necessitated federal prosecution or where the federal penal provision itself reflected a sense that protection of Federal interests by state prosecution was defeated or inadequate and needed Federal implementation. See, e.g. Working Papers I at 349:

". . . It seems clear on the basis of existing law that Congress has power to preempt a State's criminal jurisdiction, to forbid the State to prosecute an offense, or to grant an immunity to an offender where such steps are necessary to protect Federal interests.[1] This the approach generally taken in Federal testimonial immunity from State prosecution.[2] Here the interests of the United States in the correction of offenders against its law appears strong enough to justify forbidding the States to interfere with the sound correctional planning by subsequent prosecution arising out of the same conduct."

Second, the proposed Code would permit federal prosecution for the same acts and same crime as that prosecuted by the State if the Attorney General certified that the interests of the United States would be unduly harmed if the federal prosecution is barred. This proviso, which reflects present governmental policy, is entirely inconsistent with the constitutional protection against double jeopardy and could potentially subvert the principles protected by the Fifth Amendment. It must be remembered that the bar to multiple prosecutions is in reality a bar *against the Government* from reprosecuting for the same crime. This provision allows the Government to pick and choose cases for reprosecution. Certainly, it would be unconstitutional to allow the Attorney General to certify *federal* cases for reprosecution. No countervailing factors can be advanced for justifying reprosecution merely because the initial case was liti-

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[1] *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956).
[2] *Brown* v. *Walker*, 161 U.S. 591 (1896); 18 U.S.C. §§ 1954 (b), 1406, 3486(c).

gated in a state court. Moreover, this provision could be used in political cases, thereby allowing dual prosecutions for political and other highly visible acts. This would indeed be ironical since it was these types of defendants that the double jeopardy prohibition most obviously was intended to protect. We therefore propose that § 707 read as follows:

§ 707. Former Prosecution in Another Jurisdiction. When a Bar.

When conduct constitutes a federal offense and an offense under the law of a local government or a foreign nation, a prosecution by the local government or foreign nation is a bar to a subsequent federal prosecution under either of the following circumstances:

(a) the first prosecution resulted in an acquittal or a conviction as defined in section 704 (a) and (c) or was a barring termination under section 704(d) and the subsequent prosecution is based on the same conduct or arose from the same criminal episode, unless the second offense was not consummated when the first trial began: or

(b) the first prosecution was terminated by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition which must be established for conviction of the offense of which the defendant is subsequently prosecuted;

Section 708. Subsequent Prosecution by a Local Government: When Barred

For the reasons stated in the analysis of § 707, we would urge modification of § 708, as follows, so as to give complete protection against dual prosecution, federal and then state:

§ 708. Subsequent Prosecution by a Local Government: When Barred.

When conduct constitutes a federal offense and an offense under local law, a federal prosecution is a bar to subsequent prosecution by a local government under either of the following circumstances.

(a) the federal prosecution resulted in an acquittal or a conviction as defined in section 704(a) and (c) or was a barring termination under section 704(d) and the subsequent prosecution is based on the same conduct or arose from the same criminal episode, unless the second offense was not consummated when the first trial began: or

(b) the federal prosecution was terminated by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

In this section, "local" has the meaning prescribed in section 707.

Section 1003. Criminal Solicitation

Under the proposed section on "criminal solicitation" the following elements establish the offense:

(1) A person commands, induces, entreats, or otherwise attempts to commit a particular felony,

(2) With intent to promote or facilitate the commission of that felony,

(3) Under circumstances strongly corroborative of that intent,

(4) And the person solicited commits an overt act in response to that solicitation.

The ACLU believes that a serious civil liberty issue is presented by this section with respect to its application in First Amendment contexts. It should first be noted that solicitation involves conduct even more remote from the commission of the offense than an attempt. In fact, solicitation is probably the earliest stage in a particular transaction in which intervention by the criminal law is constitutionally permissible. Thus, as a preliminary matter, care must be taken to ensure that the conduct sought to be prohibited does not amount merely to advocacy or expression of approval of the crime allegedly soilicted.

With respect to the question of free speech, we do not think that the proposed statute adequately protects against the danger of a jury finding that legitimate discussion or agitation of an extreme or inflammatory nature was solicitation to crime. Advocacy and rhetoric in behalf of an unpopular cause may be construed as solicitation to others to violate the law, rather than protected speech under the First Amendment designed to foster political

change. It has been recognized in many contexts that, particularly where criticism by minority groups is concerned, the language used must be extreme in order for it to be politically audible and effective.

Under the proposed section, advocacy of action could be punished even though the advocacy was neither directed toward inciting or producing imminent lawless action, nor was likely to incite or produce such action, both of which are constitutional prerequisites to any abridgment of speech. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Nothing in the statute limits criminal solicitation prosecutions to situations where there is the likely result of "imminent lawless action." Rather, the statute would permit prosecution upon advocacy of a criminal act, as long as it was done with the intent to promote commission of the crime and the person "solicited", in response, commits any overt act, insignificant as it may be, towards commission of the crime. No time or probability factors are stated. Accordingly, even the "clear and present danger" test is not satisfied since the "solicitation" may be made without any objective chance of success and where it was intended only to reach fruition in the distant future.

It is true that the Comment to this section indicates that "instigation is required; mere encouragement is not enough," but the limiting language in the section does not provide this protection. Forceful advocacy could easily be construed as "instigation"; the line between the two is finely drawn and extremely difficult to define. The end result will be, of course, as in other areas where free speech is involved, to deter persons from engaging in speech which later be held criminal. Rather than risk the vagaries of jury fact-finding and a possible criminal conviction, many individuals will not engage in constitutionally protected speech. As Mr. Justice Brennan stated in *Speiser v. Randall*, 357 U.S. 573 (1958): "where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized."

The danger that the "solicitation" statute might be invoked to prosecute protected speech can be made clear by viewing its possible application, for example, in § 109, Obstruction of Recruiting or Induction into Armed Forces. That proposed statute would prohibit one from soliciting another, in time of war, to violate § 1108, Avoiding Military Service Obligations. Thousands of persons in the past several years have advocated, counseled and advised persons subject to the draft to resist the draft by refusing to do the acts required under the Selective Service Act. This advocacy has been conducted on a personal level and on a national scale. It would be almost impossible in most of these cases to distinguish between First and Sixth Amendment protected counseling and advocacy, and criminal solicitation as defined in § 1003. A jury would be authorized by this section to find criminal, advocacy of violation of the Selective Service Act solely on the basis of speech. They could find that forceful advocacy was actually undertaken with the intent to persuade another to commit the specified act; that the circumstances surrounding the advocacy—an anti-war rally, perhaps—was strongly corroborative of that intent; and by following up on the advocacy, the solicitee committed an "overt act."

There can be no question but that the widespread feelings against the Vietnam war and the draft have resulted in advocacy of resistance to the Selective Service Act. But speech in these circumstances, as well as in others where advocacy involves political and social issues is concerned, should remain protected. See *Spock v. United States*, 416 F.2d 165 (1st Cir. 1969).

Section 1004. Criminal Conspiracy

The ACLU strongly opposes the proposed section on criminal conspiracy for it does little to avoid or even minimize the gross invasions of constitutional rights and liberties produced by conspiracy prosecutions. A few of these abuses might be remedied by the section, but the overwhelming number remain unaffected.

Conspiracy laws and prosecutions threaten First Amendment and due process liberties in at least the following three ways:

(1) Heavy criminal penalties are possible for conduct which goes little beyond idle talk and in fact poses no substantial danger to the community. The "agreement" can be a merely tacit or implicit understanding inferred

from circumstantial evidence and the "act to effect an objective of the conspiracy" can be of the most trivial variety. As the Comment indicates, "the act need not constitute a 'substantial' step as is required in the case of attempt", raising the possibility that, as hinted at in the Comment, "the act may (indeed) be innocent in itself and not particularly corroborative of the existence of the conspiracy." In short, heavy criminal penalties can be imposed for conduct that is not much beyond mere and perhaps even idle thoughts, and for only the most peripheral relationship to criminal conduct.

(2) Such liability for non-dangerous conduct can be imposed on all joint activity, and will often be based primarily on speech, thus impairing fundamental First Amendment freedoms of speech and association.

(3) The procedures by which conspiracy cases are tried seem also designed to make it impossible for any individual defendant to defend himself adequately. Exceptions to hearsay and relevancy rules, the dangers of a multi-party trial, venue problems—all these are left for another day.

A. *The Substantive Questions*

1. Should there be a conspiracy law?

Anglo-American law is almost unique in the heavy penalties it imposes on what will often be a little more than the most tentative kind of behavior. Indeed, there is much reason to wonder what legitimate functions of the criminal law are served by the conspiracy offense that are not equally served by attempt, solicitation and complicity liability. The standard claim is that there is a special danger from the mere unity of criminally-minded people, even if they do nothing or—where an overt act is required—almost nothing else but come together. And the requirements for an agreement are so loose (partly because of the misapplication of the rather special justification for loose conspiracy rules in antitrust cases) that penalties are imposed even where there is little unity at all. Yet there is very little empirical support for this assumption of dangerousness from mere joinder, and it is hard to escape the belief that the main reason for retaining the offense in the Criminal Code is because it represents such an easy way to evade almost all of the standard protections against the arbitrary imposition of criminal liability, including the act requirement, some real danger to the community, individual responsibility, and a fair trial. In addition, the offense is a very handy weapon against political dissenters who, while doing little more than speaking out against established authority, still irritate and threaten such authority.

2. The "Agreement" and "act to effect an objective of the conspiracy".

Nowhere is the looseness and inevitable susceptibility to abuse of conspiracy more manifest than in the key elements of the offense: the agreement and the necessary overt act.

(1) "Agreement". Few terms are as vague as "agreement" in both the general law and the law of conspiracy. Some of the cases to date permit liability for acts that are both minor and peripheral to the illicit goals; in some cases mere knowledge of the unlawful end is enough to warrant liability. The problem is especially acute where an organization has both legal and allegedly illegal goals, for then there may be agreement only as to some though knowledge of all; such multiple-goal organizations may be particularly common among political dissenters.

The proposed section does absolutely nothing to eliminate this problem of heavy liability for what can be an extremely tenuous relationship. The statute merely adopts the concept of "agreement" leaving the law in as confused and troublesome a state as before. Other model statutes, like the Model Penal Code, have sought to ensure that only those who actually intend to promote or facilitate the specific criminal objective of the conspiracy are held liable.

(2) "Overt Act". An overt act is required to prove the firmness of the intent. Unfortunately, this act can be virtually negligible, indicative of absolutely nothing. It therefore offers no reliable indication of the danger to the community, for the act can be very far indeed from actually trying to achieve the unlawful objective.

It would be more appropriate to insist that the overt act represent a substantial step toward consummation. The Comment recognizes this shortcoming of the proposed provision and raises the possibility of such a requirement.

(3) Objectives of the Conspiracy. Although the section is commendable for limiting the punishable objectives to crimes, it does nothing to deal with the

very vexing question of when a unitary conspiracy is to be deemed single or multiple. This complicated question has been the source of much confusion and encroachment on individual rights.

In a codification of this kind, an effort should have been made to deal effectively with this problem, as the Model Penal Code tried to do.

(4) Renunciation. The Working Papers recognize that "to require more" than "a timely declaration of withdrawal to his co-conspirator or the duly constituted law enforcement authorities" would amount to "refusing to recognize the defense at all." (p. 395) Nevertheless, the proposed section *does* "require more" by requiring that the defendant actually have "prevented . . . the crime or crimes contemplated by the conspiracy, as the case may be." § 1005 (3)(b)

B. Conspiracy and the First Amendment

The experience of the last several years, first in Boston in the *Spock* case, then in Chicago in the trial of the "Chicago 8," recently in New York in the highly publicized Black Panther trials, and presently in Harrisburg in the *Berrigan* case, demonstrates in dramatic fashion the danger that conspiracy charges in political cases have for First Amendment freedoms. The prosecution in each instance has resorted to the conspiracy charge to place political groups and individuals on trial where the government could not begin to prove that any overt criminal act had in fact been committed by any of the defendants. The ACLU does not oppose the conspiracy doctrine *per se;* rather, the dual dangers of (1) the conversion of perfectly innocent and protected speech, advocacy and association into elements of the crime of conspiracy by means of the overt act doctrine, and (2) permitting juries to find the requisite intent and agreement through speech otherwise protected by the First Amendment condemns the use of the conspiracy doctrine in this context. We think that juries are properly rejecting the conspiracy doctrine and Congress should do the same.

As indicated, the proposed conspiracy section embodies the classic dangers to free speech and association that have been manifest in recurring conspiracy trials. In substantive terms this section authorizes prosecution and conviction for advocacy by anyone in a group that harmlessly agreed, for example, to effect resistance to the draft and who in support of these goals made speeches attacking conscription and uring others not to comply with the Selective Service Act. The objective is illegal: non-compliance with the Selective Service Act; and the overt act is present: the speech. Thus a conviction may be had for nothing more than an open agreement between two persons to do the illegal act and the commission of an overt act by either person which may, independent of the agreement, constitutionally protected speech. Not even a "clear and present" danger limitation is applicable to this statute. The statute converts free speech (e.g., advocacy of draft resistance) into criminal conduct merely because two or more persons engage in the advocacy.

If one man may discuss and advocate, there should be no less freedom for a number of men to discuss and advocate together. Conspiracy for an unlawful purpose may not be punished until there arises a clear and present danger of an unlawful act—in other words, until steps are taken not merely to advocate but actually to plan and carry out an unlawful act.

The existence of a criminal conspiracy doctrine has operated and will continue to operate as a drastic deterrent to free association of political dissenters. Those who oppose *any* governmental policy face the possibility of conspiracy prosecution for their discussions and speeches because an agreement based only on inferences and questionable circumstantial evidence can be found to exist among them to commit an "unlawful act." A meeting of minds to advocate resistance to or change in policies is almost always susceptible to being interpreted as an agreement to do an unlawful act. And there will always be an overt act of speech which completes the crime. Thus in the *Spock* and *Berrigan* trials it becomes clear that what really is being punished is speech, association and political dissent.

The defendant in a conspiracy trial based on speech and advocacy under this proposed statute could be convicted even if he did nothing more than enter into the original unlawful agreement. This fails even the conservative test under the First Amendment established by *United States v. Spock*, 416 F.2d 165, 173 (1st Cir. 1969), which requires that the specific intent of each person charged be proven by evidence of *his* individual act, not those of third

persons. The specific intent of one defendant must not be ascertained by reference to the conduct or statements of another even though he has knowledge thereof.

It is unconstitutional to use the expansive doctrine of normal conspiracy law as the basis for a conviction upon public speeches, assemblies and petitions protected by the First Amendment. It is this precise use of a conspiracy charge which poses the greatest threat to public statements on public issues which are entitled to special protection, *New York Times Co. v. Sullivan*, 376 U.S. 254. Such a conspiracy charge is an invidious form of prior restraint for it permits the state to reach out and censure the mere agreement to speak, which is one step removed from the speech itself, the speech being still another step removed from the action allegedly sought to be induced. This double gap between the "act" of conspiracy and the ultimate injury to the state would make irrelevant the condition of direct incitement without which speech is privileged. Cf. *Yates v. United States*, 354 U.S. 298, 324.

Persons will be deterred from joining groups that advocate social change by a variety of means, both "legal" and "illegal" for fear of a subsequent speech by anyone in the group which though entirely innocent, may be charged and found by a jury to be an overt act to effect an illegal objective of the group.

A further restriction should be placed on the substantive reach of criminal conspiracy. Where the "conspiracy" is in the area of opinion and is not manifested by secret agreement, but rather by public agreement and statements, no criminal sanctions should attach. Where the effort and agreement is public, where the issues are all in the public domain and the purposes of the agreement are both lawful and unlawful, criminal conspiracy serves no purpose but to deter association and speech. The public interest in preventing violation of its substantive criminal laws are adequately protected without prosecutions for this type of "conspiracy." The basis for criminal conspiracy—the need to forestall a threat to public safety and welfare and the need to deter concerted action which is a greater threat than individual effort—does not apply to public, open agreements in the field of public issues.

C. The Procedural Problems

Procedurally, the proposed section fails to change many of the exceptional rules in criminal procedure which apply solely to conspiracy trials. These rules, all of which facilitate prosecution and suppression of First Amendment freedoms, are as follows:

1. Each member of a conspiracy becomes liable for the statements and actions of every other member, whether or not he has even met the other members and whether or not he is aware of what they said and did. Thus in the *Spock* case, while only Ferber and Coffin were present at the Arlington Street Church ceremony at which draft cards were turned in, the other three defendants were equally liable for everything that went on even though they were unaware of this rally until they read about it in the indictment.
2. Anybody who commits an act intentionally to further the objectives of the conspiracy becomes a member of the conspiracy. It was the position of the Department of Justice in the *Spock* case that this could include, for example, all 28,000 signers of the "Call to Resist Illegitimate Authority," all who voiced support at rallies where the defendants spoke, even newsmen who reported their speeches sympathetically.
3. Furthermore, and this is one of the most troublesome and pernicious aspects of conspiracy law, the hearsay statements of any one of these persons, whether or not he had been indicted as a conspirator, could be used as evidence against all of the others.
4. Accusations of crime are normally required to be specific as to time and place. In conspiracy cases, however, the prosecution is allowed extraordinary latitude. In many instances allegations are made that the conspiracy covered many months or years, and that overt acts occurred in many places. This, of course, leads to the handy conspiracy exception that permits the government to pick the place of the trial. Ordinarily, under the Sixth Amendment, an accused has the right to be tried in the state and district where the crime was committed. But in a conspiracy case the prosecutor can choose the place for the trial from among any of the districts where he has alleged that "overt acts" occurred. The core of the government's case against Dr. Spock and the others was events that took place in New York and Washington: the October

2 press conference, the demonstration at the Department of Justice, the distribution of "A Call to Resist Illegitimate Authority." Yet the government found it expedient to try the case in Boston, site of but one of the overt acts, the service in the Arlington Street Church in which only Coffin and Ferber had taken any part.

5. Eevn before the conspiracy is proven, evidence may be admitted on the assumption that it will be subsequently "connected up" with the conspiracy.

6. The trial is usually large and complex, and rarely are efforts made to ensure that some defendants are protected from being found guilty on the basis of evidence that is properly applicable only to others.

All these matters are left for another day. The treatment of crucial substantive questions offers little reason to expect that rights will be protected on these vital procedural matters.

Chapter 11. National Security.

Throughout this chapter, the commission of a criminal act is made dependent upon the United States being engaged in "war." Thus, the crime of treason requires the United States to be engaged in "international war" (§ 1102); sabotage as a Class A felony can be committed only "in time of war" (§ 1105); to solicit one to avoid military service is a crime "in time of war" (§ 1109); one can impair military effectiveness by false statements only "in time of war" (§ 1111); one definition of espionage turns on whether the prohibited acts are committed "in time of war," and the same phrase also effects whether the crime is a Class A or B felony (§ 1112). Sec. 1117, however, requires the existence of a "declared war" as a predicate for commission of several crimes relating to communicating with the enemy.

We believe that whenever an offense turns on whether the United States is at war, the Code should be amended to require that the war be one declared by Congress.

All of the offenses which require our being at war are not only traditionally thought to be serious indeed, but some of them—treason, impairing military effectiveness, soliciting avoidance of military service, certain espionage offenses, and wartime censorship—inevitably implicate questions of freedom of speech. And if the First Amendment is to be so seriously impaired under any of these provisions, those drastic restrictions upon fundamental freedoms should be permitted, if at all, only after a deliberate and explicit declaration of war by Congress, as required by Article I, Sec. 8 of the Constitution. The nation should be ensured that imposition of the severe penalties provided in these sections, together with their intrusions into the First Amendment, not be left to the sole determination of the Executive Branch of government.

The most divisive issue in this country over the past five years has been the Vietnam war. This deep division has been caused not merely by the feeling among tens of millions of citizens that the Vietnam adventure has been unwise, but by the strongly-held conclusion by substantial numbers that the war has not been legally authorized. Senator Sam Ervin commented during the National Commitments debate:

"The consequences of this failure to observe the Constitution are all too evident. True, no Supreme Court decision has adjudged the war in Vietnam as unconstitutional on the grounds that Congress adopted no formal declaration of war and because the Senate gave no effective advice and consent. Instead, the declaration of unconstitutionality has come from the judgment of the people. We see the decree everywhere. For the first time in our memory, an incumbent President was forced from office. Young men whose fathers and brothers volunteered to serve their country now desert to Canada and Scandinavia rather than bear arms in the country's cause. Thousands march on Washington and picket the White House, the Capitol, and the Pentagon. Now we have riots and violence on our university campuses. ROTC programs are being forced out of schools, and there is dissension and anti-war activity even among those in uniform.

"Perhaps not all the anarchy we see today has been caused by the Vietnamese war and the way in which we became involved. No one can say. But no one can say that the war was not the cause, or at least the catalyst. And I cannot shake the feeling that ultimately the reason so many are now disrespectful and unresponsive to authority is because authority was disrespectful and unresponsive to the Constitution in the making of our policy in Vietnam." 115 Cong. Rec. 17217 (June 2, 1969).

The comments of Senator Ervin and other political leaders point out the most damaging feature of dispensing with explicit Congressional exercise of the war power, in Vietnam or in any other military adventure that might arise: the loss of legitimacy by the basic institutions of government. The use of military force under any circumstances is bound to create serious tensions within a society. But to fail to follow the accepted forms which the nation expects to initiate a war invites the pervasive sense that the war in question is merely an exercise in naked power, rather than the lawful expression of the national will.

It would be a substantial retrogressive step to provide that any "war," whether or not it is declared by Congress, may trigger prosecutions under various sections of Chapter 11. The ambiguity of some armed conflicts certainly raises the question whether an international war situation exists and to allow punishment for acts done during these conflicts on a *post facto* determination by a court that "war" in fact existed at the time is fundamentally unfair. Judicial and scholarly opinion is deeply divided on the question of the legality of the Vietnam War and similar questions were appropriately raised by the engagement of our troops in the Dominican Republic in 1965. The formulation of "declared war" makes explicit what is required prior to the application of these penal sanctions, particularly since many of them curtail fundamental freedoms normally protected by the First Amendment.

Section 1101. Treason

The ACLU strongly objects to the proposed section on treason. As drafted the proposal could, for example, subject thousands of Americans to prosecution and a sentence of life imprisonment for the speech and conduct in which they presently are engaged in opposing the Vietnam war. The section is pregnant with possibility for misuse and could lead to prosecutions intended to punish dissenting speech.

The operative language is: "participates in or facilitates military activity of the enemy with intent to aid the enemy or prevent or obstruct a victory of the United States." Using the Vietnam conflict as an example, it is clear that many Americans, including representatives in Congress, who have spoken and marched against the war with the express intent of preventing a military "victory" for the United States could be prosecuted under the draft proposal. In their activities they may have "facilitated" the "military activity" of the enemy by giving the enemy encouragement to continue fighting. In fact, many critics of the anti-war movement have specifically stated that opponents of the war have given aid and comfort to the enemy by their actions. The comment to the Code acknowledges that "facilitates" could be construed to cover "trivial conduct." Should one who advocates immediate withdrawal of all American troops from Vietnam, with the intent of preventing an American "victory", run the risk that the enemy's military activity will thereby be facilitated because the enemy is encouraged by dissent in this country?

It is true that the courts to date have said that words in and of themselves cannot constitute treason. E.g., *Chandler v. United States*, 171 F. 2d 921, 938 (1st Cir. 1949). Nevertheless, treason convictions for persons who conducted propaganda campaigns for Germany in World War II have been sustained. Under the present treason statute, speech which severely criticizes the Government's operation of a war, and which gives aid and comfort to the enemy is apparently protected unless it also was done with an intent to betray or adhere to the enemy. *Chandler, supra* at 938; *Cramer v. United States*, 325 U.S. 1, 29. However, under the proposed Code the prohibited conduct is punishable if done with the intent *either* to aid the enemy or prevent or obstruct a victory of the United States. Thus, it is certainly arguable under this section that the mere speech, if convincing enough to encourage the enemy to persevere in their efforts, will be punishable as treason. Speech in this area must continue to be protected. Even in the course of normal activities of political opposition, the expression of criticism and statements as to what is best for the country must not be fettered by fear of a jury's finding of a traitorous purpose in the passion and tumult of a subsequent prosecution for treason.

Willard Hurst in "Treason in the United States," 58 Harv. L. Rev. 395 (1945), made the important observation that the framers of the Constitution, in drafting the restrictive language of the treason clause, had in mind the need to eliminate the historic misuse of treason prosecutions as an oppressive

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instrument of domestic political force. The proposed Code restores that danger: the chilling effect it could have on free speech, particularly in a period of paranoia caused by dissent and criticism of a failing Governmental policy, is all too obvious.

A loosely constructed treason statute enforces a conformity to a particular form of nationalism which should be anathema to free men. It represents Governmental pressure for a false unity and national doctrine, the teachings of which all are compelled to follow. As Mr. Justice Jackson stated: "We set up government by the consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). The section as proposed tends to channel exercise of First Amendment rights along a uniform path by prohibiting a wide range of speech that could be construed as intended to "prevent or obstruct a victory of the United States."

The ACLU believes that the crime of treason, except as it covers direct participation in the military efforts of the enemy in a declared war, is an anachronism. Decisions as whether to invoke the treason statute will necessarily be made at least in part upon political considerations. The extreme emotions generated during wartime are bound to effect those who must make these critical judgments. Unfortunately, history has already recorded numerous instances of repression of personal freedoms, for which the justification invariably hinges on the alleged requirements of national security. Congress should not permit an overbroad treason statute to facilitate such action in the future.

Section 1103. Armed Insurrection

The ACLU always has opposed statutes such as the Smith Act, which makes it a crime to engage in some political speech, and we oppose its modification embodied in this section. The fundamental objection to these kinds of statutes is that they offend the central notion of the First Amendment that the most unpopular or dangerous speech is entitled to the same freedom as the most pious and harmless cliches.

Section 1103(3) should be dropped entirely. Even with the cosmetic surgery which this section performs on the Smith Act. it still contains grave civil liberties defects.

Subsection 3(a) makes it criminal to advocate, with intent to induce or otherwise cause others to engage in armed insurrection. the desirability or necessity of armed insurrection under circumstances where there is substantial likelihood the advocacy will imminently produce an armed insurrection. Two critical defects inhere in this proposal. The first is the lack of any requirement that any overt acts toward insurrection actually be committed. *Mere advocacy is punished.* In fact. this section rewards inoffensive speech. The strong advocate, the individual who is persuasive and thereby takes full advantage of his First Amendment rights, is subject to punishment.

The second defect concerns the question of intent. How is one to judge the speaker's intent at this juncture? It is extremely difficult. if not impossible, to obtain enough reliable evidence on the intent with which a given statement was made to justify a generalized constitutional or statutory distinction between "discussion"—to be considered protected under the First Amendment—and advocacy—to be punished under this section. Forceful presentation of one's views to large numbers of people, even if the words stir the audience to anger or unrest, is protected by the First Amendment. However, under this section the speech becomes criminal if a jury finds an "illegal intent". That intent can be gleaned only from the speech itself, since no overt acts are required and no insurrection in fact need occur. Thus the danger is substantial that prosecutions will be selective and prejudiced, and based only upon the unpopularity of the speaker's political views.

As written, the proposal even offends current Supreme Court doctrine relating to advocacy as set down in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). As held there, advocacy can be made criminal only where it is directed "to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. Section 1103(3)(a) should comply at least with that standard.

Subsection 3(b) is objectionable because it authorizes punishment for one who organizes an association which engages in the advocacy prohibited in

3(a). This section, therefore, on its face, would make criminal wholly legal activity undertaken pursuant to the protection of the First Amendment. If, for example, one were to organize an association, without any intent to induce or otherwise cause others to engage in armed insurrection, which sometime after its organization engaged (presumably through its members) in the illegal advocacy, the organizer, though he may have left the organization, or became a non-active member, or even opposed the "advocacy", would be liable for the alleged illegal acts of others. Further, he would be liable even if there was no causal connection between his original intent and the actual advocacy. It is a basic tenet of our system of criminal law that the criminal intent and the criminal act must occur in order for a crime to have been committed. See, e.g., *United States v. Fox*, 95 U.S. 670 (1877). The proposed code violates this rule by authorizing a conviction where the illegal intent does not coincide with the alleged illegal act.

Guilt, at the least, should be personal; it may not be attributed by association or, as the draft purports to do, by *prior* association. Moreover, even if the organizer is sympathetic to or even supports the advocacy of those who engage in advocacy in violation of this section, he should not be subject to prosecution. The right to freedom of association under the First Amendment, guarantees an individual the right to join groups and associate with others, without being held liable for the alleged criminal acts of the others when he only sympathizes with them or supports them by way of speech. *Noto v. United States*, 367 US 290 (1961) so holds. This organizational clause is patently overbroad and can only operate to drastically chill individuals from performing associations and other political groups for fear that they will be later prosecuted for the acts and speech of others. Not only the First Amendment, but the most fundamental notions of due process condemn this criminal sanction.

The second part of (3)(b) is also overbroad and violative of the First Amendment. Assuming that advocacy under circumstances set out in (3)(a) can constitutionally be prohibited, surely it is wrong to punish one who is merely an active member of an association, and in any small way facilitates the advocacy of another in that organization. One who merely edits a speech, provides moral support, engages in philosophical discussion with the advocate, provides the advocate with food, shelter, or clothing, or even provides him with transportation prior to his advocacy would be liable under this section for advocacy of armed insurrection. To protect himself, one would have to steer completely clear of the advocate, for fear that a jury sometime later would determine that he facilitated the advocate's speech.

As Mr. Justice Douglas had indicated, the line between the status of "active" and "inactive" membership marks the difference only between deep and abiding belief and casual or uncertain belief. The Constitution and Congress should protect all varieties of belief equally. The grave dangers this section poses to free association and free and untrammeled political discussion both within and without these associations is manifest. The prohibition of facilitation of advocacy can only have an *in terrorem* effect on the First Amendment rights of numerous individuals. As the Supreme Court has stated: "The threat of sanctions may deter almost as potently as the actual imposition of sanctions." *NAACP v. Button*, 371 U.S. 415 (1963). This membership clause places every individual on notice that he joins organizations, and particularly political organizations, under peril of future criminal prosecution. The obvious result will be a reluctance to join or form political groups where not only discussions otherwise protected by the Constitution can be punished, but acts of those in the association who facilitate such discussions are similarly prohibited.

Finally, the section makes illegal by mere association what is legal if not done in an association. For example, if one were to facilitate another's illegal advocacy, and neither belonged to an association, his facilitation would not be criminal. Once an association is involved, however, the action becomes punishable. This provides clear evidence that the membership clause is directed primarily at deterring the formation of and participation in political associations.

Subsection (4) provides for criminal sanctions for attempts, conspiracy, facilitation or solicitation of advocacy of armed insurrection as defined and made criminal in subsection (3) and thereby punishes acts or speech which are one step again further removed than advocacy from any overt act of

insurrection. Thus one who merely requests another to advocate armed insurrection (with the requisite criminal intent) under circumstances in which there is a substantial likelihood of imminent insurrection is liable, even though the advocacy is never articulated. A criminal conviction is authorized without either any steps being taken to actually carry out an unlawful act or without any advocacy in support thereof. By definition, there can be no clear and present danger under these circumstances. "Conspiracy" in this context is particularly threatening to First Amendment freedoms. If one man may "discuss" and "advocate", there should be no less freedom for a number of men to discuss and advocate together. Conspiracy itself—in the sense of combination, even secret combination—is not criminal unless its purpose is unlawful. Furthermore, even conspiracy for an unlawful purpose may not be punished until there arises a clear and present danger of an unlawful act, that is until steps are taken not merely to advocate but actually to plan and carry out an unlawful act.

Section 1104. Para-Military Activities

The ACLU believes that this section is potentially one of the most dangerous proposals in the Code. It seems clear that the intent of the section is to provide a ground for prosecution of groups like the Black Panthers or the Minutemen where none other exists.

The prohibition in this section is against "acquisition, caching, use, or training in the use, of weapons for political purposes by or on behalf of the association of ten or more persons." The term "political purposes" is so overly broad, vague and ambiguous that it will, by self operation, foster selective political prosecutions. It may mean the National Rifle Association or the Boy Scouts to one administration and the Panthers and SDS to another. This wide latitude given to executive and judicial agencies as to what constitutes "political purposes" violates the most basic notions of due process and necessarily makes any prosecution under the section rest on a subjective determination of what is political, and on what are good or bad political purposes. Further, is a political purpose merely one to change the government or does it extend to any political activity in the Aristotelian sense of the word—all relationships among persons in society?

It is important to note here that the activities prohibited by the draft proposal are limited neither to those with armed insurrection as to the object, nor to those aimed at overthrow of the government, nor to those carried on by organizations under foreign control. The section sweeps broadly and prohibits the mere acquisition or training in the use of weapons which might include penknives, bows and arrows, or other objects which a jury may determine to be a weapon, provided the jury also believes that the purpose was a political one.

At a minimum, the prohibition in this section should be inapplicable where "para-military activities" are pursued for self-defense. The evidence abounds that certain unpopular political organizations in this country are the subject of attacks by both private vigilante groups and law enforcement officials. They cannot depend upon protection by established authority and should, therefore, be allowed to defend themselves from physical attacks. Indeed, the self-defense provision (§ 603 of the Code) recognizes the necessity and legitimacy of self-defense under certain circumstances.

But the section as a whole ought to go. It would be far better—and unobjectionable from a civil liberties point of view—to enact an effective gun control law which would regulate the acquisition of weapons by everybody, rather than on a politically selective basis as in this proposal.

Section 1108. Avoiding Military Service Obligations

The ACLU is opposed to the draft in general on constitutional grounds, but this is not the place to argue that question. But we do note one objection to the statute proposed here.

Subsection 2 is intended to counteract the recent Supreme Court construction of the Selective Service Act in *Toussie v. United States*, 397 U.S. 112 (1970). As Mr. Justice Black stated in *Toussie, supra*, at 114–115:

"The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those

acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of the acts in the far-distant past. Such a time limit may also have the salutory effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."

A five year statute of limitations provides ample time for the government to initiate prosecution for violation of § 1108(1)(a). The offense stated therein is not "secret", in fact, it is a matter of public record and there is no undue burden on the government to initiate prosecution within five years. It would serve all the purposes outlined above to continue the limitations at five years. To make a violation of § 1108(1)(a) a continuing offense until the actor is no longer under a duty to register as provided in the regulatory act, would subject persons to prosecution for 18 years. This could lead to prosecutions based solely on harassment, political purposes or expediency.

Section 1109. Obstruction of Recruiting or Induction Into Armed Forces

We have dealt specifically with the solicitation offense in this section in our criticism of § 1003, the general criminal solicitation provision. We emphasize again the First Amendment questions which arise under this section.

Section 1110. Causing Insubordination in the Armed Forces

The Working Papers, Vol. I at 448, indicate that the language used in this section is intended to preclude prosecutions for broadside opposition to a war which may result in or can be construed as attempts to cause insubordination in the armed forces. Apparently, the inclusion of the term "intentionally" is thought to be sufficient to protect First Amendment rights in this context. The ACLU, nevertheless, believes that this proposed section, both on its face and more important, in terms of how it may be applied, is a burden on speech.

Insubordination encompasses a wide variety of acts and conduct. Unfortunately, the military itself has not adequately distinguished between acts and speech which should quite clearly be protected under the First Amendment and those which are properly punishable as insubordination. The military has initiated several court martial proceedings against members of the armed forces for conduct which is constitutionally protected. In one case, a soldier was court-martialed and convicted for marching and demonstrating against the Vietnam war in much the same fashion as hundreds of others have protested against the war over the past five years. The charge was conduct unbecoming an officer and using contemptuous words against the President. *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

In another case an enlistee was court-martialed under a statute prohibiting the impairment of loyalty, morale and discipline in the armed forces (18 U.S.C. § 2387), for stating to fellow marines that black and whites should be separated and that they should not go to Vietnam to fight a white man's war. *United States v. Daniels*, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970). Thus, it is clear that the military views speech such as that used above as acts of insubordination. We emphatically disagree. No sanctions should be available either for this type of conduct by service personnel or for the person outside the military who intentionally causes this kind of speech and protest activity. Under the proposed section prosecutions would lie against anyone who intentionally caused a member of the military to engage in insubordinate acts. Given the military's expansive definition of insubordination, this section would work an intolerable burden on the First Amendment. For a general criticism of the armed forces narrow view of First Amendment rights, see Sherman, The Military Courts and Serviceman's First Amendment, 22 Hastings L.J. 325 (1971).

Even assuming the propriety of these courts-martial, the proposed section goes a step further, prohibiting one from intentionally causing the insubordination. Does a civilian black separatist who preaches separation of the races and advocates refusal to serve in a white man's war fall within this prohibition? Does the person who advocates military personnel to voice their opposition to the war, armed forces policy or military regulations come within

this section's prohibition? And what of the person who speaks generally against the war, in support of free speech for members of the armed forces and even for conscientious objection? Does he too face prosecution under the proposed section? According to the broad definition of insubordination, all possibly could be prosecuted.

The overbreadth of the section will also cause many persons to forego advocacy which might affect the actions of military personnel even though the speech otherwise would be protected. The chilling effect on speech and advocacy is particularly strong here. It should also be kept in mind that while prosecutions under this statute would require actual insubordination, mutiny or refusal of duty, a prosecution for attempted causation of insubordination is authorized by § 1001 and would require only a jury's findings of "intent" and a substantial step toward the commission of the "crime". This step, of course, would probably be speech and a jury could find it to be made with the intent to cause insubordination.

Section 1112. Espionage

Section 1113. Mishandling National Security Information

Section 1114. Misuse of Classified Communications Information

Section 1115. Communication of Classified Information by Public Servant

These sections of the proposed Code prohibit communication, publication, or use of "national security information" (Sections 1112–1113), "classified communications information" (Section 1114), or "classified information" (Section 1115). However, no defense of faulty or impermissible classification is provided. (*Comment*, Section 1115.) It is on this single but critical issue that the ACLU disagrees with the Code and we urge that the defense of faulty or improper classification be provided because we think it required by the purposes served by the First Amendment. The great controversy last summer around the Vietnam Papers posed the problem in the most dramatic possible way. Simply put, to criminalize the communication of information whose classified status is unreviewable, empowers the government to withhold information from the public which it has every right to know, both as a matter of public policy and as a matter of law under the First Amendment.

A. The paramount guarantee of the First Amendment is the public's right to know what its government is doing. So long as the information relates to the conduct of government—no matter how embarrassing, deceitful or dishonest that conduct may be—the people have a right to know about it, and the Congress, no less than the press, has a duty to insure that the public is so informed. Without access to such information, the American people are handicapped in their ability to make the kind of reasoned judgments on public issues which our constitutional system presupposes. There is, in short, a constitutional presumption against *any* system of classification which results in withholding from the American public information concerning its government.

To turn from these fundamental principles and view the existing classification system supplies ample support for that conclusion.

The Department of Defense regulations governing procedures for downgrading and declassification of documents present an Alice-in-Wonderland maze of groups, levels, and hierarchies, which result in far too little declassification. In the Defense Department alone, more than 800 officials can mark a document Top Secret, almost 8,000 can label it Secret, and any of some 30,000 employees acting alone can affix a Confidential seal to government papers. And bear in mind that the Defense Department is only one of three dozen agencies specified in Section 1(a) of Executive Order 10501 as authorized to classify material! It is little wonder that as a result of this system, more than 20 million documents are now classified.

No valid national interest is served by the great bulk of this classification. William G. Florence, a retired Defense Department classification expert testified last summer before the House Committee on Government Operations that only one-half of one percent of all documents presently classified should be classified; 99½% could be declassified without harm to the national security.

No episode more clearly reflects the abuses in the system than the classi-

fication of the "Pentagon Papers." Those papers were, for the most part, classified Top Secret, (Group I). Section 1(a) of the Executive Order, dealing with "defense information or material which requires the highest degree protection," defines the Top Secret category as follows:

"The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.

Before the cases reached the Supreme Court, 19 federal judges had reviewed the papers *in camera*. The Government was offered every opportunity to show how the national security would be endangered. Yet, 12 of these judges were completely unpersuaded and the other 7 merely felt the government should have a further chance to make its showing. *Not one federal judge* wholly agreed with the government's claim. We believe the public was absolutely entitled to receive the information in the Pentagon Papers since these papers explored the origins of the most controversial public issue of our century. The Top Secret classification given those papers was absolutely unjustified, and did a vast disservice to the principles of our free society.

We propose that only the following material be protected through criminal sanctions: material which, if made public, would create an immediate danger to military operations and would be of no value in permitting citizens to render an informed judgment on public issues. The only material, as far as we can tell, that falls into this category is:

(a) Present or future tactical military operations;
(b) Blueprints or designs of advanced military equipment;
(c) Secret codes or material identifying particular secret operatives; and
(d) Current diplomatic negotiations.

It is important to stress, as a paramount principle, that no information may be kept secret if it would be of value in permitting citizens of the United States to render an informed judgment on public issues. Many examples of such information come to mind that would superficially seem to justify a classification. For example, the plans for the landing at the Bay of Pigs, the facts surrounding the Tonkin Gulf incident, the American invasions of Laos and Cambodia all represent situations where the needs of the political process are overriding. It is the American public's right to know if an invasion of Cambodia is planned so that it can be debated in the public arena. Similarly, the public should know the competing considerations relevant to procuring a new weapons system so that it can properly decide whether to spend the billions required.

The origins of today's heavy-handed government classification program were rather modest. The laudable intention was to protect the physical security of the United States from direct military threats. But as the concept of "security" expanded, so did the notion of what information must be kept secret in order to preserve that security. In the process, classification has become a device to deny the public access to information about many matters necessary to an informed citizenry in a democratic country. The time has come to reserve that process and to reassert democratic control over the national destiny.

Section 1301. Physical Obstruction of Government Function

Section 1302. Preventing Arrest or Discharge of Other Duties

We object to the provisions in both sections under which the conduct of a public servant acting in good faith and under color of law in the execution of a warrant or other lawful process for arrest or search and seizure be deemed lawful. Our reasons in support of a defense based on the illegality of judicial process are stated in our comments to § 603.

Second, the proposed sections state that it is no defense that the defendant mistakenly believed that the administration of law or other government function was not lawful. We think that a good faith but mistaken belief of unlawfulness should be a defense. This would place the burden on the defendant

to prove by a preponderance of the evidence that he believed in good faith that the governmental action was unlawful. It is fundamentally unfair to punish one for a good faith mistake of fact. This concept is already reflected in the Code in § 608 (Excuse—Mistake). One who makes a reasonable mistake, believing that the force he uses is required to meet the situation, when actually it is not, should not be guilty of a crime. The subjective state of the defendant's mind and not the objective reality should control. Of course, where the defendant's mistake was without a good faith basis this defense would not be available.

One example demonstrates the necessity for this defense. Suppose a bystander intervenes in a street fight to help the apparent victim, unaware that the victim was resisting arrest by a federal officer, and under conditions where a reasonable inquiry was impossible. Surely his conduct should not be criminal. Swift action may have appeared necessary to prevent serious injury and there is no way to reasonably determine the objective facts. Cf. *United States v. Heliczer*, 373 F.2d 241 (2d Cir. 1967).

§ 1325. Demonstrating to Influence Judicial Proceedings

The section imposes a blanket proscription against *any* person from picketing, parading or demonstrating within 200 feet of a courthouse with the intent to influence a judge, juror or witness in the discharge of his duties in a judicial proceeding. Thus, for example, a person peacefully picketing a courthouse for "justice" for a particular defendant and causing absolutely no disturbance or obstruction may be prosecuted even though his actions are not even communicated to the judge, jury or witnesses in the case. No clear and present danger limitation is included in this section and none is likely to be required by the courts. See *Cox v. Louisiana*, 379 U.S. 559, 565–66 (1965).

The statute singles out only a narrow area of conduct which is intended to influence judicial proceedings. No restraints, for example, are made on newspaper editorials or on any other media-type publicity concerning particular cases, and quite properly. The reason, of course, is that the First Amendment proscribes such legislation. But it could well be said that the "influence" of newspapers and television, which go directly to the judge, has a greater effect than a single picket outside the courthouse. Consequently, the distinction works an invidious discrimination against those persons whose only means of communicating their views on judicial proceedings is to put their bodies on a picket line. Those with the financial means to gain access to the press or media may "influence" judicial proceedings through the exercise of free speech, but those without those means are precluded from making their views public.

This does not mean that conduct which physically obstructs or interferes with judicial proceedings or intimidates any judge, juror or witness is protected. Rather, a line should be drawn between that type of conduct and mere speech or picketing which urges, for example, that a judge do justice or a witness testify truthfully.

Section 1341. Criminal Contempt

Instances of *summary* criminal contempt proceedings have increased markedly over the past few years. Particularly in political and other controversial trials, courts have invoked the contempt power in an extraordinary and unconstitutional manner to punish persons whom the court for one reason or another dislikes. The ACLU believes that the misuse of the judicial power of contempt must be sharply curtailed.

(a) The summary contempt procedures provided by law were reserved for exceptional circumstances and unusual situations where it is necessary to summarily and immediately vindicate the dignity of the court, such as situations involving threats to the judge or serious disruptions of court procedures. It only applies in those unusual situations where instant action is necessary to protect the judicial institution itself and when there is such an open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedure, is required.

The ACLU vigorously opposes the length of sentence that is authorized for summary criminal contempt under proposed § 1341. There is presently a

six-month maximum sentence. We believe that if the summary contempt power is retained at all it must be drastically curtailed and the maximum sentence limited to five days imprisonment and/or a $500 fine. This was the suggestion in the original study draft. It has, of course, the distinct advantage of interposing an impartial tribunal between the offending defendant and offended judge prior to the imposition of an extended jail term. This punishment is sufficient to vindicate the court's authority so as to allow the proceedings to continue. If the contempt is serious then there can be a prosecution with all the due process safeguards in another proceeding. As experience has amply demonstrated, the danger of abuse is simply too great to allow the offended judge to summarily impose a six month period of incarceration.

(b) Except in those rare situations as outlined above contempt procedures if retained at all should only be employed after:

(1) specific appropriate warnings shall be given at the time of the alleged contemptuous conduct;

(2) the contempt proceeedings shall have been referred for handling to another judge;

(3) the alleged contempt shall be tried after written charges are delivered to the alleged contemnor and he shall have been given an opportunity to reply in writing thereto; and

(4) the contempt proceedings shall be conducted subject to all rights of due process guaranteed to defendants in criminal trials, including the right of the defendant to present evidence in his behalf and the right to trial by jury.

(c) The proposed statute is objectionable as well on vagueness grounds, particularly with respect to the use of the term "misbehavior" in section (1) (a). If there are to be effective limitations on the contempt power of federal judges, there must be clear standards for its exercise. The Code provision does not contain any such standards on its face. It purports to punish the "misbehavior" of any person in the Court's presence that "obstruct[s] the administration of justice." The statute does not itself define what constitutes "misbehavior." Certainly that word is susceptible to many different interpretations. People may reasonably disagree on what conduct by witnesses, spectators, or parties to a proceeding or by their counsel, constitutes such "misbehavior" as amounts to contempt. On its face, then, the statute leaves to the whim of the presiding judge the determination of what is contemptuous misbehavior.

It is a well established constitutional principle that "[t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harris*, 347 U.S. 612, 617 (1954). Another defect of the vague indefinite criminal law is that it is "susceptible of sweeping and improper application"; it "lends itself to selective enforcement against unpopular causes." *NAACP v. Button*, 371 U.S. 415, 433. 436 (1963). Both due process, and the separation of powers require that prosecutors, judges and jurors be trammeled in the exercise of their powers. Indeed, the Supreme Court has ruled that a law is over-vague if "it leaves the public uncertain as to the conduct it prohibits *or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.*" *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966). (Emphasis added.)

The requirement of definiteness in criminal statutes is especially important in the context of criminal contempt statutes. If the dividing line between a vigorous presentation of a case and contemptuous "misbehavior" is uncertain, attorneys will be inhibited in their role as advocates; criminal defendants will thereby suffer in the exercise of their Sixth Amendment right to effective representation by counsel of their choice. In addition, litigants and their counsel will be seriously deterred in the exercise of their First Amendment right to present issues and cases of public interest to the courts. Thus, in its vagueness, the criminal contempt statute would also be overbroad, proscribing conduct "which legitimately may be proscribed" as well as conduct "which may not be proscribed." *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967).

So far the courts have avoided the question of whether this language is unconstitutionally vague by narrowly construing the statute. In *In re McCon-*

nell, 370 U.S. 230, 234 (1962), the Supreme Court ruled that the statute is violated only where it can be clearly shown that the conduct of the contemnor actually obstructed the court in the performance of a judicial duty. As stated by the Court, where "[p]ositive evidence of a deliberate intent to pursue a course of improper argument or prohibited conduct is absent," a finding of contempt cannot be supported in the absence of an actual obstruction to the performance of a judicial function.

Conduct, wilfully engaged in, that should clearly be covered by the contempt section includes, for example, utterances or behavior that prevent continuation of the proceedings, the threatening of witnesses in the courtroom and the destruction of evidence in the courtroom. However, disrespectful and insulting remarks do not constitute contempt and should be specifically excluded from the section.

Chapter 15. Civil Rights and Elections

Generally, the Code adopts present law on these subjects, i.e., 18 U.S.C. Secs. 241 and 242, and the Civil Rights Act of 1968, and we of course support these provisions as well as their strict enforcement. We have only a few comments to make about these provisions.

We oppose inclusion of "economic coercion" in sections 1511 and 1512 as another specie of injury or intimidation forbidden by the Code. Though we oppose the application of economic sanction as retribution for the exercise of one's civil rights, or for supporting racial equality, we also recognize that boycotts of commercial establishments which discriminate on the basis of race, color, religion or national origin, embody substantial elements of free speech and assembly which cannot constitutionally be prohibited. The other side of that coin would allow those opposed to racial equality, for example, to seek to make their point of view effective by engaging in similar boycotts. A principled construction of the First Amendment must, of course, allow both kinds of political activity to exist side by side.

In addition, to criminalize economic sanctions such as boycotts, even if drafted with the intention of protecting pro-civil rights activity, may backfire. The pending case of *United States v. Mitchell*, No. 71–1500, Eighth Circuit, is a good example of the two-edged nature of the "economic coercion" sword. In that case, the defendant was an organizer for CORE in St. Louis. CORE became involved in a dispute with an employer over the question whether he would employ a black manager in one of his stores located in a black neighborhood. The employer refused and the defendant, Mr. Mitchell, threatened to stir up a boycott against the employer. The matter came to the attention of the local U.S. Attorney who secured an indictment and conviction against Mr. Mitchell under the Hobbs Act, 18 U.S.C. 1951, which prohibits labor racketeering. We think the prosecution is a serious distortion of Section 1951, and the ACLU has filed a brief *amicus curiae* arguing that Mr. Mitchell's conduct was protected by the First Amendment.

The Hobbs Act was never intended to be applied to the kind of conduct involved in the *Mitchell* case, and we think a badly-advised U.S. Attorney has begun a prosecution which directly violates First Amendment rights. Likewise, no matter how well-intended the inclusion of "economic coercion" within this section may be, it is fairly predictable that it will be selectively abused by federal prosecutors hostile to civil rights proponents and will interfere with constitutionally protected speech and assembly. We urge its rejection.

We also urge that section 1512 be expanded to apply to discrimination based upon sex. Discrimination based on sex has, of course, been prohibited in employment under Title VII, as recognition of the fact that sex, like race, or color, is an invidious classification which results in intolerable acts against women. That recognition should be given substance in Sec. 1512. Though the Working Papers at page 794, strikes an out-dated note by declaring that "forceful action against women to discourage their participation in specified activities would be downright ungentlemanly," the fact is that women are often victims of threats when they attempt to assert their right to be served in places of public accommodation, to secure a place to live, or to take advantage of other facilities which are said to be for men only. The law now recognizes the moral outrage suffered by reason of discrimination based upon race, color, religion, or national origin. Women suffer the same outrage because of their sex. It is time the criminal law recognized

that plain fact and criminalized threats which are intended to discourage women from exercising their civil rights.

Section 1521 makes it a crime for federal officials, acting under color of law, to subject another to unlawful violence or detention, or to exceed their authority in making an arrest or a search and seizure. We applaud the simplicity of this provision and urge that it be expanded to include state and local officers as well. Most instances of official abuse occur on the state and local level and they must be dealt with, if at all by federal law, under sections 241 and 242 of Title 18 (Secs. 1501 and 1502 of this Code). Experience proves that the complexities of those sections discourage prosecutions and make convictions difficult. But straightforward official abuse as defined in this section should be amenable to federal prosecution since local prosecutors are reluctant to bring charges against the local officials with whom they so closely work.

Section 1561. Interception of Wire or Oral Communications

The ACLU of course approves para. (1) of § 1561 which seeks to penalize those who intentionally intercept wire or oral communications. The defenses to such liability, however, cause us great concern, as they did when Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was first enacted. Moreover, the Comment seems to go much further than current law authorizes, though at least part of this issue is presently before the Supreme Court of the United States in *United States v. United States District Court for the Eastern District of Michigan and Honorable Damon J. Keith*, Oct. Term 1971, No. 70–153.

It may be well to reiterate at this point the basis for the ACLU's opposition to the legitimation of electronic surveillance, as embodied in 18 U.S.C. § 2510–12.

An essential difference between the totalitarian state and the free society is that the totalitarian state seeks to deprive the citizen of his privacy by trying to observe all his movements, words and even thoughts. Fear and insecurity permeate every aspect of life and the pursuit of happiness is merely a phrase.

Recognizing this, as Mr. Justice Brandeis has said:

"The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone—the most comprehensive of the rights of man and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. at 478.

Privacy does not however, mean solitude. Each man must communicate and exchange thoughts and ideas with others—his wife, his children, his doctor, his lawyer, his religious advisor, his business acquaintances and associates, his friends, his constituents. Often this must be confidential. The growth and complexity of modern society have made the telephone probably the major instrument for such intercourse, for it provides instantaneous, direct, spontaneous and ostensibly private communication.

To permit law enforcement authorities to wiretap, even under limited circumstances, would serious impair this privacy so necessary to a free society. Awareness by the public of the power to wiretap is alone sufficient to reduce drastically the sense of security and privacy so vital to a democratic society. The mere thought that someone may be eavesdropping on a conversation with one's wife or lawyer or business associate will discourage full and open discourse. Indeed, government officials who are in office for a period of time can build up a substantial body of information on other public officials and representatives which can seriously impair the working of representative democracy.

The rapid and multiple development of other forms of electronic eavesdropping only aggravates the threat of this fundamental invasion of personal liberty. There are now eavesdropping devices which can record conversations at great distances or behind closed doors easily and inexpensively. By these devices the most private and intimate utterances, often deliberately confined to one's home, are exposed to the ears of listening police. Inevitably, miniature television and image recording instruments will soon be developed and the omnipresent telescreen of George Orwell's 1984 will be with us.

The ACLU believes that all such types of electronic eavesdropping violate the fundamental rights protected by the Fourth Amendment to the Constitution. The

founders of our nation established the protections of the Fourth Amendment because they had seen their homes subjected to unlimited invasions and searches by the authority of general warrants and writs of assistance; they sought to ensure that such unlimited searches and general warrants would never be repeated. Government officials were to be allowed only specific warrants, particularly describing, in the words of the Fourth Amendment, the "place to be searched" and the "thing to be seized."

Electronic eavesdropping cannot be so limited. Any authorization for such practices is necessarily a general, rather than a specific warrant limited to specific objects and places, for it necessarily permits a general exploratory search for evidence in aid of prosecution. This is because such devices inevitably pick up all the conversations on the wire tapped or room scrutinized, and nothing can be done about this. Thus, not only is the privacy of the telephone user invaded with respect to those calls relating to the offense for which the tap is installed, but (1) all his other calls are overheard, no matter how irrelevant, intimate or otherwise privileged and thus all persons who respond to his calls have their conversations overheard; (2) all other persons who use his telephone are overheard, whether they be family, business associates or visitors; and (3) all persons who call him, his family, his business, and those temporarily at his home are overheard.

Because of this dragnet quality, wiretapping and other forms of electronic eavesdropping cannot be regulated by controls similar to search warrants; the object to be seized or the premises to be searched simply cannot be limited or even specified, because the very nature of a wiretap or spike microphone is to catch all calls and conversations. Indeed, the proponents of wiretapping themselves admit that the process is indiscriminate, because one of the alleged benefits of wiretapping is that evidence of one crime has occasionally been uncovered when policemen were looking for evidence of another crime.

§ 1561 seeks to re-enact 18 U.S.C. § 2500 *et seq.*, The Wire Interception and Interception of Oral Communications chapter of the Omnibus Crime Control and Safe Streets Act of 1968. However, even where circumscribed within the confines of 18 U.S.C. § 2500 *et seq.*, electronic surveillance represents an intensive and extensive invasion of private speech and thought with almost no parallel. Because these electronic devices intrude so deeply and so grossly, they discourage people from speaking freely; as Justice Brennan has warned, if these devices proliferate widely, we may find ourselves in a society where the only sure way to guard one's privacy "is to keep one's mouth shut on all occasions." *Lopez v. United States*, 373 U.S. 427, 450 (1963). When that day comes, political liberty is dead.

Specifically, the ACLU has the following constitutional and public policy objections to § 1561:

(a) The eavesdropping and wiretapping authorized by this section is essentially an indiscriminate dragnet. 18 U.S.C. § 2518(5) authorizes wiretapping and eavesdropping orders for 30-day periods. During such 30-day authorizations, a bug or tap will normally be in continuous operation. Such a bug or tap will inevitably pick up all the conversations on the wire tapped or room bugged. Nothing can be done to capture only the conversations authorized in the tapping order. Thus, under this section, not only is the privacy of the telephone user invaded, with respect to those calls relating to the offense for which the tap is installed but as discussed above all his calls are overheard. Further, all persons who respond to the telephone user's calls also have their conversations overheard. Likewise, under this section all other persons who use a tapped telephone are overheard and all persons who call a tapped phone are also overheard. This provision amounts to a "general warrant," giving officials blanket authority to make sweeping intrusions into persons' lives.

(b) The range of crime, both state and federal, for which wiretapping and eavesdropping is authorized under 18 U.S.C. § 2516 is so broad as to include, as Senator Hart has pointed out, the college student who takes a puff of marijuana. The section is not limited to so-called "major offenses" and cuts broadly across virtually the entire penal code of the federal and state governments.

(c) Section 2(b) and (c) of the proposed section allow for third party interception of communications where one party to the communication gave

his consent and where the interceptor is either a person acting under color of law or the communication was not intercepted for the purpose of committing a crime or other unlawful harm. This provision presents an extremely dangerous threat to the most fundamental values of a free society. Mr. Justice Harlan recently articulated these dangers in a compelling dissenting opinion in *United States v. White*, 401 U.S. 745 (1971). We excerpt from his opinion:

"The impact of the practice of third-party bugging, must, I think be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. It goes beyond the impact of privacy occasioned by the ordinary type of 'informer' investigation upheld in *Lewis* and *Hoffa.* The argument of the plurality opinion, to the effect that it is irrelevant whether secrets are revealed by the mere tattletale or the transistor, ignores the differences occasioned by third-party monitoring and recording which insures full and accurate disclosure of all that is said, free of the possibility of error and oversight that inheres in human reporting.

"Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one expected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life. Much off-hand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.

"It matters little than consensual transmittals are less obnoxious than wholly clandestine eavesdrops. This was put forward as justification for the conduct in *Boyd v. United States*, where the Government relied on mitigating aspects of the conduct in question. The Court, speaking through Justice Bradley, declined to countenance literalism.

"Finally, it is too easy to forget—and, hence, too often forgotten—that the issue here is whether to interpose a search warrant procedure between law enforcement agencies engaging in electronic eavesdropping and the public generally. By casting its 'risk analysis' solely in terms of the expectations and risks that 'wrongdoers' or 'one contemplating illegal activities' ought to bear, the plurality opinion, I think, misses the mark entirely. *On Lee* does not simply mandate that criminals must daily run the risk of unknown eavesdroppers prying on their private affairs; it subjects each and every law-abiding member of society to that risk. The very purpose of interposing the Fourth Amendment warrant requirement is to redistribute the privacy risks throughout society in a way that produces the results the plurality opinion ascribes to the *On Lee rule*. Abolition of *On Lee* would not end electronic eavesdropping. It would prevent public officials from engaging in that practice unless they first had probable cause to suspect an individual of involvement in illegal activities and had tested their version of the facts before a detached judicial officer. The interest *On Lee* fails to protect is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation. Interposition of a warrant requirement is designed not to shield 'wrongdoers,' but to secure a measure of privacy and a sense of personal security throughout our society."

(d) Section 1561(d) seeks to grant an additional defense for those who engage in electronic surveillance without a warrant pursuant to the so-called "national security exception" of 18 U.S.C. § 2511(3). On its face para. (d) implies very little in itself, for it merely permits a defense where "the provisions of [18 U.S.C. § 2511(3)] apply," thus implying nothing as to whether there is indeed such an exception. The Comment, however, goes much further and explicitly states that "the national security exception . . . is . . . to be

treated as a defense," implying rather clearly that there is in fact such a defense. This assumes the answer to one of the questions that is currently before the Supreme Court and over which some individual justices have previously divided. See, *Katz v. United States*, 389 U.S. 347, 358 n. 23 (1967) (question of exception to warrant requirement for national security left open), 389 U.S. at 363–64 (White, J., concurring: there is such an exception); 389 U.S. at 359–360 (Douglas, J. concurring: there is no such exception).

On the merits, as the ACLU has urged before, there is no justification for such an exception for either domestic or foreign security considerations.

With respect to domestic surveillance, the Government's claim before the Supreme Court is for a virtually free and uncontrolled right to electronically eavesdrop on any group whom the Attorney General considers dangerous. The Government explicitly rejects both the authority and the competence of the judiciary to oversee such surveillance, and demands the right to engage widely in such activity even when it has no probable cause to believe a crime has been committed.

Such authority would devastate basic First and Fourth Amendment freedoms. It is inconsistent with the clearly enunciated warrant requirements of the Fourth Amendment, *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971), and would seriously chill both speech and association by denying the sense of confidentiality and security that is absolutely indispensable to free discourse and association. Moreover, the Government's tapping of Martin Luther King, Jr., and many, many others under this justification shows how widespread is such a practice, a melancholy fact that is supported by the figures recently disclosed, showing over 100 such surveillances for each of 1970 and 1971, by use of both telephone and microphone.

Equally troubling is the fact that if this exemption from constitutional limitations is granted, there is no rational basis for not granting a similar exception in the name of "national security" to other constitutional protections such as surreptitious or forcible search and seizure, detention for investigation or "protection," or taking property forcibly, all of which have been attempted in the name of "national security." Such powers are authorized by neither the Fourth Amendment, the inherent powers of the presidency, nor otherwise.

Section 1615. Threats Against the President and Successors to the Presidency

Section 1615 is aimed at furthering the valid national interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without being hamstrung by threats of physical violence. Nevertheless, the draft proposal like present federal law (18 U.S.C. § 871), cuts too broadly into the purview of First Amendment freedoms and for that reason is opposed by the ACLU. § 1615 is dangerous overbroad because it makes criminal a form of pure speech without distinguishing carefully what is a "threat" from what is constitutionally protected free speech.

The overbreadth is the result of two related defects. First, insofar as "threat" is defined at all, it is done without regard to the traditional requirements of statutes making threats criminal: (1) that they be communicated to the persons threatened under such circumstances as to impede voluntary action by those persons, *and* (2) that they be made seriously with the intention of executing them. Paragraphs (a) and (b) of the proposed section do not satisfy those minimal requirements. Under this section a statement is a punishable "threat" if addressed to or intended to reach the President or his staff, regardless of whether it was made in circumstances which would warrant a curtailment of the President's freedom of action, *or* if it is made under any circumstances which would warrant a belief that it was a serious threat regardless of whether it was ever intended to be communicated to the person threatened.

The disclaimer contained in the Comment that this section would not reach "drunken threats or angry political comments by persons clearly incapable under the circumstances of carrying out such threats" is clearly inaccurate. On its face the statute *could* reach such comments under the disjunctive requirement of (a) or (b).

In their efforts to safeguard one national interest—the protection of the President—the drafters have subordinated the paramount constitutional right of free speech. A statute which makes speech criminal must be judged

"against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Free and open political discussion is seriously endangered by a statute which punishes "threats" defined in such a loose fashion. The Supreme Court has recognized the danger to freedom of speech which results from the present statute, holding that it cannot punish what the speaker meant as "political hyperbole" simply because a listener thought it was a "true threat." *Watts v. United States*, 394 U.S. 705, 708 (1969). The "chilling effect" that this section would have on political debate and on criticism of the President is manifest. Caustic and emotional statements would be curtailed, thus inhibiting constitutionally protected wide-open speech and debate. The danger to free speech which the Court found in § 871 is in no way alleviated by § 1615. Due process requires that the statute define the type of speech which is punishable. The simple label "threat" does not automatically remove speech from the purview of the First Amendment any more than does the label "libel".

The second defect which causes the section to sweep overbroad is its omission of the requirement that the "threat" be made "knowingly and willfully." Compare 18 U.S.C. § 871(a). Section 1615(b) adopts a construction of the willfulness requirement of § 871—that the "threat" be part of a statement made intentionally and voluntarily by the speaker and that it contain an *apparent* determination to carry it out. *Ragansky v. United States*, 253 F. 643, 645 (7th Cir. 1918). The Supreme Court has indicated "grave doubts" about the correctness of that interpretation of the requirement. *Watts*, *supra* at 708. The danger inherent in this construction of "willfullness" is that speech which may be willfull only in the sense that the speaker *meant to speak* is subject to punishment. At the very least such a statute must make clear that what is punishable is speech made with the specific intent of execution of any "threat" which it contains.

The Supreme Court has recognized what the drafters of the proposed section have overlooked: the political language "is often vituperative, abusive, and inexact." *Watts*, *supra*, at 708. The proposed section, in effect, establishes once again the long rejected concept of seditious libel. At a bare minimum, prosecutions for alleged threats, particularly for those made in the context of political discussion, must conform to the clear and present danger test. The statute on its face authorizes punishment for speech that amounts to mere advocacy and, therefore, violates the First Amendment.

§ 1615 is inexact in that its construction does not reflect the fact that it is aimed at three distinct problems: (1) physical harm to the President from the person making the threats; (2) physical harm to the President from a listener incited to action by the speaker; and (3) harassment of the President in the performance of his duties. The statute should be broken into three subsections, each prohibiting one of the three things sought to be prevented by § 1615. The elements of proof would be different for each. Thus, where the evil to be prevented is an assault on the President by the speaker, specific intent to commit such a crime of violence will be required to be shown. In addition, since intent alone is not punishable, and since not all threats are executed, only threats which present a clear and present danger of their execution would be punishable.

Where the evil to be prevented is the incitement of others to harm the President, it is clear that specific intent to achieve this result must be shown. The section must contain the traditional safeguards of a statute prohibiting incitement. And the nexus between the incitement, once established, and the contemplated harm must be sufficiently close to present a clear and present danger that the harm will be accomplished.

The third purpose of the section is the prevention of harassment of the President in the performance of his duties. The first requirement to be met must be the communication of the threat, for there can be no harassment by a threat which never reached the President of his staff. There must be specific intent to execute the communicated threat. Furthermore, the threat must be communicated in such a way that it presents a clear and unambiguous present danger to the life or safety of the Chief Executive. There is arguably an interest in protecting the President from *all* harassment which might inter-

fere with his performance of his duties, but that interest is outweighed by the interest in protecting First Amendment freedoms. The clear and present danger standard simply does not allow abridgement of speech merely because it "tends" to harass the President. As Judge J. Skelley Wright has stated:

"Many statements wholly protected against restriction by the First Amendment may 'tend' to contribute to the climate of hate which makes the free movement of the President dangerous. The affirmations of the affluent as well as the militant exhortations of the dispossessed may have this tendency. Many statements on political affairs may, by implication or through hyperbole, compass the violent end of the Chief Executive. The threat of punishment for all such statements would exert a chilling effect on political speech too drastic to be consistent with the guarantee of free expression." *Watts v. United States*, 402 F. 2d at 691.

Sections 1821–1826. Dangerous, Abusable, and Restricted Drugs

The ACLU opposes criminal sanctions for use, or sale (to adults over 18) of marijuana. The use of marijuana involves protected constitutional rights including the right to privacy. Intrusion by government on such a constitutionally protected act places a burden of justification upon government. That burden has not been met with respect to laws which impose severe penalties on the use and possession of marijuana.

There are three important reasons why possession and use of marijuana should not be subject to criminal penalties: (1) the government has not met its burden of demonstrating, through scientific evidence, that use of marijuana is intrinsically harmful, causes anti-social conduct or leads to use of more potent substances; (2) an individual has a right to privacy and the right to control his or her own consciousness; (3) the enforcement of the criminal prohibitions has involved serious harassment and abuses of constitutional rights.

The ACLU is also opposed to the perpetuation of possessory offenses against addicts with regard to addictive drugs such as heroin, injectable amphetamines, oral amphetamines and barbiturates. It is conceded that there is substantial scientific evidence of the harmful effects of hard narcotics. What is in doubt is the ability of criminal sanctions to deter use and the subsequent social harm.

The crucial point is that the use of criminal sanctions to eliminate this harm to society brings in its wake additional social harms. The criminal punishment method is extremely costly to society as a whole. We must seek methods other than criminal law enforcement if we mean to solve one enormous social problem without creating others which are equally dangerous. There are two dangers to society which follow necessarily from both present law and from the proposed Code. The first is the abridgement of the Eighth Amendment's guarantee of freedom from "cruel and unusual punishment." The second is the spiralling incidence of crimes perpetuated in urban areas by people attempting to support expensive habits.

The United States Supreme Court has ruled that a conviction under a statute making it a crime to be addicted to the use of narcotics is unconstitutional. *Robinson v. California*, 370 U.S. 660 (1962). Punishment for the "status of narcotic addiction is cruel and unusual. That principle was reaffirmed in *Powell* v. *Texas*, 392 U.S. 514 (1968) (where, however, the Court affirmed a conviction for being drunk in a public place, finding that the facts of *Powell distinguished it from Robinson*). Mr. Justice White, concurring, agreed with the majority that the record below did not support a finding that Powell was the victim of a chronic disease, but pointed out that the reasoning of *Robinson* would reach that case if there were a showing that Powell was a chronic alcoholic:

"If it cannot be a crime to have an irresistible compulsion to use narcotics (*Robinson v. California*), I do not see how it can constitutionally be a crime to yield to such compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law." *Powell v. Texas*, *supra*, at 548–549.

Section 1824 of the proposed Code makes criminal an activity which is part of the disease of narcotic addiction. A sense of the fundamental unfairness of punishing an addict for possession while refraining from punishing him or her for simply being an addict is reflected in a statement by one of the drafters of the Code: "It is regrettable that the final draft dropped the defense against a federal charge of possessing dangerous drugs for own use, that the defendant was so addicted that 'he lacked substantial capacity to refrain from use.'" THE PROPOSED FEDERAL PENAL CODE: ACCOMPLISHMENTS AND ISSUES, Statement to the Senate Judiciary Committee, February 10, 1971, by Professor Louis B. Schwartz, Director, National Commission on Reform of Federal Criminal Laws, p. 4.

One solution which the ACLU supports is to permit ethical doctors to treat addicts by the administration of drugs without risk of prosecution. Present restrictions upon that practice violate the patient's right to seek medical attention and violate the physician's right to give the medical treatment he deems fit.

Section 1851. Disseminating Obscene Material

The proposed section on obscenity reflects existing law, with only minor changes in substance, and thereby continues a policy which the ACLU believes imposes severe limitations on the exercise of First Amendment rights. Prior to setting forth our particular criticisms of the proposed section we state the policy of the ACLU on obscenity:

A. The American Civil Liberties Union opposes any restraint, under obscenity statutes, on the right to create, publish or distribute materials to adults or the right of adults to choose the materials they read or view. Freedom of speech and press and freedom to read can only be safeguarded effectively if the First Amendment is applied as it was written and intended—to prohibit any restriction on these basic rights.

B. Statutes which prohibit the thrusting of hardcore pornography on unwilling audiences in public places, which compels them to be exposed to such material, must be narrowly drawn to affect only such methods of distribution in such public places, and should not restrict the right to publish or otherwise distribute any work to adults, regardless of its contents.

C. Obscenity statutes which punish the distribution of material purchased or viewed by minors violate the First Amendment, and inevitably restrict the right to publish and to distribute such materials to adults. The complex social problems which prompt such statutes cannot be solved by avoiding their real causes and making freedom of speech and press a diversionary whipping boy.

The ACLU is well aware of the concern of parents about the exposure of children to what many regard as hardcore pornography, whether through its availability at neighborhood stores and newsstands or by its unsolicited dissemination through the mails. The Supreme Court has held that the distribution of such materials to minors is not protected by the First Amendment.

As a practical matter, however, it would appear that there can be no legal substitute for parental responsibility. Whereas the avowed dealer in pornography is usually astute enough to keep minors out of his emporium, the proprietor of a small candy store cannot effectively censor the hundreds of paperback books displayed on racks. While he might decline to display a periodical with a patently offensive cover—and might well be persuaded to do so at the request of his customers—it is unrealistic to expect him to examine the contents of every publication he offers for sale. Coercive sanctions would inevitably threaten the distribution of non-pornographic materials.

D. The ACLU believes that the constitutional guarantees of free speech and press apply to all expression and that all limitations of expression on the ground of obscenity are unconstitutional. But so long as courts sustain such limitations in any form, it will also work to minimize their restrictive effect. Under the First Amendment and the due process clause of the Fifth Amendment, such statutes should be required to define precisely the forms of proscribed speech, provide strict procedural safeguards, and choose the least restrictive methods of regulations.

The following safeguards for freedom of expression should be required:

(i) The statutory definition of obscenity must be drawn precisely and narrowly limited to the category of materials which the Supreme Court has determined to be "obscene."

(ii) Book publishers and bookstores, motion picture producers, exhibitors and play producers and actors and others involved in theatrical productions, and libraries and museums, should not be subject to the sanctions of criminal statutes for distributing or being connected with a work before it has been determined obscene in an adversary civil proceeding. The state should be required to select a civil proceeding as the least restrictive method of censorship.

(iii) Obscenity statutes should be required to provide for prompt trial, determination and appellate review within specified time periods; and to require proof of scienter, under clearly defined and reasonable standards.

(iv) Obscenity statutes should assure defendants the right to counsel; and, if a defendant is acquitted, he should be entitled to recover the costs and reasonable attorneys' fees he incurred in defending his First Amendment rights.

(v) The bookseller or motion picture exhibitor or play producer, or museum or art gallery proprietor should not be obliged to risk punishment by misjudging the age of a minor. He should not be required to keep records of evidence submitted by minors; and he should be entitled to rely reasonably on a minor's statement of his age (e.g., if the child is actually within three years of the age he claimed to be).

(vi) There should not be a variable standard of obscenity for minors.

(vii) With reference to obscenity, the government should not be entitled to define a minor as anyone over the age of sixteen.

In accordance with these standards, the ACLU must object to the proposed section on obscenity. We briefly outline our major objections:

1. The most obvious problem on the face of the draft statute is the lack of any definition of "obscene." The reason for not following a definitional approach is given in the Comment: "An effort to give some precision to the concept of obscenity was abandoned in view of the current state of flux in the relevant constitutional law, leaving it to the courts to continue to evolve the test on a case-by-case basis." Thus, the most fundamental requirement of due process is violated by this statute: because of vagueness the citizen is not given fair notice of what in fact is criminal. And even if we use the Court's pronouncements on this subject as a guide, the citizen, because of the extreme subjectiveness of the standard of what constitutes "obscene" material, is similarly faced with manifest uncertainty. As Professor Paul Bender has noted (Working Papers at 1213–1214):

"In most areas of criminal law the law itself makes the judgment regarding what conduct is to be penalized; the primary question for the trier of fact in each case is whether the historical facts show that the prohibited conduct has been committed. Where this is not true—as with statutes penalizing conduct which is 'unreasonable' or 'reckless'—the conduct prohibited is ordinarily dangerous in the sense of its creating an immediate threat of physical danger. In such cases, while the trier of fact in an individual case must do more than ascertain what the defendant did, e.g., he must predict what were the known likely physical consequences of such conduct and must evaluate the costs of preventing such dangers, the trier is aided in making such judgments by a core of common objective experiences in, for example, what kind of automobile driving conduct is productive of a great chance of injury to others.

"Present Federal obscenity law, as expressed in proposed section 1851, differs radically from this pattern in that it leaves to the trier of fact in each case a vast judgmental function under a legal standard which does not call upon any common experience with objective phenomena but relies instead upon moral, aesthetic and psychoanalytic determinations by those charged with application of the law. The test is not whether materials bear certain specified contents, nor is it whether they have certain dangerous or harmful effects, common to human experience. Rather the tripartite standard evolved by the Supreme Court . . . calls for a judgment about the 'appeal' of the material involved to those to whom it is addressed, (including an assessment of whether the material is of interest because of 'lustful' and 'shame' infected attitudes in the potential recipient), about the 'social value' of the material, and about the way the material compares with standards of offensiveness prevalent in the community. It is probably not unfair to suppose that, in

actual practice, application of this test more often than not comes down to the trier's individual conclusory judgment whether the particular work involved ought to be permitted in society, and that this judgment is frequently made primarily with reference to personal beliefs about the morality of certain sexual practices and the aesthetic appropriateness of publicizing or communicating about those practices.

"Such subjectivity makes accurate prediction of results of prosecution impossible in an area where the first amendment probably ought to be deemed to require clear tests as a guide to the exercise of rights of free expression. It leads, as well, to situations where the results in individual cases may legitimately be seen by the community and the defendant as the reflection of the personal predilections of judges and jurors, rather than as the result of law. This is not satisfactory criminal law.

2. There is no evidence that exposure to "obscene" material produces any harmful results in adults or children. In fact, the studies conducted to date indicate just the opposite. The National Commission on Obscenity and Pornography concluded that in light of the lack of evidence of harm, no criminal sanctions should attach to dissemination of obscene material and no counter evidence or objective studies provide any basis for rejecting their proposals.

None of the conventional objections to distribution of obscene materials survived the Commission's report, and it is questionable whether they survive the reasoning in *Stanley v. Georgia.* Obscene materials do not cause crime, do not "erode morality" and may actually help to prevent anti-social conduct by affording a non-violent outlet for sexual curiosities and drives, and may provide a socially useful education function.

3. At a minimum, of course, for the reasons stated above we would urge the Congress to adopt bracketed paragraph (c) of subsection (2), allowing the additional defense that would permit dissemination of obscene material to adults.

4. We also think it is imperative to include the procedural safeguards noted above, which would require an adversary civil proceeding prior to the bringing of a criminal prosecution.

Section 1861. Disorderly Conduct

Discriminatory and arbitrary enforcement of disorderly conduct and breach of the peace ordinances has been recognized by many authorities as a prime factor in degenerating police-community relations and even as a cause of serious civil disturbances. See, e.g., *Coates v. Cincinnati,* 402 U.S. 611 (1971); Report of the National Advisory Commission on Civil Disorders, 26–27 (1967). A basic theme of a line of cases in the Supreme Court establishes that the standard for conduct on the streets that government seeks to make illegal must be readily ascertainable and specific so that men of normal intelligence need not guess at its meaning. The standard, for example, prohibiting conduct which "annoys" people is unconstitutional because conduct that annoys some people does not annoy others and thus one is forced to guess at the meaning of the term—no standard of conduct is set forth.

Furthermore, the constitutional right of free speech prohibits enforcement of statutes that make public intolerance or animosity the basis for conviction for "disorderly conduct." When one exercises his right to assembly, his action cannot be made criminal because its exercise may be "annoying" to some people.

In accordance with these guidelines the Supreme Court has required great specificity as to what conduct in fact is prohibited in disorderly conduct ordinances. Without this specificity these ordinances allow free assembly only at the whim of some police officer and invite discriminatory enforcement of the law "against those whose association together is 'annoying' because their ideas, their lifestyle or their physical appearance is resented by the majority of their fellow citizens." *Coates* v. *Cincinnati, supra.*

The proposed section fails to satisfy the requirements of specificity. The result is that conduct and speech protected by the First Amendment may be chilled for fear of arrest as the police are given an overbroad statute which can be the basis for discriminatory enforcement.

Subsection (1)(b) prohibits the making of unreasonable noise in reckless disregard of the fact that another person may be annoyed by this behavior. Does this section apply to loud streetcorner speeches that "annoy" passersby? Does it prohibit the use of soundtrucks? Does it preclude streetcorner debate and argument. Who shall determine reasonableness?

Subsection (1)(c) prohibits the use of abusive or obscene language or the making of an obscene gesture. But the United States Supreme Court has recently ruled that the use of obscene words in public is fully protected by the Constitution notwithstanding the fact that the obscenity may annoy another. In *Cohen v. California*, 403 U.S. 15 (1971) Mr. Justice Harlan stated that even distasteful modes of expression that are thrust upon an unwilling or unsuspecting person cannot be made criminal. The Court noted that "one man's vulgarity is another's lyric."

Subsection (d) prohibits loitering in a public place for the purpose of soliciting sexual contact and the solicitation of such contact, where another is annoyed or with the intent to annoy others. There is, however, no definition at all provided for the term "sexual contact." Does it apply to conversations? the mere touching of another? sexual intercourse? Does it apply to homosexual contacts as well as heterosexual contacts? The phrase sexual contact is so vague and overbroad that it encompasses constitutionally protected activity and speech. We think it is unconstitutional to prohibit a person from attempting to solicit "sexual contact" with another by merely speaking to other people on the street. This widespread course of human behavior includes numerous types of contact between persons who were strangers before the meeting. The fact that a person may be annoyed, and in many cases irrationally annoyed, by this kind of behavior does not provide sufficient grounds for criminal sanctions.

Subsection (1)(g) is completely mystifying. It is obviously intended to be a catch-all provision and thereby gives the greatest power to law enforcement officials to act in an arbitrary and discriminatory manner. On what basis can the arresting officer determine if the act served a legitimate purpose? No definition is provided for this phrase and it is impossible for men of common intelligence to ascertain its meaning. What may be legitimate to one person may seem illegitimate to another. Furthermore, the term "physically offensive" is similarly vague and devoid of specific meaning. Some people can get literally sick to the stomach by conduct which is perfectly proper and even constitutionally protected. The statute therefore would authorize arrest and punishment for legal activity that may offend any given person. This subjective test fails to satisfy even minimal due process requirements.

Part C. The Sentencing System

The dispositional phase of the criminal process—sentencing—which is the most critical stage of the proceeding for most defendants, since so many plead guilty, is one of its weakest links. Sentencing has a close relationship to the success of the correctional system. Whether fair sentencing procedures are employed may influence the attitude of a convicted offender toward the legal system and affect his capacity and motivation for rehabilitation. Accordingly, sentencing procedures must be reformed to afford the fairest disposition to defendants and the public.

The Code proposal provides for some improvements in the practices presently used in sentencing. These will be indicated below. But it falls far short of formulating the kind of standards necessary to assure procedural regularity and fairness in disposition. Several facets of the sentencing system are of particular concern to the ACLU.

1. *Length of Sentences.*—The ACLU has two basic objections to the sentencing system provided by the Code. First, the maximum penalty authorized for a Class A felony of 30 years is excessive. We agree with Professor Schwartz's assessment that "setting aside cases of manifestly dangerous lunatics who should be dealt with outside the penal code . . . [no] society should ordain sentences as long as 30 years." Incapacitative goals could be realized in a more humane and rational method. A person imprisoned for 25 or 30 years will be, under our system of corrections, a completely dehumanized and destroyed individual upon his release. No rehabilitation can reasonably be

thought to occur when there is no prospect for release in a reasonable period of time. The impact of this type of sentence can only destroy the hopes and chances of rehabilitation for the prisoner.

Second, the maximum imprisonment for a misdemeanor should not exceed three months. Short term imprisonment does not, by definition, afford time for rehabilitation, and is useful solely for the possible deterrent effect of being locked up. To extend the prison term beyond that short "shock period" destroys its usefulness. The costs to society and the prisoner escalate each day beyond this period because the Government must pay the costs of incarceration, the individual can only be warehoused in the prison without a rehabilitative program (while being exposed to all the evils of the prison system) and his resentment can only increase during this time. In short, a sentence of six months or one year serves no penological purpose.

2. *Resentences.*—Sec. 3005 allows for increased sentences where a conviction has been set aside if a more severe sentence is warranted by conduct of the defendant occurring subsequent to the prior sentence. This section follows *North Carolina v. Pearce*, 395 U.S. 711 (1969), which permits the imposition of a higher sentence on reconviction. The ACLU believes that, as a matter of policy, more severe sentences should be prohibited notwithstanding the circumstances. Several reasons support this view. First, subsequent misconduct, if criminal, can be dealt with upon conviction for such conduct.

Second, the possibility of a higher sentence on retrial will have the effect of discouraging the exercise of constitutional rights. The only class of persons who are vulnerable to increased sentence are those who have exercised the right to challenge their convictions. There is no basis for believing that there exists any rational correspondence between this group and those offenders who may indeed deserve an increase. The risk of a greater sentence as a result of the assertion of the right of review necessarily acts as a deterrent to the exercise of the right. There can also be adverse effects on the rehabilitative effort of the individual defendant who believes that he was wronged but is told that he may have to subject himself to the possibility of a greater wrong in order to assert any error.

3. *Appellate Review of Sentences.*—The Code proposes an amendment to Title 28 U.S.C. § 1291 which would broaden the review of criminal cases to include the power to review the sentence and to modify or set it aside for further proceedings. The ACLU favors the concept of judicial review of sentences for the reasons set forth in the Comment to the section and the Working Papers (at p. 1334–1335). However, we urge that this provision be limited to allowing an appeal by a defendant with the sole power of the appellate court to decrease the sentence.

The constitutional protection against being subjected to double jeopardy clearly, we think, prohibits any increase in sentence either by a trial or appellate court. In *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873), the United States Supreme Court stated this principle:

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger of jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction, a second punishment inflicted?

"The argument seems to us irresistable, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

4. *Pre-Sentence Reports.*—The Code does not change the law with respect to the issue of whether pre-sentence reports must in all circumstances be provided to the defense. Under present federal law the pre-sentence report is available to the defense only at the discretion of the court. This leads, we believe, to arbitrary and ill-informed sentencing. To guard against arbitrariness,

a larger role for the adversary system, principally through enhanced disclosure of sentencing information to the defense, should be adopted. The value of adversary procedures and freer discovery extends to sentencing as well as to the pre-trial and trial stages of the case. There are too many flaws in the conventional sentencing model: sentencing on the basis of information communicated privately to the judge by a supposedly expert staff of probation officers, without disclosure of the presentence report or investigation to the defense for fear of drying up the probation officer's confidential sources of information.

The dangers of inaccuracy and bias in information used to sentence are at least as great in presentence investigations as in any other form of *ex parte* inquiry. It is unthinkable that decisions on guilt and innocence should be made in the manner of sentencing decisions. Reliance on information untested by an adversary proceeding for a decision of such magnitude is an invitation to error and arbitrariness. Disclosure to the defense of detrimental information in a presentence report and the opportunity to meet it are a minimal requirement of fair procedure and should be recognized as an element of due process.

The constitutional foundations of this principle have already been laid down. The Supreme Court has held that due process considerations require disclosure to the defense of staff reports relied on by a juvenile court judge in deciding whether to transfer a juvenile accused of crime for trial as an adult. In *Kent v. United States*, 383 U.S. 541, (1966), the Court stated:

"There is no irrebuttable presumption of accuracy attached to staff reports . . . . While the Juvenile Court judge may, of course, receive ex parte analyses and recommendations from his staff, he may not for purposes of a decision on waiver, receive and rely upon secret information, whether emanating from his staff or otherwise. The Juvenile Court is governed in this respect by the established principles which control courts and quasi-judicial agencies of the Government."

This principle is manifestly relevant to the disclosure of pre-sentence information, although the Supreme Court has not yet re-evaluated the issue of defense access to pre-sentence reports as a constitutional matter The trend toward enhanced disclosure of presentence reports in both federal and state courts should receive impetus from the emerging constitutional doctrine reflected in *Kent*. Disclosure of pre-sentence reports was not made mandatory in the 1966 amendments to the Federal Rules of Criminal Procedure, but the framers of the rules urged judges to disclose such information freely to the defense, and many federal judges will ordinarily do so. There is strong support for establishing rights of disclosure by statute, decision, or rule of court.

Respected authorities are in favor of disclosure. In an important recent decision the Supreme Court of New Jersey ruled unanimously that the presentence report must be made available to the defense. In addition the ABA Standards Relating to Sentencing Alternatives and Procedures has recommended the full disclosure of the pre-sentence report to the defense.

5. The Code proposal makes several changes in existing sentencing practices that the ACLU, for reasons well stated in the Working Papers, fully supports. First, the rejection of mandatory sentences demonstrates an enlightened approach in this area. Second, the provision in § 3403(3)(a), Incidents of Parole, allowing a parolee to accumulate "clean" or "good time" on parole is commendable. There is no reason why a parolee who commits no violation of his parole for a period of time should be forced to serve that time after a violation has occurred. It is a sufficient deterrent that the parolee be faced with imprisonment for the balance of his parole term. Third, the use of good-time in computation of prison sentences with respect to release dates has been eliminated. This follows sound penological practice and is supported fully by the reasons outlined in the Working Papers. Finally, for the reasons stated in the Working Papers at 1303–1304, the ACLU urges adoption of bracketed section 6 of § 3001. This provision would build needed flexibiilty into the adjudication process by allowing the court to reduce the class of offense in the interests of justice after the hearing.

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Mr. Ennis. I have asked Mr. Wulf and Mr. Rudosky to join me this morning because I must, in all frankness, confess to you that, as you know much better than I do, this is an extraordinarily complicated matter, this new code and they have so much more detailed information on the subject that I do, Dr. Blakey, that I thought if you or the Senator had some questions they might be more able to answer than I can.

Senator Hruska. Yes.

Mr. Ennis. Now, I might add so far as whatever qualifications I have to speak on the subject, I was for 14 years an attorney in the U.S. Department of Justice, and although most of my work was civil, I did do some criminal work and, indeed, I prosecuted the first case under the Anti-Racketeering Act. You might remember the *United States* v. *Local 807*.[1] I had a great deal more success with the case in the district court but unfortunately on appeal before the court, of which Learned Hand was the Chief and the Supreme Court, we lost the prosecution on appeal. But, I do have some criminal law experience although my own work is not as intimately connected with criminal prosecutions at the present time in my position as chairman of the American Civil Liberties Union which is a private

[1] *United States* v. *Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, et al*, 315 U.S. 521 (1942).

organization of now some 170,000 members devoted to really just one proposition, that all government, Federal, State, and local, in controlling the citizens and the inhabitants of the United States shall rigorously observe the first 10 amendments to the Constitution. That is our concern. The government, of course, has the concern of observing the Constitution and also passing such controls as they think appropriate for control of the population within the Constitution.

Now, as a preliminary statement, very briefly, what I am going to do is merely refer orally to a few of the matters, a few of the sections that we have discussed in our written report. And I have chosen them principally because they deal with provisions which we feel infringe upon the first amendment provision that Congress shall pass no law abridging the freedom of speech. We feel that this preferred first amendment right that any criminal statute which undertakes to punish speech must be measured, and measured zealously against this first amendment freedom. I might also say as a preliminary matter, though not in order to please the committee, that we genuinely believe that this massive job which is being done is a very useful one and, indeed, no doubt every Criminal Code should be brought up to date every generation. And this undertakes to do this, and we think from the special Civil Liberties Union point of view, it is important that Criminal Codes be clarified as judicial decisions necessarily and the intricacy of human affairs brought out problems on many of the present particular provisions. We very strongly believe that, of course, every member of the community must know as clearly as language can make it, when his conduct goes over the edge and becomes criminal.

We offer another reason. We also believe that to the extent that a Criminal Code is as precise as human language can make it, that we avoid the ever-present danger in our society that the criminal laws will be enforced differently against the rich and the poor simply because of the influence that exists in human relationships. We think a precise code, an improved code, helps to some extent in eliminating a preferred application of the criminal law.

Now, to get down to two particular provisions, and I say that I have picked these for some oral statement, which we feel punish speech and, therefore, infringe upon the first amendment command that Congress shall not pass any law, including any criminal law, which abridges the freedom of speech.

I refer first to section 1003 which makes solicitation a crime, a crime in itself. Well, of course, solicitation is speech. It is a form of advocacy, and this section does not place in the statute what we consider it a necessary constitutional protection; namely, that the solicitation results in some imminent danger, as the courts have called it clear and present danger, that the solicitation will accomplish a purpose of the commission of an act of crime. And we say that any criminal solicitation section which makes solicitation, which is a form of speech, a crime, without a requiring of the government to show that the solicitation imminently endangers the commission of that crime is unconstitutional and that the Congress in observing its oath to uphold the Constitution should not pass the section.

I turn now to the next section, section 1004, which is the Criminal Conspiracy section. I am sure that without any testimony from

witnesses at all the Commission has a great difficulty itself in just how a criminal conspiracy statute should be phrased, and what limitations should be placed upon it because the experience we learn from the courts, our judicial experience, is that prosecution of multi-defendants in a dragnet criminal conspiracy charge involves a great many difficulties that each individual defendant faces in getting a fair trial.

Mr. BLAKEY. Mr. Ennis, may I ask you at that point a question?

Mr. ENNIS. Certainly.

Mr. BLAKEY. Do I understand the thrust of your objection in this area is really to present law and not necessarily to the form in which present law has been codified in the code?

Mr. ENNIS. Well——

Mr. BLAKEY. In other words, I take it you object to present law rather than some innovation of the code?

Mr. ENNIS. Well, we object to the present law and the present law as I think it is continued in the provisions of the code. For example——

Mr. BLAKEY. The point I was trying to raise with you is you are not objecting to something new that the Commission is doing?

Mr. ENNIS. No, no. I do not think—it is my understanding that what the Commission is doing is really just continuing the present statutory law on criminal conspiracy.

Mr. BLAKEY. And, indeed, some areas of the Commission draft are narrower than the present law.

Mr. ENNIS. Yes, I believe that is true. Our basic objection to criminal conspiracy, addressing ourselves again to our touchstone, the first amendment, is that unhappily the criminal conspiracy law is commonly used where the government is not in a position to charge and prove a criminal act, so that it falls back upon a combination or an agreement which can be proved by implication or mere association of persons that they have agreed to commit a crime, which they had not committed.

Now we feel that the actual use of such a statute has violated first amendment rights wherever it is used to prosecute advocacy, talk, cases such as the *Spock* case, for example, where the charge is conspiracy to advocate resistance or advocate that a person resist the selective service.

Now, we think that as a matter of the practice of government, as a matter of, if you will, the politics of government whenever the criminal conspiracy statute is used to charge persons who are guilty of essentially political conduct, such as Spock and his associates, or the present Berrigan trial that we are getting into a dangerous area where the government is using the criminal law to punish dissident speech.

Mr. BLAKEY. Has the government been terribly successful in winning those prosecutions?

Mr. ENNIS. Well——

Mr. BLAKEY. They lost the *Spock* [1] case on appeal.

Mr. ENNIS. They lost the *Spock* case and, of course, they lost a conspiracy count in the *Chicago Eight* case. The jury convicted on the individual conduct, but not the conspiracy conduct.

[1] *U.S.* v. *Spock,* 416 F. 2d 165 (1st Cir. 1969).

Mr. Blakey. Do you think there is a chance the government might learn a lesson and that the dangers of abuse that you raise may go away?

Mr. Ennis. No. I think, Dr. Blakey, that being subjected to a criminal prosecution trial, even if you are so fortunate as to obtain a jury verdict, has a tremendous chilling effect on the first amendment rights, on advocacy of unpopular thought in the land.

Mr. Blakey. Short of eliminating the law, do you have any suggestions that would build in protections against that kind of an abuse?

Mr. Ennis. Well, one thing, for example——

Mr. Blakey. Each of those indictments could have been brought under a complicity provision, could they not?

Mr. Ennis. Yes, that is correct. But that would not give the government perhaps the great freedom of proof that, as you know, the exception to the hearsay rule, in which all of the evidence is good against all of the defendants and the admissions by one defendant is an admission against all of them.

Mr. Blakey. Does that doctrine not also apply in complicity cases without an allegation of conspiracy?

Mr. Ennis. Yes, I think you are right. I think it does. One specific change, we think, that might be made to the criminal conspiracy statute is the doctrine of an overt act such as having lunch, making a telephone call, writing a letter. If it requires that the overt act be a substantial act in the furtherance of the conspiracy, that would be a kind of provision which we think would be fair, would be protective of the defendant, and also be perfectly fair to the government. The one thing that concerns us in a criminal conspiracy statute is a temptation to government to put the criminal machinery in operation before a crime has been committed, and I think I can well understand the government saying, well, if we have a criminal conspiracy statute, we should not have to wait until the parties who are talking about committing a crime actually commit it. We should have the victim and we should save the government from this result by prosecuting the criminal conspiracy. We say, you might be able to reach a middle position by at least holding back the forces of the criminal law until the overt act is one which is then substantial furtherance of the conspiracy, and not what by itself might be a wholly innocent act.

Now, that is a doctrine that I commend to the Commission for consideration, to the committee, for its consideration.

Now, I am not going to refer to the various due process problems that criminal conspiracy convictions raise, because I think it is very well summarized very recently in a dissenting opinion by Mr. Justice Douglas in *Addonizio* v. *United States* [1] in dissenting from the denial of certiorari on the conviction, on the requirements of the conviction of the Mayor of Newark, N.J., for conspiracy, and it is conveniently reported, Justice Douglas' dissenting opinion, is conveniently reported in the United States Law Week of February 22, at page 3395. And there Justice Douglas briefly reviews the difficulty that the court has had, going back to Justice Jackson's opinion, con-

[1] *Addonizio* v. *United States,* 10 Crim. L. Rept. 4176 (Feb. 22, 1972).

curring in the *Krulewitch*[2] case, that individual defendants in the conspiracy trial get a fair trial despite the rules of evidence which allow such a broad exception to the hearsay rule. I will leave my remarks on due process implications of the conspiracy prosecution to Mr. Justice Douglas' opinion.

Now, turning back——

Senator HRUSKA. Is that the opinion of Justice Douglas?

Mr. ENNIS. Yes, it is an opinion of Mr. Justice Douglas dissenting from the court's denial of a petition for a writ of certiorari. The court has decided not to review the case, and Mr. Justice Douglas wrote an opinion dissenting from that opinion.

Senator HRUSKA. Dissenting from that?

Mr. ENNIS. Yes, dissenting from that.

Senator HRUSKA. Was there a majority opinion on the decision?

Mr. ENNIS. No, the court——

Senator HRUSKA. Just a ruling?

Mr. ENNIS. Yes, they just denied without opinion, denied certiorari, and felt that certiorari should not be granted, and Justice Douglas felt that certiorari should be granted and he wrote his response and in the course of that he usefully summarizes the problem that a criminal conspiracy presents when you have multiple defendants.

Senator HRUSKA. It will be admitted into the record.

(Excerpt from the United States Law Week follows:)

71-744, 71-745, 71-754 & 71-756 Addonizio v. U.S. LaMorte v. U.S.; Vicaro v. U.S.; and Biancone v. U.S. The petitions for writs of certiorari are denied.

Mr. Justice Douglas, dissenting.

At the trial in this case there was much evidence of corrupt practices by the mayoral administration of petitioner Addonizio, during his tenure as mayor of Newark, New Jersey. But the question posed to the Jury below was not whether these petitioners had engaged in corrupt practices but the narrower issue of whether these defendants had entered into and executed a criminal agreement to extract kickbacks from public contractors through threats of physical harm or economic ruin in violation of 18 U.S. § 1951.[1] Although the petitioners were charged with 65 substantive acts of coercive extraction of kickbacks, the key issue in the trial was who, if anyone, had conspired to commit these acts. Absent a finding that such a confederation had been formed most of the evidence which damaged the petitioner could not have been introduced at all inasmuch as this evidence was hearsay admitted provisionally under the so-called coconspirator exception. That the jury found a conspiracy to have existed, however, was under the circumstances of this trial the unsurprising and virtually inevitable result of many disabilities imposed upon an accused by the ordeal of a multi-defendant, conspiracy prosecution.[2]

Justice Jackson catalogued many of these disabilities in his well-known concurrence in Krulewitch v. United States, 336 U.S. 440, 445, 446 (1949), re-

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[2] *Krulewitch v. United States,* 336 U.S. 440 (1949).

[1] Section 1951 provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b)(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951, Act of June 25, 1948, c. 645, 62 Stat.793, as amended.

[2] The potential for abuse of multi-defendant conspiracy proceedings has been discussed in O'Dougherty, Prosecution and Defense Under Conspiracy Indictments, 9 Brook. L. Rev. 263 (1940); Note, Developments in the Law: Criminal Conspiracy, 72 Harv. L. Rev. 919, 983 (1959); Wessel, Procedural Safeguards for the Mass Conspiracy Trial, 48 A.B.A.J. 628 (1962); Goldstein, The Krulewitch Warning: Guilt by Association, 54 Geo. L. J. 133 (1965).

versing a conspiracy conviction where he concluded that the prevailing "loose practice as to [the conspiracy] offense constitutes a serious threat to fairness in our administration of justice." He criticized the tendency of courts to dispense "with even the necessity to infer any definite agreement, although that is the gist of the offense." Id. 452. As to the procedural evils of this device he found that the risk to a codefendant of guilt by association was abnormally high:

"A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other." Id., 454.

Justice Jackson also regretted the wide leeway that prosecutors enjoyed in the broad scope of evidence admissible to prove conspiracy (and consequently to prove substantive acts as well). Under conspiracy laws, the declarations and acts of any confederate in furtherance of the joint project are attributable to and admissible against all of its participants. This is true even if the declarant is not available for cross-examination. Moreover, such statements are admissible "subject to connection" by the prosecutor later in the trial. At the close of the Government's case, for example, the judge may believe that the Government failed to present a jury question as to a defendant's participation in a collective criminal plot. In such a case, the judge must ask the jury to disregard the provisionally admitted hearsay. Obviously, however, it will be difficult in a lengthy trial (such as this one filling 5,500 pages of transcript) for jurors to excise the striken testimony from their memories. In the alternative case where the judge believes that a jury question has been presented as to a defendant's participation in a criminal enterprise, the jury is permitted to consider the provisionally admitted matter in determining whether or not a defendant was a conspirator. In other words, the jury is allowed to assume its ultimate conclusion. Justice Jackson was particularly sensitive to the abuse potential in this vicious logic:

"When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissable against all. But This shortcoming of the jury is compounded when, as here, the jury is also the order of proof of so sprawling a charge is difficult for a judge to control As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. United States, 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore & Ohio R. Co., 167 F.2d 54." Id., 453.

There are other disabilities. Often testimony will be receivable only against a particular codefendant yet it may also inculpate another accused such as where (a) a codefendant "opens the door" to prejudicial evidence by placing his reputation in issue,[3] (b) a codefendant wants to place before the jury in-

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[3] An example of a single defendant's opening the door to prosecution rebuttal prejudicial to other defendants was presented in the famous Apalachin trial (United States v. Bufalino, 285 F.2d 408 (CA2, 1960):

"The reputation of the Apalachin delegates and the character of the meeting had been the subject of much public comment during the two years before trial. Many reports had described the lengthy criminal records of some of the delegates, had characterized the meeting as a convention of the "Mafia" and had given other lurid details of what had occurred. None of this evidence was considered sufficiently material to the charge to warrant its introduction at trial.

"Towards the end of the trial, one of the defendants placed his reputation squarely in issue. He cited witnesses who testified to his excellent reputation for truth and veracity at the time of the trial.

"Ordinarily it would have been entirely proper to attempt to refute this testimony by cross-examining with reference to the earlier publicity; the defendant himself had elsewhere complained about how much it had hurt his reputation. However, such evidence might have had equally serious adverse effects upon the nineteen co-defendants, who had done nothing to open the door against themselves." Wessel, Procedural Safeguards for the Mass Conspiracy Trial, 48 A.B.A.J. 628, 631 (1962).

formation which is helpful to him but is damaging to other defendants, or (c) the Government desire to offer evidence admissible against less than all of the codefendants. Cautionary instructions, of course, are routinely given where such circumstances arise but we have often recognized the inability of jurors to compartmentalize information according to defendants. Bruton v. United States, 391 U.S. 123 (1968). See also Jackson v. Denno, 378 U.S. 368, 388 (1964); Krulewitch v. United States, 336 U.S. 440 453 (1949) (quoted above). asked to digest voluminous testimony.

A victim of the multi-defendant conspiracy trial has fewer options for trial strategy than the ordinary defendant tried alone. Counsel may reluctantly give up the option of pointing the accusing finger at his client's codefendants in order to obtain similar concessions from other trial counsel. Counsel must also divert his preparation in part toward generating possible responses to evidence which may be admissible only against other codefendants. As for the defendant, he may be put to the choice of hiring less experienced counsel or less actively pursuing discovery or investigation because of the higher legal expenses imposed by longer joint trials. Furthermore, although an accused normally has "the right to present his own witnesses to establish a defense," Washington v. Texas, 388 U.S. 14, 19 (1967), an accused in a mass conspiracy trial may not put on his cofendants without their prior waivers of their absolute rights not to testify.[4]

All of these oppressive features were present to various degrees in this trial. But, in particular, the most onerous burden cast upon these petitioners was their inability to cross-examine each other as to comments which Government witnesses said they had heard them utter. The Court of Appeals recognized that "There was much testmony as to statements made by various coconspirators during the course, and in furtherance, of the conspiracy." —— F.2d ——. For example, one important prosecution witness testified that he had been a contractor hired by the city administration and that one of the accused conspirators, "Tony Boy" Boiardo, had told him "You pay me the ten percent . . . I take care of the Mayor. I take care of the Council." (A 2611.) The lawyer for the former mayor, however, was not permitted to put Boiardo on the stand and to ask him whether Addonizio had, in fact, entered into an agreement with him to coerce kickbacks. This handicap of an accused is at war with the holdings of this Court that a defendant should be permitted to confront his accusers especially where, as here, their declarations might have been purposefully misleading or self-serving. Pointer v. Texas, 380 U.S. 400. 407 (1965); Douglas v. Alabama, 380 U.S. 415 (1965); Brookhart v. Janis, 381 U.S. 1 (1966); Bruton v. United States, supra; Barber v. Page, 390 U.S. 719 (1968); Roberts v. Russell, 392 U.S. 293 (1968). Dutton v. Egans, 400 U.S. 74 (1970), is not inconsistent with this proposition. There the Court found that the hearsay was probably reliable. "[T]he circumstances under which [the declarant] made the statement were such as to give reason to suppose that [he] did not misrepresent [his conspirator's] involvement in the crime." Id., 89. On the other hand, involved here were declarants, as mentioned earlier, who might have been motivated to misrepresent the roles of other parties in order to induce contractors such as Rigo (the Government's key witness). to make kickbacks. Moreover, in Dutton the hearsay was "of peripheral significance at most" whereas here much of the case against the petitioner. as the Court of Appeals pointed out, was admitted under the coconspirator exception to the hearsay rule.[5]

In addition. the petitioners were deprived of the right to cross-examine codefendant Gordon (who is not one of the petitioners). He had testified at the prior grand jury proceeding and that testimony was introduced at trial by the Government to corroborate the story of the Government's key witness,

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[4] Even at a severed trial of only one defendant. another alleged coconspirator may, if called to testify, invoke his privilege against self-incrimination. Where the severed trial is delayed until after the acquird or finalzed conviction of the witness, however, invocation of the privilege would be improper. In any event, even if the witness refused to answer questions, the defendant would at least obtain whatever inference of innocence might result from the apparent guilt of the witness.

[5] The Dutton plurality opinion found the coconspirator hearsay had played a minor role in the trial:

"In the trial of this case no less than 20 witnesses appeared and testified for the prosecution. Evans' counsel was given full opportunity to cross-examine every one of them. The most important witness, by far, was the eyewitness who described all the details of the triple murder and who was cross-examined at great length. Of the 19 other witnesses, the testimony of but a single one is at issue here." Dutton v. Evans, 400 U.S. 74, 87 (1971).

Rigo, as to various kick-back transactions. The circumstances at trial were substantially similar to those involved in Bruton except that Gordon's grand jury remarks did not directly mention his codefendants. Normally, that difference would be sufficient to support the lower court's finding that Bruton was inapposite but for the fact that Government's case against all of the defendants turned upon Rigo's credibility. On cross-examination of Rigo, the codefendants had relentlessly attacked his credibility. But when the Government introduced the grand jury transcript in rebuttal, the defense challenge was completely terminated because Gordon, who was also on trial, could not be called to the stand. The judge, of course, gave instructions to the jury to consider the impact of the transcript upon Rigo's credibility only when assessing Gordon's guilt but it is doubtful that the jurors could faithfully adhere to the delicate logic that Rigo may have told the truth as to Gordon but may have lied as to his codefendants. The contrary conclusion, to borrow from Justice Jackson, would be "unmitigated fiction." Krulewitch v. United States, supra, at 453.

In light of the claims of prejudice committed in this multi-defendant conspiracy trial, I would grant certiorari to consider whether the extensive reliance by the prosecutor on the coconspirator exception to the hearsay rule and the admission of the Gordon transcript deprived these petitioners of constitutional rights.

Senator Hruska. My inquiry was for the purpose of determining whether there was an opinion on the affirmative, on the ruling itself.

Mr. Ennis. There was not.

Senator Hruska. If there had been, we would have wanted that in the record too.

Mr. Ennis. Of course, Mr. Chairman.

Now, turning to the national security provision, all I am going to say is that we feel that these provisions should speak in terms of a declared war, a constitutionally declared war, and we cite to you for example, in our fuller statement, the very wise remarks of Senator Ervin in which he pointed out that much of the dissension among our people today, much of the confusion about the foreign relations objectives of our country may very well be due to the fact that the Congress of the United States has not exercised its constitutional responsibility in dealing with the undeclared war we have been fighting for so many years. We feel that those provisions, that reference to an international war should be changed to a declared war.

Now, I am going to refer very simply to the treason provision, and perhaps get the reaction from the chairman and Dr. Blakey. The provision is written and the comments say there is departure from the archaic language of the former statute and of the Constitution of the United States. Although I have some familiarity with constitutional law, unfortunately, I cannot for the life of me understand how the Congress can adopt a treason provision which departs from the language of the Constitution. Section 3 of article 3, says that treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort, and the Supreme Court has said adhering and giving aid and comfort to the enemy is conjunctive and that it means giving adherence to our enemies and giving aid and comfort. This language may be a bit old-fashioned but I cannot understand how there can be any crime of treason other than the one that is stated in those precise words. It is true that some of the conduct which the new treason section wishes to call criminal might be made criminal,

but I think it is just a mistake for the government to call that conduct treason. Such a provision should be the most majestic criminal prosecution that our government brings. To raise at the beginning such a crucial constitutional question by casting treason in language different than the Constitution just passes my understanding and that may be because my understanding is insufficient and I will leave the matter there.

Mr. BLAKEY. For whatever it is worth, Mr. Ennis, that is also my feeling.

Mr. ENNIS. Well, fine. I think if I had known that, Mr. Blakey, I might has passed it and not taken up your time with it.

Mr. ENNIS. I will go on now very briefly because our time is limited and I also appreciate that the nature of statutory language is such that we can make a much better contribution by our careful written report than we can by giving our views orally, but at least it gives you the flavor of our thinking about it. Section 1103 on the armed insurrection, we feel, again, that this infringes upon the first amendment rights and, indeed, on the constitutional rule laid down, for example, in the *Brandenburg* [1] case because it puts in no restriction that the armed insurrectionary language must be connected with a likelihood to immediately produce a lawless action. Now, we think that any crime for talk, for speech, which is not in the statute, itself, intimately connected with criminal action is unconstitutional under the first amendment because it merely punishes advocacy without establishing that advocacy is likely to produce criminal conduct.

Now, passing on to section 1104, which makes a crime certain paramilitary activities. This is a new crime, I believe. Our objection to that section is that acquiring of arms for political purposes is too vague to be an appropriate basis for a criminal law and we feel that this overbroad statute, of course, has been suggested to the makers of the code by activities of such groups as the Minutemen on the one hand, or the Panthers, on the other, and we believe that it again infringes on first amendment rights.

Now, turning to the espionage section, section 1112, and the mishandling of classified information, our principal objection here is that no defense for faulty or impermissable classification is provided in the code. We think that if we learn anything from the controversy last summer involving the Vietnam papers, and it has been developed from that, that literally millions of documents are routinely classified and with that experience, behind the committee to adopt this section 1115(a) saying that divulging of classified materials is a crime without any defense, without permitting any defense of misclassification or improper classification was really just shutting your eyes to a current history and to a current problem, and that that ought to be dealt with by providing a defense or in some similar manner.

Now, turning to Chapter 15, the Civil Rights and Elections, we, of course, feel that insofar as the code includes the civil rights statute we approve it. We disapprove, as do some members of the Commission, the inclusion of economic coercion as criminal conduct. We are very dubious that boycotts and such economic coercion, should be

[1] *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

made a criminal offense. We agree with those members of the Commission who feel that this should not be included.

So far as section 1512 is concerned, making it an offense to discriminate in public education, or employment, or use of public accommodations, we think that the committee would be well-advised to update the Commission's recommendations by including sex as well as national origin, race and color. We think that many of the discriminations which section 1512 are meant to hit at, are discriminations which also hit and are levied against persons on account of their being members of the female sex, and we would think that a modern code ought to introduce sex into section 1512.

Now, we come to our discussion of section 1561, the interception of wire and oral communications. Of course, our position still is that we oppose all wire tapping as really an unnecessary intrusion upon privacy which is fast disappearing from life, and we are going to do what we can to hold onto as much of it as we can, and we think that we are going to adhere to our position that all wiretapping is an erroneous Government activity. We have recently made a report showing how really ineffective it is. The ACLU made a large study on it but, of course, this is not very helpful to the committee. We would like to make some more precise suggestions. One is, we think that the crimes to which it is applicable, wagering, for example, and many other offenses which we feel that even if there is to be wiretapping, it should not be extended to many of the offenses to which it is extended.

Mr. Blakey. On the assumption that the Congress might very well decide to retain the wiretapping statute, would you have any suggestions for improvement of the language of the existing law?

Mr. Ennis. Well, I have one suggestion. The language assumes a matter that is undecided in the courts, namely, the executive power to tap in domestic matters without a warrant, that is put in the Code. Now, I think the Code ought not, at this stage of its development, assume such power can be used until it is upheld as constitutional. It is a perfectly practical suggestion. As to any suggestion for improving it, improving the statute, if there is to be wiretapping, organizations like mine are always put in a rather awkward position with something we are opposed wholly to when we are asked, can we help by making it more palatable. It is difficult for us to do that because we think that even with the warrant requirement in treating of wiretapping, of course, under cases as search and seizure, we think that wiretapping in its nature is indiscriminate. When you get a right to tap a wire, you not only hear the conversation you are seeking, but you hear all the other conversations of that person on the phone, you hear all other conversations of everybody else on the other end of the phone and we do not think that the warrant procedure can be properly narrow so as not to make it just a shotgun invasion of many persons' right to privacy. So, our main objection has to be that we are opposed to it. I cannot help very much, doctor, on amendments.

Mr. Wulf, is there any particular amendment of the present wiretapping laws that we are opposing? Does anything occur to you?

Mr. Wulf. Your dogmatic position is correct.

Mr. Ennis. You know, sometimes we try to be a little more helpful in the practical, on the practical level, you know, and maybe we can in this instance.

Mr. Wulf. Not in this case.

Senator Hruska. Now, Mr. Ennis, in professional football, there is always a 2-minute warning that the end of the game is due. I now give you a 5-minute warning.

Mr. Ennis. Well, I think I am prepared, I am prepared to rest on the statement I have already made since I think, Mr. Chairman, you do understand that one of our greatest concerns is that if the Congress intends to punish as criminal any form of speech that it must be approached with the greatest caution because of the absolute prohibition that Congress shall make no law abridging the freedom of speech, and define that line where speech threatens immediate criminal conduct. We do not contend that speech can never be a crime. We do not take quite that absolute position. We say that it can only be a crime when it is immediately the cause of criminal conduct, which very shortly or immediately follows the speech. And if I can impress upon you the seriousness of our view in that matter, this covers a great deal of our position and with that statement I am glad to rest. And thank you very much, Mr. Chairman, for your attention.

Senator Hruska. Thank you for your statement and also for this very comprehensive report. I was glad to hear, Mr. Ennis, that you support the overall goal of this codification and reform, even though you have some reservation on particular points.

In that regard, I would like to ask you this question: The process, the legislative process, after all, is a give and take proposition. In any comprehensive measure there are always a certain number of pluses and a certain number of minuses. In making up his mind to either vote aye or nay on final passage, a Legislator has to balance it out and make his choice. It is hardly ever possible to win all you want or to prevent all that you do not want. But, assuming that none of your objections were met, would you consider the proposed code as presently drafted a sufficient improvement over present law that you could support it on that ground alone, still reserving your objections as registered for another day, perhaps?

Mr. Ennis. Well, I think the nature of our organization is such, Mr. Chairman, that we would not, we do not think we—of course, as I told you, we honestly believe that the code insofar as it clarifies law is a good thing. But, in view of our grave objections to many sections on constitutional grounds, I do not think that we would take a position on that. But, let me ask my legal director, Mr. Wulf, who is associated with these things, in a sense, on a daily basis, much more closely than I am. Do you think now that an organization like the Union, would take a position that everything considered, the codification is desirable, despite our objections to many provisions on constitutional grounds, or would we stay out of that?

Mr. Wulf. I think on the whole we might approve the code even if it did not contain the changes to meet our objections. I do not know if we would go out of our way to make a position particularly usable, but at this juncture now I think we could say we would sup-

port it. I see nothing in it that is retrogressive and I think on the whole those changes that are made are improvements. But, we certainly would like to see the changes that we recommend adopted, certainly if not in their entirety, certainly a large number of them.

Senator HRUSKA. Well, that position would not be by way of depriving you of any of your conviction or positions.

Mr. WULF. We would continue to pursue our objectives.

Senator HRUSKA. We are faced with that practical situation every time we have any meeting that is of any scope at all. We have to decide on the relatively few things, or the large number of things to which we object, are we willing to put them aside for a little while in the interest of getting the bill passed because it contains more things which we very, very much want. That is why I put that question to you.

Mr. ENNIS. I understand.

Senator HRUSKA. In those cases we frequently reserve to ourselves the right, and the position, of maybe advancing in a following session of Congress an amendment to perfect the bill that was enacted into law.

Mr. ENNIS. Yes, we understand the process very well.

Senator HRUSKA. Well, it is a problem.

Mr. ENNIS. And we understand your problem, Mr. Chairman.

Senator HRUSKA. It is a problem, and we just wanted you to share it with us.

Mr. WULF. We might pursue it in the courts, also, of course.

Senator HRUSKA. Thank you very much.

Mr. ENNIS. Thank you very much, Mr. Chairman.

Senator HRUSKA. Out next witness is Mr. James J. Clancy, general counsel for the citizens for decent literature. If he will be seated, and then give me about 3 minutes to make a phone call, I will be right back.

(Short recess taken).

Senator HRUSKA. Thank you for your patience, Mr. Clancy. We are trying to put 2 days' work into one, so it makes it a little difficult sometimes. You have filed a statement with the committee, have you not?

Mr. CLANCY. Yes, sir.

Senator HRUSKA. It will be inserted in the record in full, and you may now proceed to give your testimony in your own fashion.

(Statement of Charles H. Keating, Jr. follows:)

STATEMENT OF CHARLES H. KEATING, JR.

Mr. Chairman: Let me say at the outset that I appreciate the opportunity this Senate Subcommittee has given me to address it on matters relating to Proposed Federal Criminal Code Section 1851 which applies federal sanctions to the dissemination of obscene materials. As this Senate Subcommittee knows, I was a member of the Presidential Commission on Obscenity and Pornography (created in October, 1967 by Public Law 90-100) and am keenly interested in any legislation that might be offered to deal with this national problem. I was one of the dissenting commissioners from the findings and conclusions of that body and filed a separate dissent therefrom, a copy of which is attached hereto as Appendix "A" and is referred to hereinafter as "Commission Dissent of September 30, 1970".

In the introduction of my report, I pointed out at page 1 that the opening statement of Public Law 90-100 read "The Congress finds that the traffic in

obscenity and pornography is a matter of national concern." Three years and $1,750,000 later, that "runaway commission" elected to disregard the findings of Congress and, based primarily upon their legal panel's analysis of the law, recommended that the federal laws and state statutes on obscenity should be repealed (Commission Dissent at page 3). Those recommendations were rejected by the U.S. Senate by formal resolution and by an overwhelming vote.

The fallaciousness of the legal analysis which mis-guided that runaway commission has since been thoroughly exposed by the recent decisions of the U.S. Supreme Court in *U.S. v. 37 Photographs*, 402 US 351 and *Reidel v. U.S.* 402 US 351 (May 3, 1971). Having been directly confronted with these fallacies when I was a member of the Presidential Commission, it is with considerable dismay that I now find those same fallacies being employed to mis-lead the National Commission on Reform of Federal Criminal Laws.

I would like at this point to incorporate into my remarks the very fine statement of Senator McClellan appearing in the Hearings before the Subcommittee on Criminal Laws and Procedures, 92nd Congress, First Session, Part 1 dated February 10, 1971 at page 30 under the title "XIV The 'One People' Concept". Those remarks set forth the historical development of federal involvement in the morals area. It is there noted:

"*In Hoke v. U.S.* 227 US 308, 322 (1913), upholding the act, Mr. Justice McKenna employed expressions which, when considered, serve as a reminder that, since 1872, Congress had been acting, intermittently, upon a principle foreign to Madison's that did not come into application until after the Civil War. He said: 'Our dual form of government has its perplexities . . . but it must be kept in mind that we are one people . . . and the powers (granted to the Federal Government) . . . are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral'."

"The inference is plain. Lotteries, frauds, circulation of obscene literature, prostitution, narcotic addiction, all were, at first, well within what Madison had in mind when he commented that the powers reserved to the States extended to 'all the objects which, in the ordinary course of affairs, concern . . . the internal order improvement and prosperity of the state'. The trouble was that it proved, as we became not only one people, but one nation, impossible for the States, under their own powers, effectually to preserve 'internal order' in these matters when the facilities of the mails were seen to operate, in one fashion, and the privileges of interstate commerce, in another, to negate the efforts of any state to suppress what the people of the nation saw as national evils. In the judgment of many, these evils were pervasive throughout the whole nation. There were, moreover, Federal constitutional powers under which they could be attacked by the enactment of federal criminal legislation. From time to time, therefore, Congress made use of the powers assigned to the general government, singly or in combination, 'to promote the general welfare, material and moral'."

As noted in the foregoing discussion, there is a proper role for the federal government in this area today—the same role that it has been playing in the past, when it went after the Mishkins, Ginzburgs, Hamlings, Millers and a multitude of other national pornographers who have used the federal facilities and interstate privileges to frustrate state public policy. For this reason, I would say that *nothing* should be done to diminish the federal involvement which has developed over the years. Our historical experience has shown it to be absolutely essential as an aid to state controls. The need for it today is beyond question. Further, any investigation of the practical experiences of federal prosecutors in this area will reveal that such powers have not been improperly exercised.

Senator McClellan has pointed out in his remarks on "The Challenge of A Modern Federal Criminal Code" (Hearings of February 10, 1971, supra, at page 32) that the modification to the Code in 1948 was a "revision" rather than a "reform". I strongly emphasize that if any tampering is to be done with the federal provisions on obscenity control today, it should be limited strictly to "revision" and should not undertake "reform"—certainly not the reform proposed herein by Proposed Section 1851. As noted in my remarks hereinafter, we have, in the past ten years, been spectators to a judicial revolution in the High Court in the obscenity area. The unrelenting Black-Douglas "absolutist" philosophy has almost (but not quite) wrecked this nation's concept of public

morals in the sex area. With the demise of the late Justice Black and the ascendancy of other members to the bench, we now have hopes of a return to the state of normalcy which existed in this nation for most of its first two hundred years of existence. An opportunity should now be afforded that Court to stabilize itself. For this tactical reason above, the proposed reform of Section 1851 should be rejected.

If reform is applied before the condition is permitted to stabilize itself, it will be impossible to recover the ground lost during the confusion of this "silent revolution". What is needed now, more than anything, is an opportunity to re-establish those grass root moral values which have been relegated to limbo by the amoral attacks attending the Black-Douglas absolutist onslaught. One major defense attorney in the obscenity area has commented on television that what was happening here was a social revolution, and that before any change in government could be accomplished, there must first occur a change in its moral values. The effect of this type of "reform" on that development should not be lightly taken. The purposes of those who would strike down this nation's obscenity laws could not be served better than by permitting "reform" of any kind to be introduced at this time.

But aside from this practical factor, the reform must be rejected for its proposed substantive changes in the law in at least two particulars. First, to write into law the defenses created by Proposed Sections 1851 (2) (b) and (c) would codify several erroneous concepts which have been introduced into legal argument as a side product of the court revolution noted above. Those mistakes would assuredly operate to erode the very foundations upon which the nation's obscenity laws are constructed. Secondly, the downgrading of the federal offense from a felony to a misdemeanor would amount to nothing less than a national scandal. That course points in a direction which is diametrically opposed to the present needs of the nation in this area. The national product has become so gross, it is to be expected that adequate patterns for state control will require many states to upgrade the degree of crime from its present state of misdemeanor to that of felony in order to cope with "big time operators" now moving into those areas in full force. Since the federal controls are, by and large, aimed at those larger scale operations which cut across state lines, it would be taking a step backward, were the federal crime to be downgraded to a misdemeanor.

It would be cataclysmic were Congress to adopt legislation of the type suggested by the National Commission on Reform of Criminal Laws. Believe me—that would *really* worsen matters. I disagree completely with the general recommendations of Director Schwartz as it pertains to Section 1851 when he states in the Hearings of February 10, 1971, supra, at page 106:

"The National Commission and its Advisory Committee were not a group of amateurs and theoreticians, but experienced legislators, judges, prosecutors, private lawyers, and experts in relevant fields. Their work product, as a whole, is entitled to a presumption of validity . . ."

Quite the contrary, the track record of the "consultant" employed in this area stamps those recommendations with a *presumption of invalidity*. It is at this point that I must refer this Senate Subcommittee back to my experience as a member of the Presidential Commission on Obscenity and Pornography.

At pages 7 through 15 of my Commission Dissent of September 30, 1970 (Appendix "A"), I pointed out the backstage maneuvering which brought ACLU members Paul Bender and William Lockhart into absolute control of the legal thinking of the Presidential Commission and documented the fact that the ACLU, whose views they espoused, was committed to an overthrow of the nation's obscenity laws. Paul Bender is listed at Page VII of the "Working Papers of the National Commission on Reform of Federal Criminal Laws", Vol. 2, dated July, 1970, as the "Consultant" on "obscenity controls" whose legal analysis provided the backbone upon which these proposals were constructed. As far as I can see, Mr. Bender's Report of May 12, 1969, published at page 1203 to 1243 of the Working Papers (supra) is the only treatise which guided the National Commission on Reform of Federal Criminal Laws in its work. That report preceded by fourteen months the publication of his July 7, 1970, preliminary draft of the Legal Panel Report, which rationale served as the misguiding beacon for the Presidential Commission. That both his May 12, 1969, report and July 7, 1970, preliminary draft represent a

partisan, self-serving analysis which grossly distorts the law of this land has conclusively been established by the United States Supreme Court's decisions in *U.S. v. 37 Photographs*, Supra, and *Reidel v. U.S.*, *Supra*, decided on May 3, 1971.

I have submitted herewith as Exhibit 1 for the consideration of this Subcommittee a copy of Mr. Bender's preliminary draft of July 7, 1970, setting forth his analysis of the obscenity law. A copy of my reply thereto of August 16, 1970, containing 66 specific comments and other counter-analysis of the problem is also submitted herewith as Exhibit 2. These legal analysis present dramatically opposed positions. The very foundation of Bender's position was rested upon his distorted analysis of *Stanley v. Georgia*, 394 U.S. 557 (April 7, 1969) and the view that he, Lockhart, and the ACLU held that there was a constitutional right of consenting adults to deal in obscenity. See Exhibit 2 and my comments therein at: Comment 1, Page 1; Comment 5, Page 16; Comment 6, Page 25; Comment 7, Page 26; Comment 12, Page 35; Comment 22, Page 55; Comment 35, Page 70; Comment 36, Page 71; Comment 37, Page 72; Comment 42, Page 76; Comment 45, Page 82; Comment 47, Page 83; Comment 58, Page 99, and Comment 61, Page 100.

Representative of our opposite position are my Comments No. 5 at Page 16, and No. 6 at Page 25 reading:

COMMENT NO. 5 OF COMMISSIONER KEATING

The above is but one of the numerous references in this report to *Stanley v. Georgia*, 394 U.S. 557, 22 L.Ed. 2d 542, 89 S. Ct. 1243 (Apr. 7, 1969) which the Staff employs in an attempt to justify its elaborate inquiry into an "effects" study. (See also Comment No. 1.) For example, at page 4, the report states:

"Then, in 1969, in the case of *Stanley v. Georgia*, the Court threw greatly into doubt the continuing validity of the fundamental premise of the *Roth* case that the dissemination of 'obscene' materials may be prohibited without reference to First Amendment values, *and suggested, instead, the strong constitutional significance of the question whether such materials are, in fact, socially harmful*". (Our emphasis.)

Their attempted reliance upon *Stanley* is rash and ill-conceived. An analysis of that decision, the remarks of the Court Members, and the Court's recent decision in *Gable v. Jenkins*, 25 L.Ed. 2d 595 (Apr. 20, 1970), reveals no justification for such broad conclusions.

In the first place, the majority decision in *Stanley* specifically stated that the *Roth* case and its holdings were not affected by the *Stanley* decision. At page 551, the Court said:

"*Roth and the cases following that decision are not impaired by today's holding*. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home . . . ." (Our emphasis.)

To support the "Staff" position which is to the contrary (i.e. that the Roth rule has now been altered to suggest that commercial exhibition to consenting adults has been elevated to a constitutional right) counsel Bender suggests that the 6-to-3 vote in the *Stanley* case will lead to that result. Nothing could be further from the truth for the simplest of legal analysis demonstrates the contrary proposition. It is well understood and documented that Justices Harlan and Warren, who were numbered among the majority of six in that opinion, have repeatedly disavowed anything which resembles that philosophy. Justice Fortas, also of the majority, is no longer on the bench.

Further, of the remaining three, the author of the opinion, Associate Justice Thurgood Marshall, gave indications during oral arguments before the United States Supreme Court in *Byrne v. Karalexis* on April 30, 1970, that he also entertains no such intendments. . . .

In regard to the Staff's interpretation of *Stanley v. Georgia*, Bender failed to indicate any significance in *Gable v. Jenkins*, 25 L.Ed. 2d 595, affirmed by the Court during the current term (April 20, 1970). Attorney General Quinn in his arguments saw otherwise. See Transcript, pages 15-16, where he said:

"ATTORNEY GENERAL QUINN. 'That success depends on the answer to the question. "Can public commercial dissemination of pornography be proscribed by any state?" Before *Stanley v. Georgia*, we submit there was no doubt at all

about this principle. *Roth v. U.S.*, the leading case on this subject, based that answer on the fact that obscenity is not protected speech within the First Amendment. We agree with Mr. Justice Marshall that the holding in *Stanley* in no way impairs the principle so well enunciated in *Roth*. In fact, only last week this Court summarily affirmed in *Gable v. Jenkins*, No. 1049, on the docket of the court, a case involving action under a distinguishable statute in the same jurisdiction as *Stanley*, distinguishable from the statute in the *Stanley* case, but a statute very much like that upheld in the *Roth* case and very much like the statute under consideration in the case at bar. The statute upheld *Roth* prohibited commercial distribution of pornography. The Massachusetts statute, Chapter 272, Section 28A, is of like tenure. It strikes at public dissemination. This, we submit, does not affect the situation like that present in *Stanley v. Georgia*.'

"ASSOCIATE JUSTICE. 'Was that case you referred to last week a denial of "cert" or an affirmance?'

"ATTORNEY GENERAL QUINN. 'It was a summary affirmance, your Honor.'

"ASSOCIATE JUSTICE. 'What is the name of the case?'

"ATTORNEY GENERAL QUINN. '*Gable v. Jenkins*, No. 1049. As I recall, I think there were two justices either abstaining or dissenting, your Honor.' "

Further, the "Staff" analysis of *Stanley* completely missed the significance of the Wisconsin Supreme Court decision in *Wisconsin v. Voshart*, 159 N.W. 2d 1 (June 7, 1968). Having overlooked *Voshart*, they failed to observe that the Stanley facts actually posed two major questions of law and that but one of these questions was at issue and resolved by the Court's action in *Stanley*. Stated as issues, the two questions were: (1) May a state, within the limits set by the Federal Constitution, *punish as a criminal act* the simple possession of obscene materials (our emphasis) (*Stanley v. Georgia* issue) and (2) *Independent of the former consideration*, may a state, within federal constitutional limitations, declare such materials to be contrabrand and *subject to forfeiture as against an individual's claim to a right of property therein* (our emphasis) (*Wisconsin v. Voshart* issue.) Only the first issue was answered by the *Stanley* decision.

The distinction between these two issues is the difference between (1) a criminal law motion to suppress such materials as evidence in the criminal trial, and (2) a motion made at the same time or later, based upon property rights, to restore the ownership of such property as against a claim of forfeiture by the state as contraband. See the discussion of *Wisconsin v. Voshart* (infra).

The right of government to destroy obscene motion picture films as contraband as against the claims of an individual to possession thereof was recently before the Wisconsin Supreme Court in *State v. Voshart*, 159 N.W. 2d 1 (June 7, 1968), on almost identical facts. There, certain motion picture films had been seized under a search warrant and their possessor charged with two counts of obscenity: (1) intentionally having in his possession obscene motion picture film (simple possession), and (2) intentionally having in his possession such film for sale or exhibition (commercial possession). In *Voshart*, however, the trial court granted a motion to suppress the evidence based upon the invalidity of the search warrant and the criminal complaint against him was dismissed as to both counts. Following dismissal of the criminal charge, the defendant filed a motion for return of the obscene motion picture films and the State moved for destruction of the film as contraband. As here, it was conceded that the film was obscene. The Wisconsin Supreme Court, in ruling upon the petitioner's claim to a right of possession, adopted the reasoning of the Wisconsin trial court, at page 10:

"It seems very clear to us that when contraband articles . . . to which no one can have a property right, are found in an illegal search, they should not be returned to the persons from whom they were taken. . . ."

The Wisconsin Supreme Court, in this context, did not recognize any superior right in an individual "to read", "to possess", or to satisfy one's "emotional needs" with obscene motion picture films. Instead, the court adopted what I feel is the only course opened in our Judeo-Christian Anglo-Saxon tradition; namely, at page 9:

"Under its police powers, as a matter of public policy, the Legislature may declare to be contraband property that menaces public health, safety and

morals. The right to destroy contraband property includes property such as counterfeit money, diseased cattle, contaminated food, and gambling devices. We would sustain the right of the Legislature to place obscene materials in the same category. This is not a case of an innocent article put to an illegal use. It is as impossible to separate the conceded obscenity from the films as it would be to separate the contamination from the good or the gambling from the device. . . ."

The *Stanley* decision does not controvert the right of the State of Georgia to destroy obscene motion picture films as contraband and to regard the same as not subject to lawful ownership, as did the State of Wisconsin in *Voshart.* Nor is there anything flowing from any case law interpreting the Federal Constitution which accords to an individual a property right superior to that of the community relative to the possession of obscene motion picture films. Since *Stanley* holds that the rationalization of *Roth-Alberts* is not impaired, the films should be subject to forfeiture as contraband, for that opinion was premised on one fundamental fact—the films were, under prevailing constitutional standards, incontrovertably obscene as a matter of law. . . .

COMMENT NO. 6 OF COMMISSIONER KEATING

The Staff admits that in the years between *Roth-Alberts* and *Stanley v. Georgia* there was no question but that there was no need under the law to consider the actual or potential harmful effects. If then, the Staff evaluation of *Stanley v. Georgia* is incorrect, the conclusion becomes inescapable that the unchecked "Pied Piper" tune of Counsel Bender and Chairman Lockhart has misdirected the funds which were authorized by Congress to solve this national problem, and that the authorization of the vast expenditures made on the "effects" studies constitutes wilful and wanton conduct on the part of the ACLU leadership which directed this "bootstrap" operation.

That those foundations were cast in clay was conclusively established by the U.S. Supreme Court in its recent decisions in *U.S. v. 37 Photographs*, 402 US 363 (May 3, 1971), and *Reidel v. U.S.*, 402 US 351 (May 3, 1971) holding no such right to exist. See in particular, *Reidel v. U.S. at Page* reading:

"In *Roth v. United States*, 354 U.S. 476 (1957), *Roth* was convicted under §1461 for mailing obscene circulars and advertising. The Court affirmed the conviction, holding that 'obscenity is not within the area of constitutionally protected speech or press.' id., at 485, and that §1461, 'applied according to the proper standard for judging obscenity, does not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.' Id., at 492. Roth has not been overruled. It remains the law in this Court and governs this case. Reidel, like Roth, was charged with using the mails for the distribution of obscene material. His conviction, if it occurs and the materials are found in fact to be obscene, would be no more vulnerable than was Roth's.

"*Stanley v. Georgia*, 394 U.S. 557 (1969), compels no different result. There, pornographic films were found in Stanley's home and he was convicted under Georgia statutes for possessing obscene material. This Court reversed the conviction, holding that the mere private possession of obscene matter cannot constitutionally be made a crime. But it neither overruled nor disturbed the holding in Roth. Indeed, in the Court's view, the constitutionality of proscribing private possession of obscenity was a matter of first impression in this Court, a question neither involved nor decided in Roth. The Court made its point expressly: "Roth and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity: that power simply does not extend to mere possession by the individual in the privacy of his own home.' Ibid. Nothing in Stanley questioned the validity of Roth insofar as the distribution of obscene material was concerned. Clearly the Court had no thought of questioning the validity of §1461 as applied to those who, like Reidel, are routinely disseminating obscenity through the mails and who have no claim, and could make none, about unwanted governmental intrusions into the privacy of their home. The Court considered this sufficiently clear to warrant summary affirmance of the judgment of the United States District Court for the Northern District of Georgia rejecting claims that under *Stanley v. Georgia*, Georgia's obscenity statute could not be applied to book sellers. *Gable v. Jenkins*, 397 U.S. 592 (1970); and *U.S. v. 37 Photographs*, reading:

"The trial court erred in reading *Stanley* as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use. In *United States v. Reidel*, ante, we have today held that Congress may constitutionally prevent the mails from being used for distributing pornography. In this case, neihter Luros nor his putative buyers have rights which are infringed by the exclusion of obscenity from incoming foreign commerce. By the same token, obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use. That the private user under Stanley may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. . . ."

The Final Report of the National Commission on Reform of Federal Criminal Laws was transmitted to Congress on January 7, 1971, some four months before, and without benefit of, the U.S. Supreme Court decision in *37 Photographs* and *Reidel*. Those cases establish that Bender's analysis was incorrect as a matter of law. The defense proposed at Section 1851 (2) (c) reading:

"1851(2)—Defense—It is a defense to a prosecutor under this section that dissemination was restricted to: . . . (c) dissemination carried on in such a manner as, in fact, to minimize the risk of exposure to children under eighteen or to persons who had no effective opportunity to choose not to be so exposed. . . ." and the comment thereon in the Hearings of February 10, 1971, supra, at page 421 reading:

". . . Bracketed paragraph (c) of subsection (2) would afford an additional defense that would permit dissemination of concededly obscene materials to adults. This reflects a substantial body of opinion in the Commission that harmful results from exposure to obscenity have not been demonstrated; that the attempt to suppress obscenity infringes on First Amendment and other constitutional rights, and that federal law enforcement resources are inappropriately diverted and wasted in this field."

are the product of the ACLU fallacious leadership and are *not* a reflection of what the law is. They are clearly against the national interest.

A second confrontation which developed in the Presidential Commission between myself and the Consultant on Obscenity Controls herein was that regarding the meaning of the phrase "redeeming social importance". Mr. Bender contended that the same must prevail as a *separate* test for obscenity. It was my position that the law was properly stated in Mr. Justice White's dissent in *A Book Named Fanny Hill v. Attorney General of Massachusetts*, 383 US 413 which holds that redeeming social importance is not an independent test, but is only one of the evidentiary matters to be considered in bearing on that issue. See Exhibit 2 and my comments thereon at Comment 14, page 37; Comment 15, page 38; Comment 16, page 40; Comment 18, page 43; Comment 25, page 58; Comment 54, page 94; and Comment 55, page 96. Representative of our contrary positions are my comments No. 14, page 37; No. 16, page 40; and No. 54, page 94. While the differences which existed between us on that score have not, as yet, been resolved by the High Court, it would be my judgment that that matter *will shortly be resolved*, and in a manner opposed to Mr. Bender's contentions. It would be my judgment that the result reached will follow the more rational view recorded by Director Schwartz as co-reporter to the American Law Institute, Model Penal Code when that body arrived at its draft of the model obscenity legislation in 1956 and 1962. See "Working Papers" at page 1211. In rejecting the Bender proposal and leaving it to "the Courts to continue to evolve the test on a case-by-case basis" (See Hearings of February 10, 1971 at page 421) the National Commission on Reform of Criminal Laws acted wisely.

In view of the critical situation which exists through this nation today in the area of public morals, any legal philosophy which would now downgrade the federal crime from that of a felony to a class "A" misdemeanor except where children or rights of privacy are concerned, is to me just more evidence of our progressive decadence. In his analysis the Consultant chose not to see what is a national problem and what is at the heart of this nation's obscenity problem. See Exhibit 2 and my comments therein at Comment 48, page 84; Comment 52, page 91; and Exhibit "B" thereto entitled "A Report on the United States Supreme Court and Its Recent Decisions in Obscenity Cases".

As noted above, the balance appears to have been restored in the U.S. Supreme Court, but we are still in a "crisis" situation. I have attached hereto at Appendix "E" an overall analysis of the U.S. Supreme Court involvement in obscenity cases which was part of a *Brief Amicus Curiae* on *Grove Press, Inc. v. Anthony B. Flask*, Oct. Term 1970, No. 360, carried over to the Oct. Term 1971 as No. 70-1. A copy of that *Brief Amicus Curiae* is submitted herewith as Exhibit 3 for the consideration of this Subcommittee. In my opinion that analysis reflects the true state of the law today and does not permit us the luxury of downgrading the federal crime to one of a misdemeanor rank.

In this connection, I would refer to Senator Ervin's remarks a little more than three and one-half years ago in the Hearings before the Committee on the Judiciary, U.S. Senate, 90th Congress, 2nd Session Part 2 of September 13 and 16, 1968 at page 1317 where he said: See Exhibit 2 at Exhibit A page 6 therein:

"I know of no set of decisions that manifest in a more dramatic fashion how the Warren Court has been doing just exactly what I have been charging they have been doing for years, and which has been accelerated since Mr. Fortas became Associate Justice, and that is, rewriting the Constitution of the United States. This is well illustrated by the obscenity decisions."

In connection with those hearings, the members of this Committee had occasion to reflect on the nature of the contents of obscenity on the motion picture screen. One of the questions asked by some of the senators at that time was (See enclosure at page 108, footnote 39) "What was responsible for the great change in the motion picture area?" My reply was to add that segment to the Documentary reading.

"Justice Brennan applied what he called 'national standards' to hold the film "The Lovers" not obscene—a motion picture which for the first time was allowed to depict scenes of sexual intercourse—in this instance, in a bed and bath between the wife and a casual house guest. A jury and the State of Ohio, speaking through three of its courts and twelve of its Ohio Justices, however, had held otherwise."

Realizing the importance of that question to this Senate body, I am filing with this Subcommittee today another pictorial representation of a different type to further inform the members of this body on the progressive erosion in the motion picture industry today. Appendix "B" attached hereto is an advertisement from the entertainment page of the *Los Angeles Herald-Examiner* of November 1, 1970 showing the film fare on the public screens of Los Angeles County at the approximate time my commission dissent was filed (September 30, 1970). Also submitted herewith as Exhibit "C" are pictorial continuities on eight of those films: "Sexual Freedom in Denmark", "History of Blue Movie", "He and She", "Black Is Beautiful", "Man and Wife", "Erotography", "101 Acts of Love", and "Without A Stitch". Exhibit "D" is a copy of the advertisement from the *Los Angeles Time's* entertainment page of May 7, 1971 showing the film fare on the public motion picture screens of Los Angeles County six months later. An analysis of three of those films, "Un Chant D'Amour", "Adultery for Fun and Profit", and "Harlot", in the form of time-motion studies is attached hereto at Appendix "D" pages 1 through 7 and Appendix "E" pages 1 through 26. The change in content in the above period is astounding. In this connection it should be noted that the film "Un Chant D'Amour" analyzed in Appendix "D" pages 1 through 7 is the one and only film ever specifically held to be obscene by the U.S. Supreme Court. See Appendix "D" at page 15. *Landau v. Fording*, 388 US 456 (June 1966) affirming on the merits the California decision (See Appendix "D" pages 8 through 14) that "Un Chant D'Amour" was hard core pornography under California law.

A weekly *Variety* article of February 1972 reporting that both "Harlot" and "Adultery for Fun and Profit" have found their way into the neighborhood theaters in New York without effective legal opposition, gives hard evidence of the present federal problem in this area.

The above examples are not isolated instances. Four months ago I was the plaintiff in an action brought in the Common Pleas Court of Hamilton County, Ohio to abate the Cinema X theater in downtown Cincinnati as a public nuisance. On the date the action was filed (November 17, 1971) the film fare being shown was that depicted hereinafter at Appendix 7 A-C. Because of the confusion wrought by the U.S. Supreme Court decisions in this area, it took two months before the trial would act in this matter.

In the face of the above situation, all of which involved the manufacturer's interstate shipments of hard-core materials, it is difficult to reconcile the National Commission's recommendations that the obscenity statutes be "reformed" from a felony status to a misdemeanor status, or that such fare be accepted on a national basis for exhibition to consenting adults. To pursue this line of reasoning is to abandon the moral philosophy which underlies our government, expressed in *Hoke v. U.S.* supra.

It is a tragedy that Bender, Lockhart and the ACLU were permitted to control the Presidential Commission and its expenditure of $1,750,000. It was my recommendation that a congressional investigation be undertaken of these proceedings and expenditures (Commission Dissent of September 30, 1970 at pages 8 and 9) but as yet no action has been taken. The failure to give adequate coverage to the opposing psychiatric view which solidly supports the aims of obscenity legislation was intentional. That this Subcommittee might have some idea of how the soul of America is being destroyed as this pornographic menace spreads, I submit herewith Appendix "G", a time-motion study on the film "The Stewardesses" and the testimony of Dr. Melvin Anchell given in the Common Pleas Court of Lucas County, Ohio (Toledo) which held that film to be obscene and a public nuisance under Ohio law.

The federal controls have as one of their primary objectives an assist to the preservation of internal order within the states of the general welfare, material and moral by suppressing those evils which are pervasive throughout the whole nation. See Hearings of February 10, 1971 supra. et 31 where Senator McClellan expressed it as follows in "The 'One People' Concept:

"The trouble was that it proved, as we became not only one people, but one nation, impossible for the States, under their own powers, effectually to preserve 'internal order' in these matters when the facilitis of the mails were seen to operate, in one fashion, and the privileges of interstate commerce, in another, to negate the efforts of any state to suppress what the people of the nation saw as national evils . . ."

Although it is clear that the primary evil is designated as the "commercial exploitation of sex" it does not follow from this that only commercial exploitation frustrates state policy. If this committee will inquire into the problems which developed in the administration of the postal service after the capitulation of Thurgood Marshall as Solicitor-General of the United States in *Redmond v. U.S.*, 384 US 264 (1966), they will find good reason to reject the formulation of any positive defense such as that set forth in Section 1851 (2) (b) reading:

"1851 (2) Defenses. It is a defense to a prosecution under this section that dissemination was restricted to (b) Non-commercial dissemination to personal associates of the actor.

An examination of the authorities quoted in *Redmond v. U.S.* and the case law in this area clearly indicates that the defense provided by Section 1851 (2) (b) was never so broadly defined by federal case law—nor should it be. With obscenity so rampant throughout the nation, why should this nation's legislative body fashion a rule which will hasten that corruptive process?

I have a great deal of respect for Director Schwartz. His duties as co-reporter on the American Law Institute, Model Penal Code draft of the Model Obscenity Law have established him as a well-qualified scholar in the obscenity area. I have many times had occasion to refer to his fine article on that subject in 63 Columbia Law Review (See Commission Dissent of September 30, 1970 at Exhibit "H" page 12) while his recommendation at page 108 of the Hearings of February 10, 1971 that the Federal government should get out of the business of policing public morals is well and good, that objective should not be accomplished in the manner suggested by "Consultant" Bender and the National Commission herein. I suspect that the heavy responsibilities of Mr. Schwartz as Director of this monumental reform project has not permitted him time to provide the leadership which is necessary in the obscenity area today. His remark that the Federal government should get out of the business of policing morals was qualified by the statement that the Federal government should have authority to prevent exploitation of federally-controlled facilities to violate state policies and to control large-scale organized crime. The fact is that both of those latter conditions exist today. Large-scale organized crime does exist in the obscenity area today and federally controlled

facilities are being used to violate state policies. It appears to me that had Mr. Schwartz been given the opportunity and time to examine the true state of affairs today he would not have gone along with this proposal.

It would be my advice that, rather than de-emphasize the importance of the Federal government in this area, any legislation which might be considered would instead, establish the corollary of this, i.e. emphasize the role of the states in such matters. It would be my suggestion that new legislation, if there is to be such, should accordingly be along the lines proposed in my Commission Dissent of September 30, 1970 at page 36. That proposal reads as follows:

All of the State High Courts, including those which have acquiesced in the United States Supreme Court decisions (supra) are unanimous in their agreement that the constitutional view espoused by Mr. Justice Harlan in the *Roth* case, and concurred in by Chief Justice Burger and Associate Justice Blackmun of the present Court, is the rule of law which should govern in obscenity cases. It is the codification of this rule of law which I now propose:

[91st Cong., first sess., S.______]

In the Senate of the United States, October—, 1970

Mr.____________introduced the following Bill: which was read twice and referred to the Committee on the Judiciary.

A BILL TO amend Title 18 and Title 28 of the United States Code with respect to the trial and review of actions involved obscenity, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

THAT (a) Chapter 71, Title 18, United States Code, is amended by adding at the end thereof the following new section:

Section 1466. Determinations of Fact.

"In any criminal action arising under this chapter or under any other statute of the United States, except those in which trial by jury has been waived by both the people and the defendant, determination of the question whether any article, matter, thing, device, or substance is in fact obscene, lewd, lascivious, indecent, vile, or filthy shall be made by the jury, without comment by the Court upon the weight of the evidence relevant to that question."

(b) The section analysis of that chapter is amended by inserting at the end thereof the following new item:

"1466. Determinations of Fact."

Section 2(a) Title 28, United States Code, is amended by adding at the end thereof the following new chapter:

"Chapter 176—STATE ACTIONS INVOLVING OBSCENITY

"Sec.

"3001. Judicial Review

"§3001. Judicial Review

"In any action, either civil or criminal, arising under any statute of any State or under any law or any political subdivision of any State involving (1) the sale, or distribution, or exhibition, or (2) the preparation, possession, or use for commercial purposes, of any obscene, lewd, lascivious, indecent, vile, or filthy article, matter, thing, device, or substance; or the property rights in any obscene, lewd, lascivious, indecent, vile or filthy article, matter, thing, device, or substance, or in profits arising out of the use of such materials, no court of the United States shall have jurisdiction:

(a) To stay such proceedings in the State Court, or

(b) To review, reverse, or set aside a determination made by a court of such State on the question whether such article, matter, thing, device, or substance, or the use thereof, is in fact obscene, lewd, lascivious, indecent, vile, or filthy, and in violation of the public policy of such State regarding public morality, if such material or its use, when taken as a whole, has been reasonably found in such State judicial proceedings to treat with sex in a fundamentally offensive manner under rationally established criteria for judging such material, such as in any one of the four tests approved by the United States Supreme Court in the 1957 Roth-Alberts case or their equivalents."

(b) The analysis of Title 28, United States Code, preceding Part I thereof is amended by adding at the end thereof the following new item:
"176. State Actions Involving Obscenity . . . . 3001"
(c) The chapter analysis of Part VI, Title 28, United States Code, is amended by adding at the end thereof the following new item:
"176. State Actions Involving Obscenity . . . . 3001"
Respectfully submitted,

CHARLES H. KEATING, Jr.

Mr. CLANCY. Mr. Chairman, I appear here on behalf of Mr. Charles H. Keating who, as this committee knows, was a Member of the Presidential Commission on Obscenity and Pornography and filed a dissenting report in that matter. I have filed with Mr. Blakey 20 copies of the statement of Mr. Keating, and I appreciate the opportunity to make some short comments on its content. I also have filed with Mr. Blakey a single copy of three exhibits, and appendices A through G, and appendix A through C. I would like the committee to consider printing in addition to the statement of Mr. Keating, a print from a Variety article which I will transmit later and appendix F, which contains an analysis of the obscenity case law filed in the Flask brief before the U.S. Supreme Court and appendix G, the testimony of Dr. Anchell, a psychiatrist in an obscenity trial involving the film "The Stewardesses" which took place in Toledo, Ohio.

Mr. Keating was one of the members of the Presidential Commission on Obscenity and Pornography. When he appeared on that Commission, a confrontation of opposing principles took place between himself and two other counsel, Mr. William Lockhart, the chairman, and Mr. Paul Bender, the chief counsel, both of whom are ACLU members. Lockhart and Bender adopted the position that there was a constitutional, or there soon would be declared the constitutional right of individuals, to deal in pornography so long as it was not flaunted before the public. They asserted their expectation that redeeming social importance would become a separate constitutional test for obscenity. Their philosophy was permitted to control the Commission workings and at the end of 3 years (and $1,750,000 later), there emerged a "runaway" Commission. Contrary to the findings of Congress, which in creating the law stated that traffic in obscenity and pornography was a matter of national concern, that Commission determined that the State and the Federal governments should, in effect, repeal their laws and treat the matter in a different manner. Those recommendations were rejected overwhelmingly by the U.S. Senate by a formal resolution.[1]

The fallaciousness which underlies the legal analysis of Mr. Bender and Mr. Lockhart has since been explored and thoroughly exposed in the U.S. Supreme Court decisions of *U.S. v. 37 Photographs*.[2] It is with considerable dismay that Mr. Keating now sees that this same fallacious rationale has entered into and become a part of the proposed sections in the reform of the obscenity area in the Federal law.

Mr. BLAKEY. Mr. Clancy, you are aware that the materials that appear in brackets represent minority positions on the National

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[1] Cong. Rec. pp. S. 17903–S. 17922 (daily ed. Oct. 13, 1970)
[2] 402 U.S. 363 (1971).

Commission and the material that appears simply in block letters represents the majority position. I believe that in examining your statement this distinction was blurred. What I am raising with you is that the central thrust of the Brown Commission was not to adopt the consenting adults' position of the Lockhart Commission.

Mr. CLANCY. Bracket, paragraph, (c) of subsection (2)—you say that has not been adopted?

Mr. BLAKEY. That represented the minority position on the commission. The material that does not appear in brackets represents the majority position, so the special defense and a lower grading represents the minority position on the commission.

Mr. CLANCY. Then to that extent, the remarks should be modified to exclude that particular portion.

Mr. BLAKEY. Your remarks, please do not misunderstand, Mr. Clancy, are extremely relevant, but they go really to the minority position on the commission, rather than to the commission itself.

Mr. CLANCY. I understand.

The question was raised by Mr. Schwartz in a statement where he expressed the thought that the Federal Government should get out of the morals area. That, in general, is a good statement but there is a peculiar interest which exists here, and that is as to the problem which is stated in *Hoke v. United States*.[1] Sen. McClellan, in his report at part XIV, the "one people" concept, points out what is a particular problem in the obscenity area. I refer specifically to that portion which reads, at page 31,

> The trouble was that it proved, as we became not only one people, but one nation, impossible for the States under their own powers effectually to preserve "internal order" in these matters when the facilities of the mails were seen to operate, in one fashion, and the privileges of interstate commerce, in another, to negate the efforts of any State to suppress what the people of the Nation saw as national evils.

That has particular significance in the defense at paragraph (2) (b). The recommendation is that section (2) (b) be adopted because it is a codification of the *Redmond* rule.[2] Mr. Keating takes the position that, at this particular time, when the law is beginning to become stabilized because of the ascending of new persons to the court, that it would be wrong to codify this rule. It would, in effect, give scandal to the States. I would ask that an inquiry be made of the Postal Service to uncover the real difficulty that the Postal Service has had over the *Redmond* rule. The *Redmond* rule was a case in which there was a prosecution for the dissemination of obscene material from one individual to another. It was not, however, a personal matter. It went beyond that. It had been a policy of the U.S. Attorney's office not to prosecute unless it was a serious matter, and in this case they did. It reached the United States Supreme Court and there Solicitor General Thurgood Marshall conceded that it should be reversed because of the policy.

In my opinion that concession should not have been made in that case. Immediately thereafter, this case scandalized the whole Nation. At that time there was a real problem in the Postal Service

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[1] *Hoke v. United States*, 227 U.S. 308 (1913).
[2] *Redmond v. United States*, 384 U.S. 264 (1966).

concerning the indiscriminate dissemination of this type of material in clubs which appeared across the Nation. It took from the U.S. Government the opportunity to go after this particular vice. This vice had been attacked by various State governments but they were not able to control it effectively because of the use of the mails and the fact that they could not reach it procedurally. They could not obtain jurisdiction over people outside of the State. It was a great tragedy when the *Redmond* case threw a roadblock in the efforts of the Federal Postal authorities to stop this type of business in the mail. I say it would be a tragedy if that rule were codified in the Code, and that rule were to continue to give scandal in this area. It gives scandal not only as it relates to personal matters but also as it relates to the general enforcement of the law. States, looking at a codification of this type of a rule, would find themselves faced with a counterpart argument of the *Stanley v. Georgia* rule.[1] When the law suggests you cannot prosecute an individual, the argument soon is made to the effect that if you cannot prosecute, the person must have a constitutional right to do it, which is not the case, and which was never intended by the law.

I think there is a strong role for the Federal Government in this area today for a number of reasons. First, you have the case of "big business" which is involved in the use of interstate facilities and the interstate privileges. The prosecutors in the large counties themselves do not have the money or the means of reaching, through the judicial process, those individuals that they must get at, in order to stop interstate trade. For example, they do not have a process which will reach across State lines. Assuming they wanted to get at some activity it is virtually impossible to get at it, through criminal indictment and extradition. It can be done, but results there are years and years away—reaching across State lines is almost impossible.

Second, they do not have the resources. There is a combination of defense attorneys which will move into a large jurisdiction such as New York County or Portland, Ore., to resist any major case that is brought to prove a point of law. They will bring to bear the entire weight of the industry against that prosecutor. He in turn, soon finds himself depleted of funds and unable to meet them adequately in the courtroom. See, here, the *Variety* article of February 23, 1972, reporting on the New York situation.

Then, too, the individual county prosecutor does not have the proper overall picture of the problem, whereas I submit the FBI, the U.S. Attorney, and the Federal prosecutors do. They can observe what is going on over the entire United States and can pick and choose as their targets those members of big business who are doing something which is really deleterious to the State policies of individual States in the Nation as a whole.

It would be Mr. Keating's suggestion that, if there is to be reform in other areas, and apparently the general consensus is that there is a need for reform, still it should not be in this area. It

[1] *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

should be a revision of the type described by Senator McClellan in his History of Codification in 1948, where what was undertaken was a revision rather than a reform. What we have passed through is nothing short of a silent revolution in the courtroom where the absolutist philosophies of Black and Douglas, unrelenting in their attacks, have brought to bear a tremendous resistance against the moral standards of this Nation. They have succeeded in pulling the Court apart to a point the Court has never been in agreement on anything. As a consequence, this great disturbance on the court has filtered down into the States, and everybody at the State level is confused.

I think now, with the demise of the late Justice Black and the ascendency of other persons on the court, that there is going to be a stability which will place the problem in its proper perspective and solve it. The court, as a body, should be given an opportunity to right itself under the law rather than rewrite the law and have the Court commence anew with an attempt to interpret a new law.

As is stated at page 5, the minority defenses, would actually codify in the law errors which were not recorded as errors at the time the proposed Code was submitted to Congress. That was due to the fact the Code was submitted about 4 months before *United States v. Reidel* [1] and *United States v. 37 Photographs* [2] were decided. Those cases conclusively established that the position taken by Bender was an incorrect position. The matter of redeeming social value (which the reformers did not adopt, leaving the statement of obscenity for the courts to determine), is still up in the air. Mr. Keating has the belief that there are sufficient members on the court now to re-establish, once again, the model penal code version as discussed by Director Schwartz in his notes as reporter for the draft of the model penal code section in 1957 and 1962, there Mr. Schwartz points out that redeeming social importance is only an evidentiary matter, and is not a separate test for the obscenity determination.

Mr. Justice White in his dissent in the *Reidel* case very clearly pointed out his views, and it would appear that his is the swing vote which will re-establish the law that it is purely an evidentiary matter.

Mr. Keating has submitted as exhibit 1 the preliminary Presidential Commission draft of Mr. Bender who was also the consultant for obscenity controls to the National Commission. Exhibit 1 is submitted with the view in mind to point up the type of legal reasoning that went into what Mr. Blakey said is the minority view. As exhibit 2, he has filed a copy of his reply point by point, to Mr. Bender's report July 12, which essentially is the same as contained in his consultant's report of May 12, 1969, filed at pages 1203 to 1243, of the working papers.

Mr. Keating is disturbed that Mr. Bender was the only consultant on the matter, and that his working papers have been printed with the working papers of the Commission as a whole. It is Mr. Keating's view that any effort now that would legislate defenses in this area, or would codify defenses which have been erroneously absorbed in the

[1] 402 U.S. 351 (1971).
[2] *U.S. v. Thirty-Seven* (37) *Photographs Cluros, claimant,* 402 U.S. 363 (1971).

administration of the law, would only further enhance the regression and progressively growing moral erosion which is taking place as a result of the superabundance of obscenity on the Nation's market. He has attached hereto as exhibit A a portion, an amicus curiae brief in the *Grove Press, Inc. v. Flask* presently before the U.S. Supreme Court, which applies the nuisance statute in Ohio which contains a special application to the exhibition of obscene motion picture films.[1] That matter, filed some 18 months ago, has been carried forward to the 1971 October Term and is presently on the calendar and has a possible chance of being heard by the Court.

It is interesting to note that in the recent decision in *State of Washington v. Rabe*,[2] Chief Justice Burger and Justice Rehnquist remarked that the State should take note of the public nuisance statutes and act accordingly. This is the vehicle which is used and recommended in the brief amicus curias in *Grove Press, Inc. v. Flack.* For that reason, Mr. Keating would appreciate the committee's considering printing appendix E insofar as it relates to the history of experience with obscenity in the U.S. Supreme Court.

I think that the obscenity question is at the very heart of some of the things that are wrong with America today, and would point out to the revolution which has taken place in the Court as the cause. I recall that Senator Ervin pointed out in his remarks on September 16, 1968 in the hearings before the Committee of the Judiciary, 90th Congress:

> I know of no set of decisions that manifest in a more dramatic fashion how the Warren Court has been doing just exactly what I have been charging they have been doing for years, and which has been accelerated since Mr. Fortas became Associate Justice and, that is, rewriting the Constitution of the United States. This is well illustrated by the obscenity decisions.

At that time, there were a number of questions which were considered by the Senators. One of them was the question which was asked during a presentation to certain Senators as to what it was that brought this great change in the motion picture area and what had brought this excessive sexuality to the screen. My reply was to add that segment to the document reading:

> Justice Brennan applied what he called national standards to hold the film "The Lovers" not obscene—a motion picture which for the first time was allowed to depict scenes of sexual intercourse—in this instance, in a bed and bath between the wife and a casual house guest. A jury and the State of Ohio speaking through three of its courts and 12 of its Ohio justices, however, had held otherwise.

Realizing the importance of that question in the motion picture area, Mr. Keating has attached hereto, exhibit B which shows the daily fare in the Los Angeles Herald Examiner of November 1, 1970, showing the films being exhibited on the public scenes of Los Angeles County at the approximate time he filed his dissent. Also submitted herewith is exhibit C containing pictorial continuities on eight of those films being shown in the city on that date. Exhibit D contains a copy of the advertisement for the Los Angeles Times entertainment page of May 7, which is 6 months later, showing three of those films: Un Chant d'Amour, Adultery for Fun and

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[1] *Grove Press, Inc.* v. *Anthony B. Flask,* Sup Ct. No. 70–1, pending.
[2] *State of Washington* v. *Rabe,* Sup. Ct. Doc. No. 70–247, remanded April 20, 1972.

Profit, and Harlot. Thereafter, in appendix E are shown time-motion studies on the films Adultery for Fun and Profit and Harlot.

It should be brought to the attention of this committee, that Un Chant d'Amour was the film which was before the Senate committee in September 1968, as the only film ever declared to be obscene by the modern Supreme Court. On that particular day in May 1971, it was showing in Los Angeles County despite the ruling of the Court, together with two other films that are just absolutely astounding in their content: Adultery for Fun and Profit and Harlot.

Along those lines, I would like to send to Mr. Blakey a *Variety* article of February 1972, reporting that films like Adultery for Fun and Profit and Harlot are currently moving into the neighborhood theaters in New York without any opposition. This manifests the real problem in the State-Federal area. The Variety article points out that the industry has assessed a fee on the exhibitor. I am talking now about the neighborhood exhibitors, not the main street exhibitors. They have been assessed a fee which is to go into a fund which is to support the defense of any action brought by the State against the exhibition of films like "Adultery for Fun and Profit," and "Harlot" in the State of New York. It shows how the industry can bring to bear the weight of the legal talent against the State in this area.

"Adultery for Fun and Profit" and "Harlot" are clearly hard core pornography and should be attacked by the Federal Government on an interstate shipment basis. It is in this type of legal action that the Federal Government can bring to bear the weight of its assistance which is essential for the State attack on such matters.

The time motion studies for "Adultery for Fun and Profit" and "Harlot" are not exceptions. Mr. Keating was a plaintiff in an action recently filed on November 17, 1971, to abate the theater in Hamilton County known as the Cinema "X". The film fare, which was showing there, appears at appendix 7, A through C, which consists of 1900 separate still photographs covering the 2-hour program. I have asked the members of this committee to take a look at that film fare to show you the seriousness of the matter—and it took 2 months before the Ohio Court could even act as to that type of subject matter.

In summary, Mr. Keating would say that all of these cases, involve the interstate shipment of "hard core" materials. It is difficult to reconcile the National Commission's recommendations that the Obscenity Statute be reformed, from a felony status to a misdemeanor status, or that such fare be accepted on a national basis for exhibition to consenting adults. If the Federal Legislators were to adopt this line, they would be abandoning the philosophy expressed in *Hoke v. the United States.*

Senator HRUSKA. Well, Mr. Clancy, the 5-minute warning is sounded.

Mr. CLANCY. Well, I think I can conclude with that, Senator, and if there are any questions I would be glad to answer them. I would like to make one other statement, and that is, that I do not agree with the suggestion of Mr. Schwartz that there should be a de-

emphasis of the Federal role in the moral area. I do not think it should be deemphasized as a Federal role. Rather, I think there should be an emphasis placed on the State role. The suggestion of Mr. Keating along those lines would be that appearing at page 28, which is a codification of the present statement of the law, as viewed by Justice Harlan, and that is that the Federal Government does have a role in the hard core area, and the State has a special jurisdiction in the other areas. The Federal Court should not stay out of it entirely.

Senator HRUSKA. Well, thank you very much for giving us this forceful position that favors strengthening our obscenity legislation. We heard much on the Commission from those who held views different from you, but your testimony and the statement of your colleague, Mr. Keating, certainly will lend a little more balance to the record than otherwise would have existed.

But, I have one request for comments from you on this item. Our present obscenity law is bottomed on sexuality. It seeks to create a climate in the community that will permit our children to grow up, able to handle this important human drive. Do you think that it might be advisable to expand the concept to protect against the abuse of violence? There is a recent study of HEW, for example, which indicates in its study of television, that there may be some difficulties in that area. What do you think?

Mr. CLANCY. Well, Senator, my personal belief is that something should be done. I have within the past week had a discussion along these lines.

I think that the community groups should extend their attack to include violence for this reason: I think that there is a common denominator existing in relation to those forces which want to halt the effects of violence and those that want to halt the effects of excessive sexuality on the screen. They also differ in some respects.

For example, you will find the group which is strong against obscenity, is not so vocal against violence, although they feel the same way in general. On the other side, those who are strongly against violence are generally for absolute freedom, in the speech area, particularly in the area of obscenity.

I might explain this in relation to my experience in the State of New York. The injunctive device was tested in New York in *Kingsley Books v. Brown*,[1] involving a book known as "Nights of Horror" which was a sadistic, masochistic type of obscenity. It was not the blatantly hard core type but it did have sadism and masochism intermingled with sex. Generally in the obscenity area, the New York Court of Appeals is split 3 to 4, or 4 to 3, in one direction or the other. They have rarely been united in any obscenity opinion, except that in *Kingsley Books v. Brown*, they were 7 to 0 for supporting that proposition. Trial Judge Levy said that if ever there should be a prior restraint imposed against any subject matter, it should be against this type of material. I believe that result was reached because the judge had strong feelings against violence, and perhaps felt strongly against excessive sexuality. I suspect that a number of judges on the court of appeals, for example, Judge Fuld, felt very

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[1] *Kingsley Books* v. *Brown*, 354, U.S. 436 (1957).

strongly, for the same reason—because of the element of violence in "Nights of Horror." In a recent case involving a film called "Blue Movie," which was blatantly hard core, Judge Fuld would not ban it or affirm a conviction based upon it. On the other hand in *Kingsley Books Inc. v. Brown*, when that came before him, he had a different feeling, and voted with the majority to enjoin the sale of it because it had sadism and masochism, and the judge has a strong feeling against violence. In my opinion, there are also differences between the two groups. Those who oppose excessive sexuality in public have strong feelings for the family, and the family unit. They look at sex as the basis of the family unit, and they are strongly protective of the family. In the area of violence, those who are against violence have not so much the strong feeling for family as they do have a strong feeling for rights of privacy and the rights of the individual. However, both groups recognize that there are two effects of excessive violence and excessive sexuality. One is the immediate effect on those who would be stimualted to use deranged sex in sex crimes and who would be induced to commit violence against the individual. Then there is also the indirect effect, which Alexander Pope called 'The Monster Vice"—the eroding nature of the superabundance of vice in society that drags down society. Those who are concerned in the sexuality area would say, "I am not so much worried about the immediate effect of this on an individual, although I know it would effect some, but what I am concerned most with is that it will tend to erode, that people will become so accustomed to this type of sexuality that they will lose their respect for the type of sexuality which is essential to the family structure.

Turning to the area of violence, those people in general, feel the same way. They are concerned not so much with the immediate effects of violence, but at the same time, they recognize, as is shown through their objections in this violence area, that it does have an indirect effect on the community, that excessive violence on the screen is having an effect on youth. They cannot see it immediately, but they know it is there as they observe society perform.

For example, Alexander Pope framed it this way, in his essay on the Monster Vice: "Vice is a monster of so vile a mien, as, to be hated, needs but to be seen; yet seen too oft, familiar with her face, we first endure, then pity, then embrace."

If one lives only in the present, it is impossible to perceive the change. If, however, in any one period in history, one were to look back to 10, 15, 20 years ago, that person would recognize the effect through their observation of the erosion. They are recognizing that now.

Those who oppose violence cannot point to any time in history when that effect is felt immediately, but looking backward on all of the violence that has occurred, they can say, "Why certainly, it exists in the statistics. I say that here there is a parallel comradier in the groups which want to stop excessive violence and excessive sexuality, I think the terms should be kept apart, but I think very definitely there should be an insertion in the code which would permit the enjoining of excessive violence and would permit the prosecution of those people who pander to violence for commercial

purposes because of the effect that it does have on society as a whole, carrying that same parallel over from the obscenity area, and the historical reasons for striking at obscenity——

Senator HRUSKA. Well, thank you much. If you have further thoughts on that, you can expand on them in a supplemental statement, if you wish.

Mr. CLANCY. All right. Thank you, Mr. Chairman.

Senator HRUSKA. Thank you for appearing.

[From Weekly Variety, February 23, 1972]

PORNO ON 'FAMILY' SHOWCASE—EXHIB-DISTRIB DEFENSE FUND

(By Addison Verrill)

One of the most remarkable aspects of the hardcore sexpix flood over the past two years has been the ease and rapidity with which such features as "Mona" and "Adultery For Fun and Profit" have broken out of their "permissive" midtown bookings to play showcase dates in once-inaccessible class houses throughout the five boroughs of the New York metropolitan zone. True, such showcase breaks have not been without trouble and this week exhibitors and distributors with a major stake in the "adult showcase" track are mulling a proposed plan for the establishment of a legal defense fund to help end their "whipping boy" status.

Plan has been proposed by Terry Levene, who first established the adult showcase in August, 1970 with his Aquarius Releasing's "He and She." Levene is calling for both exhibs and distribs to jointly participate in the establishment of a $10.000 minimum defense fund to retain the "best legal talent for the best possible defense."

Self-Taxed Defense

Exhibs will be asked to tax themselves 1% of weekly gross receipts matched by a similar bite from distribs using the track. Contributions to the fund will cease when it reaches $10.000. Distribs would collect the 1% from the exhibs, add their own contribution and then forward it to an independent elected administrator who would keep the fund in an interest-bearing account until it is employed for the defense of any distributor or exhibitor. The as-yet-unnamed administrator is not to be either a distrib or exhib, but someone impartial and connected in some way with the industry.

Levene is proposing the law firm of Kassner & Detsky as defense counsel not only because it is among the foremost in this type of experience, but also because firm staffs its offices to be open seven days a week until midnight for quick assistance in latenight police raids, etc.

Exhibitors and distributors asked to participate in the defense fund include RKO Stanley-Warner, Loews Theatres, Century Theatres, Brandt Theatres, Associated Independent Theatres, Cinecom, G&G Theatres, Interboro, United Artists Theatres, Mahler Films, Distripix, Marvin Films, Aquarius Releasing, Goldstone Films, Jerand Films and EVI Films, among others.

Costs of Litigation

In the past, legal costs, which could range from $35,000 for a multi theatre arrest to $500 at an individual situation, have been borne by the distributors. Lately, exhibitors, who recognize their upped gross capacity with neighborhood sexpo attractions, have expressed willingness to share the burden, and Levene reports that until the defense fund is established, most exhibs have agreed to split any legal costs 50/50 with the distribs.

Levene told VARIETY last week that since the adult showcase was established in 1970, "harassment" has been "minimal," and there has never been a conviction on obscenity grounds.

The first "adult showcase" for "He and She" consisted of 12 theatres in the five boroughs. That number is now up to 17, including four situations which joined the track over the past six weeks after dropping out of the conventional first run showcases with "conventional" theatrical fare. Two additional theatres are expected to join shortly.

Quality of the houses has also improved since the inception of the track which now includes such national circuits as Loews, Brandt and RKO Stanley Warner. Seeing "Mona" in a Loews Theatre might have been considered highly unlikely two years ago.

For individual exhibs, the adult showcase has meant a major business boost in the neighborhoods. Houses which used to average grosses in the $1,800 a week range with standard Hollywood product are now hitting between $3,500 and even $7,500 per week consistently with "Oral Generation" "Adultery" etc. Though initial pix on the track were marginally porno items like "He and She," the real thing has been playing of late. "Fun and Profit" was on the track last week. "Hot Parts" starts its run today (Wed.) and next week will see a pairing of the grande dame of the porno-queens, Bill Osco's landmark "Mona" and "Hollywood Blue." Theatres on the track are currently booked through June 21, with a new feature each week.

Terms are "equitable," according to Levene, meaning generally a sliding scale arrangement as opposed to the minimum guarantees and "tough floors" often by the majors with standard showcase product, yet another reason of exhib happiness. Levene and Marvin Friedlander generally administer the track, though films from a number of distribs play it.

'Cool' Versions

Though occasionally an exhibitor will request a "cool version" of a film, product is generally uncut from midtown run, and that means hardcore features. There are some no-nos, however, in line with what Levene calls "contemporary community standards." Track will not run scenes of bestiality or child molestation. Pix must have a storyline as well, so houses are not running the 20-minute intercourse shorts which prevail in the midtown porno parlors.

Credit for the "minimal harassment" thus far, according to Levene, is attributed to careful supervision of the houses. Underage patrons are discouraged, institutional advertising is non-pandering, and theatre fronts are kept non-salacious.

What has happened with neighborhood porno is that it has begun to attract coeducational audiences, i.e. "sexual liberation" is bringing the women out along with the men.

Though local authorities would probably not admit it, a number of exhibitors report that police on the local precinct level actually welcome the policy shift in the neighborhoods. In a number of ethnic nabes, houses classed as marginal grossers with standard action showcase fare were often forced to request police protection or hire guards to hold down "hooliganism," fights and vandalism during performances. Audiences for porno attractions in the very same houses are reported as much more "attentive" to the on-screen action and much less likely to create uproars out of sheer boredom. Thus, paradoxically, they present less of a problem for local police.

In the Court of Common Pleas of Lucas County, Ohio
No. 71-1900

STATE OF OHIO, *ex rel.* JAMES M. SCHOEN, PLAINTIFF
vs.
A MOTION PICTURE FILM ENTITLED "THE STEWARDESS", ET AL DEFENDENTS

Be it remembered, That on the hearing of the above-entitled cause, in the Court of Common Pleas of Lucas County, Ohio, in the September 1971 Term of said court, before the Honorable Robert V. Franklin, Jr., one of the judges of said court, the following proceedings were had, to-wit:

Melvin Anchel having been first duly sworn, as provided by law, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. CLANCY:

Q. Will you give your name, sir?
A. Dr. Melvin Anchell.
Q. Where do you live?
A. 721 South Burlingame in West Los Angeles, California.

Q. What is your present occupation?

A. I'm a physician.

Q. And how long have you been a physician?

A. Over 25 years. About 27, 28 years.

Q. And what formal school education have you had for this profession?

A. Well, following my graduation from the University of Maryland undergraduate school where I received a B.S. in chemistry and a minor in education I went to the University of Maryland Medical School in Baltimore, and following that I interned at the Sinai Hospital in Baltimore.

Then I went into the Army in World War II, and while there I was asked to take courses at Columbia Neuro Psychiatric Institute. The Service was having a tremendous amount of psychiatric problems at that time and they needed to develop a practical application to the problem. Courses were designed by Columbia which were accredited for one year training. These were accelerated programs compressed into three months, just like medical school at that time compressed four years into three years. It did not leave anything out but it just accelerated the prescribed training.

Following the course at Columbia Neuropsychiatric Institute I went into the practice of medicine in the Service as a psychiatrist at Camp Crowder. Do you wish me to continue my curriculum?

Q. Yes, sir.

A. Following the release from the Service after World War II I decided that I wanted to practice medicine as a complete physician because I felt that——

Mr. Britz: I'd object to what he felt, Your Honor, it doesn't add to his qualification at all.

The Court: Oh, he may testify.

A. Because I felt that the human being is psychosomatic; that is, cannot be separated into the mental and physical. Emotional and physical problems are closely entwined. I took courses at Cornell University in New York giving me accredited training in internal medicine. Then I went into the practice of medicine on a general practice basis.

My practice never deleted psychiatry, and the psychiatry I did throughout my practice was intensive psychiatry. I was always cognizant of the psychiatric aspects of patients' problems. Do you wish me to continue?

Q. Yes.

A. After 18 years of practice as a generalist, I moved to California about eight years ago, where I now limit my practice entirely to psychiatry and internal medicine.

I'm a member of the American Society of Psychoanalytic Physicians, an organization based in New York, but national.

I am a member of the American Academy of Psychosomatic Medicine. I am a member of the Pan-American Medical Association. Somewhat like the A.M.A. But it includes physicians throughout North and South America. In this particular organization I'm a diplomate in the section on psychiatry.

I'm a Board certified specialist at this time in the American Board of Family Practice. This is a new specialty that has developed within the past two years. I'm a charter member of this organization. I was graded on the basis of psychiatry and internal medicine in passing the examination for this specialty.

Q. What is the nature of your present practice?

A. Fifty percent psychiatry and fifty percent internal medicine.

Q. Have you in the course of the past 25 years written on subjects involving human sexuality?

A. I've written quite a large—well, a number of articles—on the subject of human sexuality. Two companies have published books that I have written on human sexuality. One was called *Understanding Your Sexual Needs*, which was published in 1968 by Frederick Fell Book Publishers in New York, and the other is called *Sex and Sanity*, which came out in October of this year and is published by Macmillan. Articles I've written have appeared in some medical journals, some education journals and many of the lay journals.

Q. Have you always—also written a book on diet based upon the psychiatric approach?

A. Yes. When I moved to Los Angeles my idea was to limit my practice and have more time for my family and other interests. One of the things I wanted

to do was write about my clinical experiences in over 25 years of practice, and I was going to write about three of the primary instinctual problems or instinctual components of the mind; one was nutrition, the other is sex and the other is aggressiveness.

I have written two books on these subjects. Two books have been published on the sexual aspect, one book on the nutritional aspect. The book on diet is, I would say, 90 percent concerned with the emotional aspect of obesity.

Q. Do you have any involvement at the present time with the motion picture industry?

A. Well, I'm on the Board of Directors of the Youth Film Foundation in Hollywood.

Q. Have you appeared in court on matters relating to human sexuality?

A. Yes, sir.

Q. And where have you so appeared?

A. Well——

Q. Was this as an expert witness?

A. As an expert witness in psychiatry.

Q. Where, in what courts have you appeared?

A. Phoenix, Arizona, the City of Los Angeles, the County of Los Angeles, San Diego, Cincinnati, Honolulu, San Luis Obispo, California.

Q. Have you finished?

A. Yes, sir.

Q. Do you go to films often?

A. Well, we used to go quite regularly, but in the past——

Q. How many have you seen in the past year?

A. In the past year I think we've limited our field—

Mr. Britz. Your Honor, I'd like to object to the witness using "we" because I don't know if he's referring to himself or himself and others.

The Witness. My wife and I.

Mr. Britz. Could we restrict the testimony to himself?

By Mr. Clancy:

Q. How many have you seen in the past year?

A. The past year I guess we—I have, and this is strictly a guess, perhaps 15, 10 or 15.

Q. Psychiatrically speaking, how does human sexuality function in society: that is, as it relates to the inter-personal relations between men and women in relation to sex?

A. Well, in human sexuality the sexual instinct has developed a tremendous amount of aspects that go far beyond the physical limits. In lesser creatures the entire concept of sex is for procreation, but in human sexuality you have a mental component that goes along with the physical. This mental component, which has evolved over the thousands of centuries, is fused with the physical. The physical sex act in itself is not complete sexuality. Sex in its physical aspects alone is, as a matter of fact, a frustrating type of sexuality.

In order for the human sexuality to be expressed properly there must be a fusion of both mind and body, and the mental component is especially important in women but it's so in men, too. Does that answer your question?

Q. Yes. Have you seen the motion picture film known as The Stewardesses?

A. Yes, sir, I have.

Q. When did you see it and where?

A. I saw this picture about two weeks ago. I saw it at a theater called the "Warren" at 7th and Hill in Los Angeles.

Q. Now, answer yes or no. In your opinion does the dominant theme of the film The Stewardesses, taken as a whole, appeal to a prurient interest in sex, and when I say prurient interest I mean excessive interest in nudity or sex which goes substantially beyond customary limits of candor?

A. Yes, sir.

Q. Do you have any opinion as to whether the depiction of The Stewardesses on the public screen has any social value to those who would go to see it?

A. I don't think it has any social value. I think it's socially degrading and debasing. Devastating.

Mr. Clancy. Your Honor, may we have this marked as People—or Plaintiff's Proposed Exhibit 1?

The Court. Certainly.

(Plaintiff's Exhibit 1 marked for identification by the Reporter.)

By Mr. Clancy:

Q. Dr. Anchell, I show you Plaintiff's Proposed Exhibit 1 for identification, consisting of 23 sheets. Would you examine these photographs appearing on the sheets very closely. Take your time, and then I would like to ask questions concerning the photographs.

A. Sorry to take so long. I've seen these before, but I want to get a fresh recollection.

The Court. All right.

A. Yes, sir?

Q. Dr. Anchell, you previously testified that you saw the motion picture film The Stewardesses at the Warren Theatre two weeks ago.

Directing your attention to Plaintiff's Exhibit 1 for identification, consisting of approximately 1,600 plus photographs, do you recognize those photographs?

A. Yes, I do.

Q. And do these—would you please tell the Court what you understand the photographs to be?

A. Well, they seem to be photographs of the sequences of the movie Stewardesses, The Stewardesses.

Q. Are they a fair and accurate portrayal of the individual scenes that you saw at the Warren Theatre two weeks ago?

A. To the best of my judgment they are.

Q. And do they appear to be in the same sequence at which you saw them at that theatre and that date?

A. Yes, sir.

Q. Now, directing your attention to your testimony that the dominant theme appealed to prurient interest, would you explain your testimony insofar as the appeal to prurient interest insofar as Plaintiff's Exhibit 1 is concerned?

Would you take Plaintiff's Exhibit 1 and explain your testimony that the dominant theme of The Stewardesses constitutes an appeal to prurient interest?

A. Do you wish me to go page by page or generalize?

Q. Yes, if you would go through the picture from the beginning.

The Court. Does that have something at the top to hold those films? Would you set that up, please.

Mr. Britz. Your Honor, I have a comment and a motion to make at this point with regard to this testimony.

It's my understanding that the witness is going to be asked to go through this exhibit page by page to point out items where he feels prurient interest and sex is exhibited.

The test that we're talking about here is where the dominant theme of the work, taken as a whole, appeals to a prurient interest, and I would object strenuously to this witness going into item by item pictures in this film and testifying that each of them isolated from anything else is appealing to the prurient interest.

The Supreme Court test, which I think we're in agreement on, says that the dominant theme, when taken as a whole, appeals to the prurient interest, and also this is extremely time consuming and serves very little purpose.

Mr. Clancy. Well, Your Honor, in opposition, the Ohio Supreme Court has said that the three—that the three factors in order to establish obscenity, the three factors to the test must coalesce, and we are in agreement on that point.

My question was aimed at the dominant theme, but in explaining the dominant theme my question was would he explain it in terms of the coalescing features.

The Court. Objection will be overruled

A. On the first page of the photographs, as I recall it in conjunction with the sound and the pictures, we see the feet of this lady, whose face

I don't think was ever revealed, but we see her engaged in what is obviously sexual intercourse, genital sexual intercourse. She is waiving her feet about and moaning and making noises that would indicate a sexual relationship on this particular episode of the film.

Now, the pruriency here is several parts. From a psychological standpoint, one consideration is that, normally, women do not relieve themselves of their eroticism by such primitive emotional expressions. A woman must take into consideration, to fulfill her feminineness, her mental aspects of sexuality in the art of loving. Here is a woman who says, "I am coming" in answer to a knock on the door (a double entendere). The viewer is led to believe that the woman in this case is almost a rapist, at least this is the impression one would assume from the pornographer's portrayal of the female expressing her sexuality. This is not true in real life.

A woman needs a compassionate relationship; she needs an affectionate relationship. Not at all times do women have orgasms. Throughout this picture it seems like the women have incessant orgasms one after another, and this is not true.

The studies of Alfred Kinsey, under whom I studied at Columbia and I find my clinical findings verify his findings that the average women have—we're talking about average women, not normalness—only two orgasms a month. And this is after she's 25 years of age. We're talking about average, of course.

The average stewardess in this picture looks to be in her early 20's. All she was doing throughout the picture was raping every male that came by. Her behavior and orgastic responses were most unreal and misleading to the public.

I think many women will be mislead by what they saw there. They will tend to live up to the representations in the picture. Certainly many men would try to equate women's sexuality with the male's lust fulfillment in the picture.

Mr. Clancy. Pardon me just a moment.

Q. Inviting your attention to sequence 13, which was a girl knocking on the door, did she call out the name Wendy?

A. I think she did.

Q. Would you—do you have an opinion as to the particular sequence here, would you say that the dominant theme of that particular sequence constituted an appeal to prurient interest as you understood it?

A. The woman knocking on the door. There is nothing prurient about that, but what is obviously going on behind the door and what's detaining this person from answering the door has a prurient nature—the woman in the room is obviously engaged in sexual intercourse. Which is then depicted vividly in color and three dimensions during the following scenes. I think it's quite a prurient episode. Taken all together, the knock on the door and the insistency of getting into the room and the responses she was getting is pruriency.

Q. Was the version you saw at the Warren Theatre a 3–D presentation?

A. Oh, yes.

Q. And what would be your opinion as to whether or not the depiction in 3–D is any different than depiction in 2–D?

A. Well, as you know, the person who goes to view a movie like this—I'm not talking about the Court's examination of course, viewing the movie for sociological reasons and whose feelings are restrained normally—I'm referring to the moviegoer who is paying money to see this for entertainment, these viewers are identifying with the characters. They have to be living the characters' parts otherwise the movie would bore them to the point they couldn't sit through it.

They get rid of their own lust feelings to a degree through what they are seeing represented, and three dimension makes it much more realistic than 2–D.

Q. Would you please tell to the Court what you mean by lust feelings in relation to the evolution of human sexuality?

A. Well, as I explained before, Mr. Clancy, human sexuality is not a physical need alone. The mental component is just as integral a part as a person's eyes are to the rest of their body. It's all a part of the human makeup.

In the thousands of years of human evolution the mental component has developed an affectionate—a compassionate—component. Two people in love become united and fuses as in the genital sex act.

Now, this type relationship serves the instinctual purposes of human sexuality. The instinctual purposes are three fold in the human. One is procreation. I don't mean to say that every time individuals engage in heterosexual relationships they have a child. Of course, measures can be taken by birth control pills and other contraceptives or methods to prevent that, but at least the act itself has the capabilities of producing and fulfilling the instinctual needs for procreation. It can be prevented by human desire, if necessary.

The second need of the sexual instincts is one of pleasure. This is a very important life sustaining need. The relaxation, the pleasure that is achieved from mature sexual intercourse is life sustaining.

The third component of human sexuality is one involving the earliest instincts of the human being. That is the instinct of loneliness. Only in a relationship where the man holds the woman high in esteem and with affection and in which the woman regards her partner in an equal way can the sex act melt away, so to speak, the loneliness feeling that exists in every person.

If this does not occur in the sex act a series of frustrations build up which exert themselves as mental tensions. These tensions can lead to perversity including sadism and masochism with varying degrees of destruction of self and destruction of society.

Q. You've spoken of lust feelings, are these lust feelings present in every individual?

A. Well, as you know, sensual needs are inherent in earliest childhood. They are inherent in every individual as they are born but it must be remembered only represent a component of the complete human sexuality.

As the child grows and develops sexually, the compassionate component of sexuality comes forth. This part starts to develop by the age of six to 12. Compassionate feelings are first developed toward parents. In puberty and adulthood, lust feelings and compassion are felt for other love objects outside the family.

I may add that a pornographic environment can stunt the growth of the average child. I think, more and more in our society we're seeing compassionateless type of young people who do not demonstrate the affectionate component of human sexuality. The compassionate need is supplanted with a greater use of drugs. We see a decided increase of suicide in the younger generation. This fact may be beside the question. Getting back to your question, the lust feelings without being in love are primitive sexual displays. A civilized society demands, and for that matter even primitive society demands, that these raw instincts be modulated. They must be expressed in the best needs of the individual and in accord with his society.

If he expresses primitive desires only in accord with his own self interests, his own self love—a form of perversion—then the individual is a threat not only to society but to himself. The frustrations that result from this type of sexual expression leave a residue of unused affectionate energy. This unused residue constitutes the frustrations that I mentioned in a civilized society physical sex must be controlled, they must be what we refer to in psychology—sublimated and expressed properly. Otherwise, the person reverts back to a type of psychopathic culture; an extreme example, of course, is the Manson family.

Mr. Britz. What?

The Witness. The Manson family.

Mr. Britz. Oh, the Mansons.

By Mr. Clancy:

Q. Dr. Anchell, what would be the effect of a sequence such as the sequence involving Wendy, and depicted at the start of the Stewardesses, on an average viewer in a film which was exhibited in a pornographic atmosphere?

A. Well, it has two effects. The first effect I already touched upon, in that it misleads the viewer, both men and women, and I may say especially young people. This theater I went to, the two kids ahead of me at the box office couldn't have been more than 16 or 17 years old.

Mr. Britz. I'll object to that, Your Honor. There is no indication in this case of any exposure to minors or juveniles. It's not a part of this case, and it wasn't at the theatre, and this film was——

The Court. Be sustained.

A. The viewer developes misconceptions that this is the true sexual nature of woman and of human sexuality.

It's not even the true nature of nymphomaniacs, because women in this movie get some orgastic sexual satisfaction out of their sexual antics. This is way beyond that of nymphomania. The nymphomaniac is like the alcoholic who the more he drinks the more he needs; but is never satisfied. The representation of Stewardesses as nymphomaniacs misleads the viewing public.

Many men who see this picture think all women normally react like the sex mad characters in the picture and that if they don't they are being restrained by social inhibitions or prudishness. It causes many of these men to degrade women in their relationships with them.

I think it gives the public a terrible misconception what true human sexual needs are. That's one problem.

The other problem is this. As you mentioned, there is this lust feeling, this primitive raw sexual instinct within every individual that has to be expressed in accord with the civilized society and with the individual's needs.

Now, the things that keeps down this subconscious base mental energy, this subconscious in lust—especially in the male because his sex is more extroverted than the woman's—are two forces.

One is the ego, which is the monitor of the mind. Primitive energies of from the unconscious that would threaten the individual—for instance, if you didn't like someone and wanted to club them to death the ego would stop it realizes that this would not be very profitable to the individual, he would be punished for it. The ego restrains such behavior.

The second thing that helps the mind express these raw energies is the parental (the mother, father and family) and societal influences. Create the conscience. The conscience is embodyment of the teaching, the training of the family in regard to civilized values embodied in the family and the civilized culture.

Social restraints and family values are taken away in this movie. Debased sex appears socially acceptable. Primitive feelings find a camaraderie, a strengthening, and the movie induces the viewer to let himself go in the manner of the characters.

Well, when the social restraints are taken away the conscience and ego are not strong enough to hold back unconscious instinctional energies. They can erupt like a geyser and it's very difficult to recap them. Some people, especially males stimulated in this fashion, try to relieve their tensions resulting from these sexual excitants without proper relationship with the sexual object and in improper ways. They may even engage in intervaginal masturbation. They expect women to act accordingly because they see it portrayed in these movies. They may see a strange woman on the street and expect that she either act according. These men may develop paranoia if the woman doesn't reciprocate. Sometimes they actually abuse a woman, either by rape or other forms of attack. Incidentally, I saw——

Mr. Britz. I'm going to have to object to the incidentals, Your Honor.

By Mr. Clancy:

Q. Would you examine the rest of the photographs and in order explain the various scenes which are depicted in the Stewardesses which you feel contribute to the—your overall opinion that the dominant theme constitutes an appeal to prurient interest?

A. Yes, sir. On the second page we see the airline pilot, airplane pilot, who says, as I recall the words, "Send in the new stewardess." Apparently he had not had an opportunity to exploit sex with her and he was interested in meeting her for this reason.

So, she comes in and they engage in sexual play involving the genitals—although it wasn't shown explicitly at that time—the hand of the pilot was underneath the miniskirt of the stewardess who was sitting on his lap making guttural sounds that were heard throughout the airplane over the speaker. That was to me a prurient type of sex exploitation.

Q. Now, are either of these first two that you have testified to, the one involving Wendy as she—as her stewardess friend calls upon her prior to embarking on the flight, or this initial sequence on the plane with the pilot, is that the treatment of female sexuality in realistic fashion?

A. Of course not because, as I said earlier and let me re-emphasize it, Wendy was fully anticipating to have an orgasm some how or another.

She had some sailor there that apparently was capable of doing this for her.

Now, again, the average woman, and remember we're not talking about normal, because average means the majority, not necessarily what is correct or incorrect, but the average woman doesn't have an orgasm before 25. It would appear on one of these sequences she's just as capable of having an orgasm as her sailor friend, an apparent casual acquaintance of hers. Maintaining an erection indefinitely is asking a lot of some men. Some of these men are not capable of sustaining the sex act that long. If they have an orgasm before the woman and cannot continue, the woman may have degrees of frustration unless the woman is affectionately in love with her partner. The vast majority of women do not have orgastic responses with each sex act. Even if the man is an endurance champion and is able to go for a long time there is no guarantee the woman will have an orgasm anyway, you see.

The misconception here is that all women are so sexy they have the same desire for the sex act as men. In truth, the primitive woman who has no restraints to her erotic desires is found only in fiction.

Q. All right. Would you resume your testimony in the sequences after the involvement of the stewardess with the pilot?

A. Well, there is a continuation, as you see, of the pilot and the stewardess of this little episode here. Then on the third page there is a setup for what's going to happen now that they have landed and are about to embark on an evening in the city.

The page that I'm looking at now, says "Part 4". It shows a girl in some sort of schizophrenic behavior sitting on the floor nude, as you can see.

The nudity in itself is a form of exhibitionism which prompts the viewing public to revert to this perversion, an infantile stage of sexual development noticeable at the age of four, five or six when children delight in running around the room nude and watching other people undressed.

Q. Do you recall in that particular sequence all of the females were actually nude?

A. Yes, they were, but the pictures I'm looking at as I'm going down the page just show this one woman. I'm coming to that on the fifth page—the two, three, four, fifth column show the other women coming in nude, and so we have a display of complete group nudity.

Again, nudity is an infantile form of childhood sensuality. To a degree the childhood pleasure continues to exist in the adult. It is ancillary excitation to mature sexual desires which aims to have genital sex with an individual that one loves. Exhibitionism and voyeurism do not replace the sex act in sexual relationship between sexually normal human beings. Public sexual displays invite the viewer to regress, to go back to his early sensual memories and to bring forth from the unconscious mind those infantile pleasures that are always retained there. The unconscious memories of the five-year old's sexual delights. If this regression continues often enough and there are many individuals who are subjected to this type of pornography who make permanent regressions. They relearn to fulfill their sexual needs through watching nudity and then masturbating. They cease relating normally to a member of the opposite sex and to the heterosexual relationship. Exhibitionism and voyeurism become primary desires.

Q. Would you say that this group meeting of the female stewardesses in the nude state in a group like this, is this normal for female sexuality among stewardesses?

A. I think the normal individual in sexual expression——

Mr. Britz. I'll object to the question related to normal stewardesses and not to normal women, and I suggest that the witness would have to indicate his knowledge of normal stewardesses.

The Court. I think you're correct.

Mr. Clancy. All right. I'll rephrase the question.

By Mr. Clancy:

Q. Is the group meeting of women in the nude normal as to women groups in general in our society?

A. Normally, all expressions of human sexuality on the physical level are intimate, private affairs. Most women have more modesty than this. This doesn't mean they have been affected by social inhibitions. As a matter of fact, some anthropologists define the difference between man and other higher animals by the fact that humans wear clothes.

The average normal woman would be inclined not to reveal her body with such utter indifference—even with women.

There is a normal type of embarassment to this type of display. I don't mean to say that that would necessarily mean that all women who appeared indifferently in showers with other women or did this sort of thing were abnormal, but it would cause me to be suspect.

Q. Would you reveal—would you continue with your consideration of the sequence in which, as depicted on page four, the lone stewardess returns home to find her parents not there and the acts that occurred thereafter?

A. Yes. I think this lone stewardess depicts what we see here, a picture of perversion, and in her perversity this girl has become psychosexually distorted to the point where she is now using drugs.

As you recall, she says, "I'll take a trip, too," meaning the L.S.D. trip, and then that fades out. The movie comes back to her later when she is on her L.S.D. trip. I'm on page five now.

Q. All right. Would you resume your testimony insofar as the other scenes are involved?

A. Yes, sir. On page five we see another gradual but more discrete buildup in this movie of another sexual relationship publicly displayed. There are a number of leading characters shown in this picture. It seems, from here on in this scene there is a little more culture used—a little more refinement and making of an effort to develop some personal relationship with the stewardess before she is involved. He picks up and makes a date for dinner. One knows however, at least I think it's reasonable to assume, that the date is for the purpose of getting into bed.

On page six, or part six it's labeled, we see the continuation of this wooing. It is a more normal approach to having an affair, if one is going to consider a one night stand an affair, and I don't see anything prurient on that page, sir.

On part seven we see again the girl coming into the apartment. As the scene progresses the movie goes back to another stewardess who is disrobing and about to engage in her psychodelic sexual fantasies. Again, many people who have been perverted revert to drugs in order to conjure up sexual fantasies. These people are really impotent. This girl is about to use drugs to conjure her sexual lust. We see again nudity expressed without any effort to cover up and any form of modesty. I think this is prurient, in 3-D, it certainly provides more reality.

We see this young lady continuing her psychodelic trip. In her sexualized fantasy trip she engages in sex acts with a stone object which happens to be carved into the face of a man. It is the base of a lamp with a bulb and lamp shade. This stone man becomes her lover of the moment, and then the acts she depicts here are very prurient.

Aside from the caressing which goes on in the beginning, we see the young woman in the fifth column obviously engaging in what she says is sexual intercourse with this inanimate object. She masturbates herself with the lamp. We see, subliminally reflected here, a picture of an actual hand which is a part of her psychodelic picture because there was no man in the room. The producers of this distortion apparently felt it would be sexually more realistic if a hand were shown grasping at the buttocks.

Then on page nine the young lady continues her fantasy of an orgy. We see her using the stone figure to apparently engage in oral-genital copulation. This actress is not acting normally regarding sensual excitement. She is acting. I have some movie people who come to me as patients and I know that the producers tell these girls exactly how to grimace and how to act. It's not the experiences of these women—they follow the male producers' directions on how to act.

One woman complained to me very bitterly——

Mr. Britz. Object to what his patients have told him.
The Court. Sustained.
A. At any rate, the whole sequence from this page nine is most prurient to the human mind.
Q. Now, did the audible portion of the Stewardesses that you saw have anything that contributed or detracted from the visual effect on the audience?
A. Of course the whole psychodelic scene has a tendency to desensitize the mind. It's a very morbid type of interest in sex.
To me this was one of the most prurient parts of the film, although it's hard to say which is worse, cancer of the lung or cancer of the stomach.
Q. Resume your testimony as to the scene depicted on part ten and beyond.
A. On page 10 we are now taken up with the solicitations of the airline pilot. Here again the pornographers would indicate the women are more rapist than men, which is not true.
Normal woman needs to express her sexuality in conjunction with compassion and affection and esteem. She must feel she is held in high regard by her lover or else she becomes impotent for the sex act.
Getting back to this picture here. The stewardess is calling the man to make the date. Then we see scenes of communal type of life that goes on after dark among the stewardesses which is obviously completely related to sensual pleasures.
I don't think there is any doubt in anyone's mind, and I must say there wasn't any in my mind, that miniskirted scene with the young lady shooting pool with the cue stick and the whole bit had very sensual meanings and implications.
I don't want to bring in too much of Freudian psychology, but many of these things represent phallic symbols when shown in this manner.
At any rate, the general atmosphere is one of preliminaries to carnal sex.
Q. All right. Directing your attention to part 11 and the depictions thereon, would you explain the manner in which those contributed to your opinion?
A. Yes. Well, here again we see this stewardess, who just started working for T.S.A. Airlines. She is visiting the pilot that had some love play with her in the cockpit.
One sees him begin sexual relationships with her. He has intercourse with her in various positions (which are normal, because hererosexuality is not contingent on what position is assumed as long as the gentital organs are properly employed.) It isn't the positions that are abnormal but there is obvious oral-genital type of interest and a tremendous amount of exhibitionism and voyeurism that involves not only the actors but those in the audience identifying with these characters.
In this sequence the man doesn't even know who he is having intercourse with. As he copulates with the stewardess, one female after another is depicted in front of his mind. His eyes are closed and he is just going through the motions with the girl of the moment.
Now, this is what happens to people who engage in promiscuous sexual acts with indiscriminate partners and with indiscriminate sex on the physical level only. They have sexual relationships so indiscriminately the partners have no value on them. It's a regression to primordial times when there was no need to be in love, or being in love played no part in the sex act. This pilot apparently has regressed to that level where the sex object involved makes very little, if any, difference.
He's not even thinking of the girl he is involved with, he is thinking of a number of previous stewardesses, and I don't feel he has any relationship with them either besides the actual physical aspects. He is incapable of affection.
There is, today, in the younger generation a tremendous amount of mysticism which comes about from their sexual behavior. I think it's because they are——
Mr. Britz. I'm going to object to this. This isn't responsive to any question.
The Witness. I'm leading into part 13.

By Mr. Clancy:

Q. Inviting your attention to the audiences 18 and over, what is the effect of such portrayals as that which you have alluded to; that is, the sexual contact between the pilot and the stewardess on their first meeting, what

effect does that—would that have on a viewing audience of individuals 18 and over?

A. Well, it seems to substantiate for the viewing audience what the pornographers and the free love sexologists are trying to sell to or foster on the public, and that is that women have the same unbridled passion for the sex act as man, and it makes some women feel inferior to feel that they don't have this behavior. One of the big problems we have, at least I have with patients and I know most people in psychiatry have, is the type woman coming for help because she wonders why she is not having orgasms and explosive lust every time she has sexual relationships. The false indoctrinations of pornographic influences leads to break up in marriages, it leads to friction between man and woman, it leads to misconceptions, it leads to a feeling of inferiority on the part of woman which then makes her experiment with other false teachings in the hope she will find the anticipated satisfactions the pornographers claim she should have. This type of thing just normally does not exist.

It doesn't even—it isn't this way in the nymphomaniac, whom I mentioned has intercourse like an alcoholic drinks: she doesn't enjoy it and the more she engages in sex the more she wants and it doesn't do anything for her except destroy her.

Q. Is the portrayal of a stewardess on her first meeting with the pilot—or the depicted personality that she was in the film of having sexual intercourse in the first date, in your opinion is that an honest portrayal of female sexuality in our society today?

A. It is not an honest portrayal at all. I'm not saying that this doesn't occur and I don't say it can't occur. I say these pictures are glorifying more and more debased types of free love relationship. Because of the frustrations involved——

Mr. Britz. I'm going to object to the rest of the answer, Your Honor, he's answered the question.

The Court. You may answer, you may complete your answer.

A. Because of the frustrations involved there then becomes a dissatisfaction between both sexes, so that men may pick up these girls on the first date but they don't come back to them and they don't remain with them. They keep seeking other women to satisfy not only their physical desires but their affectionate needs that they are longing for. When their affectionate needs ar not fulfilled then their so-called "love" for these women turns to hate and they become very sadistic and masochistic not only to the women but to themselves. This is a sequence that follows psychologically in very clear cut order. It's been very well defined by such eminent people as Freud and Theodore Reich and Helene Deutsche. Dr. Deutsche wrote the two volume book, Psychology of Woman, I think is quite accurate. The work of these analysts can be substantiated clinically. There is nothing new to this. We know what happens if a person gets pneumonia. What the psychological pathology is just as in the lung pathology.

Q. All right. Directing your attention to page 12 in the——

A. May I say one thing, counsel, please. I didn't mention that they show a picture here, and it's over to the side so I skipped it for the moment, but it does show a woman masturbating herself.

The Court. What page is that?

The Witness. It starts on page 12 and goes to 13. This is the woman that called the pilot, sir, and she wasn't able to get a date with him.

The Court. Oh, yes.

By Mr. Clancy:

Q. That was my next question. Directing your attention to the last column in page 12 and the scene, that particular scene, how did that contribute to the overall field of the prurient interest?

A. It's all a pruriency and its all due to perverted love. You see, this type of sex act, self masturbation, to a degree in a young child five or six or then in beginning puberty can be normal. It should't be condoned. It shouldn't be used as a method of developing frequent orgasm. The child should be lead to make a more mature development.

As a matter of fact, character develops, we know psychologically, from the suppression of masturbation. This is the way the individual develops his

character. But here you see an adult engaged in this wanton disregard. Masturbating herself, all she is accomplishing is self love and self excitation.

This is an unhealthy type of psychosexual development. In the human being we need to love someone else, we need to project our love. We cannot become psychopathic and remain interested only in gratifying our own affectionate and sensual needs. The mature individual, the individual with a conscience, the individual with compassion has to relate to somebody. He can't lie in bed and masturbate and fulfill his sexuality.

Q. What would be the effect on the average male in the audience of the depictions of the nature of the scene you have just testified to?

A. When the male sees a woman doing something like this or involved with another woman his sex is highly stimulated. It was during this type of scene that someone in the audience couldn't contain themselves in the movie I was in and——

Mr. Britz. I'll object to that, Your Honor. The question has to do with the average, not the goof ball on the street.

The Court. I think he is showing what the effect of the movie can have on someone, and as it relates to this particular thing he may answer.

A. Well, the individual in public with all restraints withdrawn now, (because there is nothing as far as I can see that would sink lower into debased sexuality than what this movie shows from beginning to end every sequence leads up to another form of perversion) in such an environment, the viewer, the public, the individuals in the theater loses some of their capacity for restraining instinctual energies and it comes out in uncontrolled feelings and sometimes behavior.

For instance, up in the balcony several people were using words allowed that were dirty, such as "shit," if I may say so in this court for purposes of truth. Their expressions were in reference to the fact that they were saying this was great sex and they had done it before. Those were the remarks coming from some of the audience in the balcony.

Q. Were you in the balcony?

A. No, I was in the orchestra.

Q. Inviting your attention to page 13 in the last column, the sequence, the scene involving the brunette and the co-pilot and would you explain the contributing nature of that particular scene?

A. There is nothing prurient in the scene. Here the woman again is making a solicitation of a stranger—well, some person that's near the bar with her—to engage in a sex act after having just left another male companion.

Q. What was your understanding of the portrayal as to the room that the pilot and the brunette resorted to after their initial meeing?

A. Well, that would be an inference, sir, because you can have heterosexual relationships in a posterior position, or it could have been sodomy. I don't know what it was portraying.

If it was sodomy it would have done a tremendous amount of physical damage to this woman to have gone through these gyrations analy. I think her rectum probably would have been torn very badly, so I assume it was genital relations.

Q. And what would be the reaction of the average viewer in the audience to a scene of that nature?

A. Well, here again I don't think the average individual recognizes the medical limitations of the human genital organs and the human anatomy. I'm sure some viewers may believe one can engage in such sodomy. Some poor girl could get hurt if she follows the example in the movie. If it were the other thing, heterosexuality, they may try to copy this example, too. People do identify and try to act out what they see in the movie. We know this to be a sound psychological fact, people copy examples of human behavior depicted in the mass media and in books and other areas of the entertainment media.

Now, if this was a heterosexual act, some girl may try to reproduce the tremendous erotica depicted. She almost certainly would not feel the anticipated pleasures. I should say she most certainly would not experience them. I can't take every case in the world, but again we're talking about the normal woman. She would not be able to respond pleasurably to this type of loveless carnality.

Q. Did the sound track that you heard, did that register sounds of anguish or joy or what on the part of the woman through this act?

A. I think taken in context with the whole picture of how it sexually depicts woman and how they gutturally emphasize their orgastic responses I would think the sounds depict erotica.

Q. Inviting your attention to the following sequence on part 14 in the last column involving the two girls, Jo Peters and Kathy Harris, will you explain how that scene contributed to your overall estimate of the prurient nature of the film as a whole?

A. This is the beginning lesbianism scene starting at the bottom of that page?

Q. Yes, sir.

A. In the last column and goes over to page 15 and it's concluded, I think, on page 17.

Well, obviously this is the perversion of lesbianism. I think it again could mislead some people into trying to find the pleasure that apparently these two people were finding.

Q. What is a lesbian relationship?

A. It's a relationship in which the libidinal instincts of an individual are so limited that if they are projected on another person it must be a mirror image of herself. If libidinal energy is projected onto a love object there is not enough love left over in that individual's mind to keep the destructive instincts in check, and so the only type of individual they can love is an individual much like themselves.

It's a form of childhood self love, and the acts the lesbians go through are oral-genital contact, manual manipulation, mutual masturbation or self masturbation while they're engaging in contact, exhibitionism or voyeurism. There are variations in how they fulfill their sensual pleasure, but it's a perverted type of sexual behavior.

Now, it is important to realize perversions don't do anybody any good. There's never been a pervert I've ever seen, treated or read about in the medical literature who doesn't have a tremendous amount of masochism or sadism. The reason is that the frustrations from their incomplete sexuality are converted into self destruction as well as destruction of the love object.

Sometimes there is an actual killing of the love object. Fortunately, in most cases the love feeling is able to sufficiently repress this sadistic feeling. Perversions are most abnormal. But the point is here that these types of movies make the abnormal seem normal. There hasn't been one normal sexual act or sexual relationship in this whole movie.

You didn't see one complete relationship, you didn't see one compassionate relationship. The closest you got to that was the slight wooing of the girl by taking her out to dinner first. But such a casual relationship leading to a sadistic, masochistic orgy culminating in a suicide and murder scene can hardly be considered normal.

Q. What would be the effect on the average viewer in the audience of a scene such as this lesbanic relationship between the two girls, Jo and Kathy?

A. People have a tendency to try to imitate what their peers show them. Movies are tremendous triggering mechanisms.

Dr. Lawrence Hattera, at a meeting of the American Psychoanalytic Physicians in New York, stated that——

Mr. BRITZ. I'll object to what Dr. Hattera said.

A. Then I'll state it without Dr. Hattera, if I may.

There are environmental triggering mechanisms that can set off an individual into homosexuality—in this case it's lesbianism, homosexuality among women. Among these triggering mechanisms—and I agree with Dr. Hattera—the most important ones are suggestive homosexual literature, movies and plays.

This tempts individuals to try to act out what they have experienced in a very real fashion in the world of make believe. You see, the viewer—and I'm not talking about a Court under social restraints and restraints of individual consciences seeing the movie for a social purpose—buying a ticket does so to be entertained. He relates to these movies he is feeling much of what the characters depicted are feeling.

This is just the same as if one is involved in more normal types of literature and movies. If the hero is suffering, the reader is suffering or the viewer is suffering. If the hero is pleased, you're laughing with the hero. It's an identification. It's a means of escaping into the fantasy world from the world

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of reality. But the fantasy world when it's depicted like this so realistically and when it involves sexuality is not fantasy. It becomes real life and leads people to accept it as such.

Q. All right. Directing your attention to the sequence which followed, that is the heterosexual relationship between the stewardess and the Vietnam veteran.

A. Well, here again—I beg your pardon. I didn't interpret it as heterosexual, sir.

Q. Would you explain? Well, that particular sequence, would you explain your opinion as to how that contributed to your overall estimate of the pruriency of the picture?

A. Here again it is another perversion. Here is an oral-genital relationship. I don't know if you caught it, but this man never took off his pants. I think if you will look at what is labeled here as 1143, 1144, 1145, 1146 and so forth. I looked at this very closely because of the fact I knew we were going to be discussing it, and I never saw the pants come off this fellow.

The only thing I ever saw him do was engage in osculatory methods of sensual pleasure. Oral-genital sex is a very regressed stage of sex. The early infant gets his sensual pleasures from sucking the bottle, of course, but for an individual who is now an adult to get his fulfillment at this level is a perversion and it leads to masochistic-sadistic frustrations.

The only thing you see with this man is the constant using of his mouth all over this woman's body. Then as you recall later on she—if I may point out to the Court, there was a point here where she was watching him as his head is in her perineum—yes, it's on page 18. At any rate, she's watching him as he is involved with mouthing her genital organs.

Now, this is not only perversion but it's physically bad, because the organisms that are in the vagina certainly are very foreign to the mouth. One of the things we're seeing more and more today in many perverted youth and adults—fortunately they're still the minority—is mouth lesions of most unusual characteristics due to oral-genital sex.

You have to go back to your studies to find out where these new organisms come from. You find the mouth sores are produced from organisms found in the secretions in the vagina and from smegma of the penis. These organisms are most foreign to the mouth. These mouth lesions are due to flaunting nature, when you go against natural intentions, when you use organs in a way they're not intended to be used. If you were to use the eyes to scrape up dirt from the ground, eye tissue is destroyed. When genital organs are used improperly or if you use mouth organs improperly you're going to cause illness, and we do see a lot of this.

If you will go on page 18, if it pleases the Court, we see this man, this Marine engaged in oral-genital relationships. I didn't see him even one time to try to engage with this girl genitally. He kisses the mouth, he kisses the breast and then his head sinks down in her groin. We see her affected by apparent exquisite erotic feeling. That again I believe is a——

Q. You're referring to the photograph on page 19 in the top of the second column?

A. Well, there was one where she's actually looking down upon him as his head is sunk into her perineum.

Q. Is that photograph 1309?

A. Yes.

Q. Is that—are you familiar with the term cunnilingus?

A. Cunnilingus.

Q. Cunnilingus, what is that?

A. That is where the male partner uses his mouth on the female's genital organs.

Q. And did you understand the scene to be depicted at that point to be the act of cunnilingus?

A. It would be my impression that would be what is involved here, although the picture doesn't show the actual act.

Q. All right. Directing your attention to the following sequence involving the advertising aide, Colin, and the stewardess, Semantha, depicted on part 19, would you explain how that particular sequence—and what occurs thereafter, how that contributed to the overall—your overall opinion of pruriency?

A. Well, of course this was the finale to the show, I think, and another form of perversion, the sadomasochist.

Here is a man who wined and dined the woman, has every opportunity to develop a companionable relationship with her. However, because of his perversion, when he goes to bed with her when she finally gives herself to him—of course, the pornographers would have you believe he gave himself to her—he abuses this woman terribly.

As you recall, when it's all over and she gets out of bed her face is just one mass of bruises. In his sexual relationship with the heroine he brutally hurts her.

Now, you know, engaging in the sex act doesn't necessarily mean you're going to engage in mature—in a mature sex act. Again I use the word inter-vaginal masturbation for people that engage in the type of sex act shown in this movie. They're just using the vagina as a receptacle for sperm. But this man's real pleasure apparently came from his harming this girl. She herself was a masochist. She stood there stoically, as you recall, without showing, evoking any emotion as far as passion is concerned, occasionally expressing pain. She had to be a masochist to subject herself to the physical sexual abuses.

Q. What would you term the human sexuality which was depicted by the female and male in that particular sequence?

A. This is a form of sadistic, masochistic sexual orgy that involved male orgasm perhaps through genital excitations.

Q. What would be the effect on the average viewing audience of this particular scene or scene of this nature?

A. Well, again I think this scene ties in with the whole movie, and its effect is the same as all the picture's effects. It leads the viewer to believe the purpose of human sexuality is to have an orgasm by whatever means you can have it, and this is what's been portrayed throughout this picture.

I may say, as I mentioned earlier, that all perversions are attenuated with their sadistic, masochistic components.

Here again we see that this sadist, masochist component pure and simple. Instead of killing themselves gradually they killed themselves by murder and suicide.

Some sadist, masochists do it by alcohol, drugs or general degradation of their physical and mental being.

The last scene in the picture, of course, shows their airplane taking off and you're lead to believe the next round of sexual debasements will begin that night.

Q. Dr. Anchell, do motion picture films like The Stewardesses have a notable influence on society patterns and values?

A. Yes, sir, and if I may just expand the subject for the purpose of being truthful with the Court, every individual's activity has an effect on society. It's as the author said in For Whom the Bells Toll to the effect that each man's pain is the next man's pain.

Each man's suffering affects the next person, and when people in our society are perverted it affects society as a whole. When the culture becomes predominantly perversed there is no room left for the mature individual.

Q. Well, in the 25 years of your experience, have you noticed any increase or decrease in the amount of adult, juvenile perversion in sexual sexuality?

A. In my own——

Mr. Britz. I'll object to that, Your Honor, I don't think that's within the scope of our inquiry here.

The Court. I think it has to be related to the film. The objection will be sustained.

By Mr. Clancy:

Q. From your practice, Doctor, in the 25 years, have you noticed any influence of movies such as this upon your patients?

A. Yes, I have, sir.

Q. Would you explain that to the Court?

A. Well, again I think these movies have a very definite effect upon the population at large as well as my patients, who represent every day people really. But aside from my observation of patients, I observe, too, the effect on the environment, and the effect is, as I mentioned,——

Mr. Britz. I'll object. He answered the question and now he's moving on to a new area, the environment, Your Honor.

Mr. CLANCY. It's all part of the one answer, Your Honor.

Mr. BRITZ. The question has to do with his patients.

The WITNESS. The effect on my patient is——

The COURT. I think he's gone beyond that and said that his observations have been that his patients reflect the attitude generally of society.

The WITNESS. My patients are not abnormal people in the sense they're in mental institutions or limited to psychotics, they're every day people.

The COURT. You may answer.

A. Thank you. I find that this type motion picture is leading to more and more perversity. I'm finding it's leading to more and more impotence in young people, to more and more drug abuse, more and more criminal-antisocial behavior and in general to a more and more psychopathic environment.

Q. Do movies fulfill a basic human need of the society—the individuals in society?

A. Very definitely. It's just as essential to have plays and movies providing a fantasy world that we can escape in as it is to have food. As a matter of fact even primitive man drew pictures on the wall and told stories. Storytelling is as old as biblical times. In all ages man needs escapes from the harsh realities of the actual world of reality. He gets relief from these tensions through the fantasy world of movies, books, etc. It's absolutely essential that the people who produce these pictures should provide for normal people and not provide for perverts alone.

Q. Is a monogamous sexual relationship in a—is it innate to mankind today?

A. It is one of the most highly developed instincts in the human being. For that matter, it's a very highly developed instinct in most organized animals; birds and many mammals are also monogamous, but in man it is especially essential. Even in nations where their Sultans have many women there's always the favored wife, the Sheherazade who becomes the Sultan's favorite. In the biblical story, for example, Solomon, was known for his hundreds of wives, but at the same time it was the Queen of Sheba for whom he wrote the Song of Songs, considered one of the most beautiful love poems in the world.

It's always that favorite wife, this need to find the better half, the other half of yourself that relieves loneliness that fulfills the sexual nature of humans. It can only be achieved in a monogamous relationship.

May I say that some of my patients, who have been brainwashed by what they're seeing in the contemporary entertainment media and, too, by some sociologists, psychologists and, if you will, without meaning to be disrespectful to my colleagues, some "go-go" psychiatrists advocating promiscuous relationships, have and do engage in promiscuous sex, but they're monogamous at least during each affair. They do not change partners when they're really in love. The changing partner scene, of course, is probably the epitome of perversion. Monogamy is one instinct that man has not outgrown. It is more and more needed, because as the affectionate component of human sexuality, as the compassionate nature of man develops, it separates man most farthest from the beast. Monogamous relationships provide the most profound expressions of love.

Q. In your opinion, do the sexual films like—do films and the sex scenes in The Stewardesses affect the monogamous social values?

A. Why certainly, it would lead you to believe that promiscuity is normal. There is no monogamy shown in the movie.

Q. Doctor, in your book you refer to a disease as psychological venereal disease. Would you explain that and whether or not The Stewardesses is a type of motion picture film which would be—would have the tendency to spread that disease?

A. Well, by psychological venereal disease, I mean a mental disease due to abuse of the sexual instinct.

Now, we're all concerned about physical V.D., gonorrhea and syphilis and so forth. A great deal of money is spent on trying to correct this problem which is due to sexual debasements to a great extent. But what is not generally recognized is that these abuses, these sexual relationships that are associated with physical V.D. also causes mental V.D. of psychosexual nature.

Q. Doctor, independent of the viewing audience, would the knowledge that the film The Stewardesses was playing in a neighborhood have a deleterious effect on the psyche of minors and over——

A. Yes, it would, because, you see, a minor has one aspiration, he's trying to become an adult. This is the greatest drive for a young person. The way he becomes an adult is to reproduce what the adult does. He plays the games the adult does and follows the adults' mannerisms. Of course, these movies show that adults play the game of adultery and perversion and promiscuity.

This doesn't mean young people are lacking in discrimination. They're quite aware of what's going on. But if these are pictures limited to adults then to become an adult and do what adults do they struggle even harder to become involved in these activities that older people.

Q. Would you say that such films as The Stewardesses contribute to the generation gap, limiting your question—your answer to your previous statement that this type of audience would not see it but would know it was in the community?

A. It would be a very contributing factor for this reason, when you talk about generation gap the older person, although he may regress in his sexual life, he still has a frame of reference. He still has values that you and I—let's say 30, 40 year olds or whatever. Well, you could be ten for that matter, but most of our generation did have family, religious and social values with which to produce a conscience. Most of our generation, of course, not all, did not have the amount of exposure to promiscuity, perversion and pornography that the younger generation is exposed to and indulges in today.

Now, when a girl or boy begins to have sexual relationships in puberty, 13 and 14, there is an interruption to the development of psychological needs for both the male or female. One such need is the need to idolize the love object. Premature sexual experiences relegates sex to simply a physical phenomena without the need for being in love. This is very devastating to the development of the harmonious feminine woman. It interferes, too with the motherhood needs. The promiscuous female is frustrated. Her disrupted feminine psychology causes continuous unhappiness. Although the boy's sex desires are more extroverted he, too, needs idolization of his love object and the feeling of being wanted and being cared for by his companion. Fulfillment of direct physical sex aims doesn't allow young people an opportunity to develop the normal psychology associated with the art of loving. Premature and perverted sex produces psychopaths. In my opinion the court needs to be helpful here just like they would be in traffic laws.

Mr. Clancy. We have no further questions, Your Honor.

The Court. Take a ten minute recess and we'll proceed with the cross examination.

(Recess taken.)

The Court. Proceed with the cross examination.

CROSS EXAMINATION

By Mr. Britz:

Q. Dr. Anchell, apparently you feel the mass media are doing a disservice to the American people at the present time, is that correct?

A. No, sir. I said that there is part of the mass media that is involved in this type of portrayal of human sexuality, and I might add excessive violence, that are doing a disservice.

Q. Violence as well?

A. Excessive violence.

Q. And which mass media do you refer to?

A. Well, we see more and more of the entertainment media, the movies, books, television responsible. Of course, the sexual problems, the psychosexual problems that are shown on television haven't reached this degree shown in the cinema, at this time.

Q. You feel it's leading in that direction?

A. I think they're making advancements toward that direction.

Q. And, of course, these are—this is a media that's shown into the home without any restrictions as to who sees it?

A. Yes.

Q. So that if television were to be dilatory, as dilatorious as the movies its effect might even be greater because of the larger number of viewers?

A. Yes, it would destroy family structure. It also would destroy religion. No structured religion or family—unless one thinks of wierd religions that

some of my hippie patients have developed, or families such as the Manson horde—will condone public sexuality or perversion.

Q. What direction do you see television going in this regard?

A. Well, I see the television taking their cue from the movies. It seems to be coming more and more oriented to direct display of human sexuality in its physical aspects and perversities.

Q. You feel that's bad?

A. It's not a question of bad, sir. I'm not a moralist, nor am I a theologian. I'm simply stating it's not conductive to normal life. If something helps life I'm for it. If something destroys life I'm against it, and I see this type of sexual debasement as destructive to life and, therefore, I'm not for it.

It's not a question of good or bad. I am not testifying as an expert in theological matters. I do think, however, there is an instinctual morality that goes hand in hand with normal sexual instincts.

Q. Then do you see a trend in television today which is debasing normal human relationships?

A. Well, it seems to me that the television is beginning to do the things that I just mentioned.

Q. And you feel they should be stopped?

A. I hope they don't continue to progress.

Q. I take it you feel the movies that you object to should be stopped also?

A. These movies should definitely be stopped.

Q. Well, the——

A. The type I'm testifying on today.

Q. Well, you're only testifying today as far as The Stewardesses so far.

A. Well, that's one I say should be——

Q. You feel it should be stopped?

A. I feel that some restraints should be made on this sexual—the exploitation of sexual debasement.

Q. I assume that this isn't the only objectionable film that is playing in America today?

A. Well, I presume you are right.

Q. There are a great number of them, are there not?

A. I think so.

Q. Films that you would find objectionable?

A. Not personally but from the psychological standpoint, yes.

Q. All right. For the same reasons that you have given testimony about today?

A. Yes, sir.

Q. And some of those movies are showing in so-called skin houses, are they not?

A. Well, I'm really not too familiar with what you mean by skin houses, because even the more elaborate theatres nowadays are showing these X rated films.

Q. In fact, there are films that are rated G and R that you object to, isn't that correct?

A. There are films that—the public has become callous to these ratings and are beginning to accept more and more open sexual depictions on the basis they're protected by these ratings, and these ratings are simply set up by movie industry experts who put their stamp of approval on it. Since I have had some little association with the movie industry I know that ratings can be changed if it so behooves the exhibitioner or the distributor of the movies. In answer to your question there is much in today's G movie that does show open sexual acts.

Q. And those movies to that extent would be as objectionable as the movie you're testifying about to that extent, would they not?

A. As I said before, a little bit of cancer, to me, doesn't make a person healthy simply because the rest of his organs are all right.

Q. But your opinion is today that there are G movies showing in the United States today that are objectionable for the reasons you've stated and which should be banned?

A. I didn't say that, sir.

Q. Well, isn't that the gist of what you're telling us?

A. Every scene in the G movies that show open sexual acts, whether you show them in theatres, television or in the back alley are still a debasement of the sexual instinct.

Q. And those are movies that children can go to, aren't they?
A. Yes, many children go to them.
Q. All right, and those are movies that have ratings other than X?
A. As I said, they're selfimposed ratings by the movie industry.
Q. Well, do you feel that such movies should be suppressed?
A. No, I don't feel movies should be suppressed on a censorship basis.
Q. Do you feel they should be——
A. However, I do feel that it's the obligation of the court to license movies.
Q. Of the court?
A. Or of some part of society. I am not a legislator and I'm not a lawyer, but I do feel that when the industry or the entertainment media or anyone else, causes a destruction of human sexual instincts, the most important life sustaining instinct of the human being, and when they do this without regard for others but simply for self advantage, in some way these purveyors of pornography should be controlled.

Now, I don't know how, nor do I propose to tell the Court how. But I do know destroying human sexuality is detrimental to the individual and the society of which he is a part.

Q. That they're detrimental psychologically?
A. Yes.
Q. And I assume you would recommend to the Court that it suppress this particular movie?
A. This movie I feel is very devastating to the individual seeing it, and to society, and if it's the Court's prerogative to suppress it then I assume they will do what they have to.
Q. And what about these R rated movies that you mentioned that had these scenes that you found objectionable, do you feel that those should be suppressed in like manner?
A. Sir, I've answered before that it doesn't make any difference what vehicle you use, when you're involved with obscenity and pornographic scenes publicly whether it's R, X, Y or Z it's still the same thing.
Q. Well, then, what is your answer, yes?
A. Mr. answer is psychologically these public displays have the same effect.
Q. And should be suppressed in the same manner?
A. I'm not a lawyer and I'm not here as an expert in that respect. I don't know what legislative action shoud be taken. I'm saying psychologically they're harmful and that's my testimony.
Q. You indicate that you feel the Court should suppress the Stewardesses, did you not?
A. I feel that this movie is devastating to the viewer and society. Now, what action the Court takes I will leave tc them.
Q. And then you'd make the same statement about certain R movies?
A. There's certain R movies that have just as much debasement in it as far as the actual depiction of open sexual acts and perverted sexual acts.
Q. Would you include Butch Cassidy and the Sundance Kid among these?
A. Butch Cassidy happens to be a movie about train robberies throughout which there happens to be one scene after another, of bordello affairs. There is a rape scene and scenes of sexual acts. I think when children go see this it's very harmful.
Q. And you feel that movie has the same objectionable qualities, perhaps not as much in degree, as the Stewardesses?
A. Well, again it's a matter of degree. The degree of The Stewardesses is overwhelming, however.

Butch Cassidy and the Sundance Kid I didn't say should be suppressed and I didn't say there should be legislation. I'm saying psychologically parts are harmful to the viewer, especially to immature minds.

Q. And Darling Lilly also?
A. Darling Lilly has a bedroom scene in which there is actual depiction of a sex act in bed. There is another scene in which the nude heroine slaps the hero in the face while she's taking a shower because he calls her a virgin.

I think that children who are brought into these "G" movies and see these scenes and attitudes are lead to believe that being a virgin is somthing bad and that chastity is no longer a virtue. To that extent psychologically I think they're harmful.

Q. And what rating did Darling Lily have?
A. G.
Q. Meaning?
A. By the movie industry.
Q. What is G?
A. G means—well, in Los Angeles—Darling Lilly, the kids would come free if accompanied by parents.
Q. And what about Butch Cassidy and the Sundance Kid?
A. G.P.
Q. Now, we have a lot of movies that are X rated, is that not right?
A. I don't know how many there are, but it seems to me that the newspapers are replete with advertisements for them. At least, in my area. I don't know how it is here.
Q. And do you feel that these X rated movies are harmful to the public psyche?
A. In the manner in which I testified I do.
Q. All right, and should be suppressed?
A. Again, sir. I don't know how to do this. I don't mean to be Solomon and have all the answers. I'm just telling you psychologically they're devastating to society and to the family structure. The family structure cannot exist in such an environment. I hope the Court will find an answer.
Q. Now, you realize, do you not, that there is a very respectable body of psychiatric opinion which completely disagrees with those statements?
A. I realize that there is a very respectable body of psychiatrists who disagree, and I realize there is an even more respectable body—and by more I mean more in number—who disagrees with that body that you're referring to.
Q. Are you acquainted with the report of the President's Commission on obscenity and pornography?
A. I happened to write a critique for one of the members and I was questioned by other members concerning my findings.
Q. And which member did you write the critique for?
A. One was Father Hill, one was Mr. Keating, and I was also asked to write a critique by the psychiatrist—the only psychiatrist, I believe, on the Commission—a psychiatrist who is at the University of North Carolina.
Q. And, of course, Mr. Keating is the one who filed the dissenting opinion to this?
A. Mr. Linder was on the majority board and Father Hill was on the dissenting side. So was Mr. Keating.
Q. But you are familiar with this report?
A. Yes, I am.
Q. All right. Are you familiar with this statement in it, that research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youths or adults?
A. I'm familiar with that.
Q. Do you agree with it?
The Court. What page?
Mr. Britz. I'm reading from page 32 of the New York Times book Bantam book issue.

By Mr. Britz:

Q. You say that's erroneous?
A. I say that's an inference that the Commission drew from its investigation, which to be quite honest with you, I think a vast number of psychiatrists and professionals would feel to be an inane study. For example, to reach their conclusion the commission provided erotic material. By measuring the amount of semen excreted in the cups they attempted to determine the effects of erotica. They concluded that obscenity and pornography cause no harm.
Q. Well, let's ask the basic question. Do you disagree fundamentally with the conclusions of the President's Commission on obscenity and pornography?
A. I think the vast majority of psychiatrists, professional people throughout the world disagree with it.
Q. That was not my question, please.
A. That is my——
Q. Just answer my question. Do you disagree with the findings of this Commission?

A. My honest answer is I agree with the vast majority of professional people throughout the world who find this erroneous.

Mr. BRITZ. I'm going to have to ask the Court to demand that the witness answer the question.

The COURT. I assume that's his answer to the question.

By Mr. BRITZ:

Q. You disagree with this?

A. Yes.

Q. All right. You know that the Commission found that, "The Commission cannot conclude that exposure to erotica material is a factor in the causation of sex crime or sex delinquency"?

A. I've also testified, sir, that the method used by the Commission was to rely on their staff findings, and their staff consisted of not one physician. It consisted of inane studies such as measuring the erections of individuals exposed to erotica and concluding that erotica did cause social or individual harm.

That is no way to study human behavior or sexual behavior. Sex cannot be studied in a laboratory.

The Masters and Johnson studies put people into a room and the scholars took pictures of them while the subjects engaged in sexual antics. That is no way to study sex or human emotion. No normal person could subject himself to such exhibitionism and voyeurism. They would become impotent under the circumstances. The inferences drawn from the sex academician's statistical-questionnaires in my judgment and judgment of the vast majority of people and professionals throughout the world is entirely fallacious.

Q. Did you put these comments in your critique of this report?

A. No, I didn't.

Q. Why not?

A. Well, I didn't put all of them in.

Q. Are you familiar with the finding of the Commission that the conclusions—that for America the relationship between the availability of erotica and changes in sex crime rates neither proves nor disproves the possibility that the availability of erotica leads to crime?

A. If I may give a truthful answer, sir——

Mr. CLANCY. Page ?

Mr. BRITZ. 32.

Q. Do you agree or disagree with that?

A. I'm familiar with that, but I'm also familiar with one thing I think throws a lot of light on your question.

Q. Do you agree with it or don't you?

A. That erotica does not cause crime?

Q. No, the statement was that there is insubstantial proof that it does either, causes it or doesn't cause it?

A. I disagree with it.

Q. You disagree with that statement, all right.

A. If I can give the Court some further——

Q. You'll have an opportunity to on redirect.

Are you familiar with its finding that the massive overall increases in sex crimes that have been alleged do not seem to have occurred?

A. I am familiar with what you are reading.

Q. All right.

A. And I continue to disagree with that, but what I'm saying——

Q. You disagree with it?

A. I disagree with it.

Q. That's your testimony?

A. That's my testimony.

Q. And do you know this Commission report finds that in fact it reflects the viewpoint of the majority of psychiatrists and psychologists in the United States?

A. In a meeting held at the U.N., where 85 nations attended, the professional people from 85 nations, including the United States, the consensus of opinion of the vast majority were amazed by these findings and by the attitude of American representatives. The foreign delegates concluded, according to Dr. LeJohn, who attended the meeting, that the Americans' delegates condoning this sort of thing is due to this country's greed for making money from the

debased elements of human nature. This happens to be the conclusion of 85 countries I think represent the majority people of the world.

Q. And is that your conclusion as to the motivation of the American psychiatrists that agree with this report?

A. No, I don't. I know that in any organization, whether it be law or medicine, that frequently the conclusions happen to represent social pressures and the pressures of the leaders, and this is particularly true in medicine.

Q. And you feel that the majority viewpoint of American psychiatrists in this field are not their honest feelings, is that correct?

A. No Freudian psychiatrist I've ever met has agreed with the opinion of the Pornography Commission. It happens to be the new fashion with psychiatrists who are not involved in psychoanalytic study but are dealing with the psychological aspect of things in the manner of psychologists and sex professors such as Masters and Johnson who more readily agree with the Commission.

Q. You would agree then that a majority, at least, of American psychiatrists would agree with the findings of the President's Commission?

A. But please keep——

Q. Would you agree to that?

A. I agree that the polls show that. But remember there is a strong minority that disagrees, and they're a very honest minority.

Q. But do you feel the majority is dishonest?

A. I didn't say anything about their honesty. I said that I disagree with the majority.

Q. You realize that I could bring in thousands of psychiatrists to testify in direct contravention to what you have testified?

A. I would assume you could. I am sure pornographers have more money to bring in witnesses for their cases than is available to those opposing them.

Q. Then you feel that the medical profession really is down to the point that they will testify as to who pays the tune?

A. No. I think you can—you have the expense account to have people come out here and pay them.

Q. But I assume you are also giving your honest belief?

A. Yes, I am.

Q. And are you suggesting that if I were to bring a bunch of psychiatrists here, in here who reflected the majority view of America's psychiatrists that they'd be prostituting themselves by testifying?

A. Absolutely not.

Q. All right. Now, you are being paid to testify?

A. That's right.

Q. By whom?

A. I think—I'm holding Mr. Clancy responsible.

Q. Have you testified in cases in which Mr. Clancy has been an attorney in the past?

A. Pardon?

Q. Have you testified——

A. Yes, I have testified.

Q. Before?

A. One other.

Q. One other case?

A. Yes.

Q. When was that?

A. I think it was a couple years ago.

Q. And what movie was that?

A. Vixen.

Q. Was that in Ohio?

A. Yes.

Q. Cincinnati?

A. Yes.

Q. All right. And Mr. Keating himself was the plaintiff in that case, wasn't he?

A. I really don't know. I don't even know who the plaintiff is in this case, although I think I've met him.

Q. You don't know that Mr. Keating was the plaintiff in the Vixen case?

A. I really don't, but I think he might have been.

Q. And you had given a critique to Mr. Keating, had you not?
A. That's right.
Q. All right. So you were contacted by Mr. Clancy to testify in this case?
A. Yes.
Q. And you live in Los Angeles?
A. Yes.
Q. And I assume he lives in Los Angeles?
A. Yes.
Q. You indicated that you belong to the Literary Guild, is that correct?
A. I did. I didn't renew my membership this year, it slipped.
Q. That's just a book buying club, is it not?
A. No, I didn't mean that. I mean it's the Author's Guild.
Q. What.
A. I must have misstated it. The Author's Guild.
Q. Author's Guild.
A. Yes.
Q. What kind of an organization is that?
A. Well, it's an organization of authors. I think the title is——
Q. Authors?
A. Yes.
Q. Oh, authors. Do you belong to the Citizens for Decent Literature?
A. No connection whatsoever.
Q. The question is do you belong to it?
A. No.
Q. All right. What is the overall national organization in the United States of psychiatrists?
A. American Psychiatric Association.
Q. And are you a member of that?
A. No.
Q. You're not?
A. No.
Q. Why are you not a member of that organization?
A. I'm not a member of it because in order to go before them to become a member you have to have three years of residency. I have what amounts to one.

If an individual got out of medical school and went before them and passed their credentials committee or whatever, they can become what they call an accredited psychiatrist.

The majority—well, a vast number, let's put it that way—of psychiatrists in this country are not members of the American Psychiatric Association. Some of the most eminent that I know in Los Angeles are not.

The reason I didn't go for the next two years of residency is because I felt it was a waste of time. The psychiatric institution, consisting of the hospital where psychotics (not everyday people) are institutionalized, the residency training program consisting of taking histories for two years—I could not see this.

The actual capabilities of the individual depends upon his own efforts, his reading, his clinical observations, his interests, his critical evaluation of the patient, his——

Q. Sir, I'm not attacking your credentials.
A. I know you're not.
Q. I'm just asking you why you don't belong to this organization.
A. I'm telling you.

Mr. Clancy. I submit it's responsive to the question. The question was why was he not a member.

The Court. I think he's answered.

A. And I felt that you actually learn about psychiatry learn about psychiatry was from the individual patient as Freud said. There was no American Psychiatric Association in his time either, but he was involved with the critical study of his individual patent. That is why this pornography committee is so erroneous, they're using statistical-questionnaire methods which comes out of an institution, and you cannot study total human behavior by taking questions out of context from the total human mind. You have to have a one to one relationship, and this is what I've tried to provide throughout my over 25 years of experience.

Q. Do you have an ideological differences with the American Psychiatric Association?

A. None whatsoever.

Q. What is the Youth Film Foundation that you are a member of the Board of Directors of?

A. Well, the Youth Film Foundation was formed in order to provide films for young people from, let's say five to about twelve, for Saturday viewing. It has nothing to do with the rating of movies. It just wants to provide funds to have more producers make these movies so the kids could go to these shows and see them without being involved in the pornographic type of pictures.

Q. You indicated that you have seen 15 movies, 10 to 15 movies this year?

A. It was an estimate.

Q. All right. You saw The Stewardesses two weeks ago?

A. Yes.

Q. For the purpose of testifying in this case?

A. That's right.

Q. You hadn't seen it prior to Mr. Clancy asking—calling you?

A. No.

Q. Was that the last movie you have seen?

A. Yes.

Q. What other movies have you seen, this year?

A. Oh, let me think. I don't know whether I saw The Sundance Kid this year or not, but I did see that. I saw Darling Lili. I saw this picture with James Stewart about houses of prostitution, the Cheyenne, "The Cheyenne Club," which was also rated G or G.P. It's difficult for me to recall them right off at the moment.

Q. I take it you didn't like any of those pictures?

A. I liked much of it. I still say that the psychological effect of showing open public displays of raw sexual acts are psychologically improper.

Q. Did you see any movies in the last year that you liked?

A. Well. I tell you, it's getting harder and harder to go to a movie without being a voyeur these days.

Q. All right.

A. And so again in answer to your question, there is the potential for liking much of the story. Why they have to splatter it with the debased sexuality, such as a movie I saw, "Sicilian Clan," which shows a young boy watching his aunt have open intercourse completely nude with a stranger, or someone who was not related to her, and when you are beguiled into bringing your children with you and you have to sit by their side, I think this causes improper development in the child's sexual development. The child should learn from the parents that sex is an intimate affair. He should learn from the parents that modesty is normal and that embarrassment at public sexual activities and feeling shame from intrusions upon ones sexual life is normal. This is pretty hard to do when you're sitting in a theatre full of people who are all condoning it because they're led to believe this is proper.

Q. And what was the Sicilian Clan's rating?

A. G.P.

Q. Meaning?

A. Meaning that you can come there if you are under age, I guess.

Q. How many times have you testified in movie cases?

A. I didn't become aware of these problems until about 1966.

Q. What problems?

A. The debasement of human sexuality and degradation of the female species.

Q. I thought you testified that this is something that's been gradually developing for 25 years.

A. Did I say that?

Q. I thought so.

A. I don't think you will find it in the record, sir. I said it's becoming increasingly more prevalent and I see more of it. I didn't specify the time interval, but in the last—let's say since 1968 I guess I've spent 12 or 13 hours in the courtroom out of my life.

Q. Have you ever testified for the movies?

A. For the movies?

Q. Yes.

A. Well, before—not exactly but indirectly. I'm not answering your question, but I testified for Senator Harmer, a California legislator, for a movie review board. This legislative bill preceded the movie ratings. As soon as it became a possibility, the movie people put in their own rating system.

Q. Well, did you ever testify in favor of any particular movie as opposed to someone who is testifying as you are today?

A. No, sir.

Q. Now, you say you have been to 10 or 15 movies this year?

A. Yes.

Q. And most of them had scenes you found objectionable?

A. I find that G rating has come to mean one sex scene of the type we're talking about here in this courtroom, G.P. is getting to mean two or three, R means at least three and X means ad lib, which is a medical term for meaning "have at it."

Q. So you really can't count on the ratings?

A. I find that the rating has caused a certain callousness in the public mind. People feel these ratings give them protection. The indifferent callousness that is developing is not good because it desensitizes the public to believe that they are within the norm when they're not. I'm not talking moralistically but psychologically.

Q. People are going to see these movies, though, are they not?

A. Well, people in India have cholera. I wish they didn't but, you know, I can't help it.

Q. But people are going to the movies?

A. Apparently they are. Movies are making a lot of money, I know that.

Q. All right, and are you familiar with how many people have seen The Stewardesses in the United States?

A. No idea, sir. I hope not too many.

Q. If I told you it was in excess of four million——

A. Well, as I said, sir, people have cholera but I can't condone it.

Q. Are you familiar with the legal tests of obscenity?

A. Yes.

Q. Are you familiar with the test regarding community standards?

A. Yes.

Q. And the fact that those community standards are to be tested on a national basis?

A. As I said, sir, I'm not here as a witness on community standards, I'm here as a witness on prurient interest.

Q. All right. Let's make that clear then, you're not here as a witness on community standards?

A. That's right.

Q. You don't know what the national community standards are, do you?

A. I have not done any statistical studies on community standards in your community.

Q. Or nationally?

A. Well, I'm aware of what I read but I would not consider myself—if you're asking me am I testifying as an expert witness on community standards, I am not.

Q. All right. Now, you went through a series of sheets showing individual pictures from the movie. Have you seen this before?

A. Yes, I've seen those—you mean the movie?

Q. No, have you seen these—have you seen Plaintiff's Exhibit 1 before today?

A. Yes.

Q. And where was that?

A. Well, Mr. Clancy and I flew to Toledo together from Los Angeles yesterday, and for about an hour and a half I viewed them on the plane.

Q. He brought them from Los Angeles?

A. I viewed them on the plane, yes.

Q. And do you know how they were obtained?

A. No, sir.

Q. You have no idea?

A. No.

Q. Do you know anything about the process under which they're made.

A. None whatsoever.

Q. And I take it then yesterday was the first time you had seen Plaintiff's Exhibit 1?

A. No. I've seen the movie which these are replicas of.

Q. But the exhibit itself?

A. That's right.

Q. Had you seen a smaller version of that same exhibit?

A. I saw a smaller version this morning.

Q. For the first time?

A. Yes, sir.

Q. Now, you have studied under Dr. Kinsey, is that correct?

A. Well, let me explain that. In this course at Columbia Neuropsychiatric Institute there was an accumulation of the most renowned people in the field of psychiatry for the purpose of building psychiatrists for the Service. The need was very acute at that time, and as you probably know psychiatry up until World War II had no practical value.

Q. I didn't know that.

A. Well, it happens to be true. It was a theoretical science. World War II brought it into its infancy of practicality, and I may add that I grew up with it that way.

Q. Did you study with Dr. Kinsey there?

A. Dr. Kinsey was one of the men who was brought into this program to lecture to our class of about 40 students. We received a resume of his findings of the statistics he was conducting at that time concerning human sexuality.

Q. Are you in agreement with his techniques?

A. Very much.

Q. You are?

A. Yes.

Q. His statistical techniques?

A. That's right. He made no inferences from them such as the pornography commission did with theirs. He only gave statistics and he did not try to determine what were the reasons.

Q. But his statistics showed that many of the things that you have described as deviant sexuality are very common in the United States, did he not?

A. That's right, and that's why we have physicians, in order to try to help people who are mentally ill as well as physically ill.

Q. You feel that people that engage in some of the things that you have called deviant behavior are mentally ill?

A. It's psychologically recognized as such.

Q. All right. Is it your testimony then that sexual activity other than the normal genital sexual intercourse is a deviation?

A. Depends upon the age group.

Q. Well, the normal age group 21 to 36 let's say.

A. It may be normal for a young five year old boy to run around the house with his little sister nude, but it's certainly not normal for a civilized grown person to do that in public. That is a deviant sex act, and it may be normal for a little boy or little girl five or six to stimulate the genital organ but it's not normal for a normal person to use masturbation for excessive orgasms. It may be normal for a little girl to have compassion for a very close girl friend without physical sexual relations but it's definitely not normal for an individual to have an orgasm by means of homosexual activities. So, yes, these are deviations and they are psychosexual.

Q. Do you believe that cunnilingus between husband and wife is a deviation?

A. I believe whenever you thwart nature you're going to get in trouble. If nature intended that the mouth be used for orgasms we wouldn't be seeing all the oral lesions we're seeing today.

Q. So your answer is yes, is it not?

A. No, my answer has not been given yet. The answer is that if the man and woman depend upon areas other than the genitals for their primary source of having a sexual orgasm and the genital sex act leaves them cold then they're stunted in the oral phase of sexual development, and I've never seen them have mature relationships—I doubt if these people could have the compassion that a normal man and wife require of each other.

Q. Well, that's based on the fact that this would be their major source of gratification, isn't that the basis of your testimony?

A. I think it would be deviant if it were a major source. In today's environment with movies and pornography and literature many men and women are being led in these directions.

Q. And do you feel these experiments among husband and wife are deviations?

A. For this reason, sir, the normal human being when he or she thinks about cunnilingus, when they think about sodomy, when they think about these type orgastic responses from perversities have a feeling of disgust. Now, this is a normal feeling. Disgust and shame protect the mind from the contamination of the pervert and his perversions. When disgust turns to sympathy or when disgust turns to over tolerance, such as these pictures are causing then there is no natural protection against the deviations that we're talking about.

Q. And you do feel that cunnilingus between husband and wife, which may be just one of the many sexual practices that they have, is evidence of sickness?

A. Again, it's a question that I can't answer yes or no.

Q. All right. You appreciate, of course, that there are many respected psychiatrists who disagree with you?

A. And you appreciate there is an even greater number of Freudian psychiatrists that don't agree with your respected psychiatrists.

Q. There are a number of respected sex manuals which advocate those practices between husband and wife, are there not?

A. Yes, I do know that there are a number of free love advocates who are advocating orgasm by any route that you can achieve them.

Q. And, in fact, historically the world literature is filled with sex manuals from various civilizations, is it not, that advocate these techniques?

A. Whenever civilization resorts to free love and sexual debasement and perversion you have destruction of that civilization, sir.

Q. It's your testimony that that is the cause of this destruction?

A. Psychologically and historically it happens to be the case.

Q. I see, and you feel, of course, that America is going in that direction?

A. I don't know. I hope not.

Q. You seem to indicate on one hand that many of the scenes that you see in The Stewardesses are unrealistic and give a false sense of reality to the public, is that correct?

A. Yes.

Q. And on the other hand you seem to feel that realistic scenes because they're in the movies appear to be unrealistic, is that correct?

A. I don't understand your question.

Q. I think your testimony was to the effect that the movies now days make the normal appear abnormal and abnormal appear normal, wasn't that your testimony?

A. Was that the meaning of your question, sir?

Q. That was it.

A. Then I stand by the statement I made.

Q. And what does than mean?

A. Many people are led to believe that perversity is normal, that there is nothing wrong with being an exhibitionist, voyourist, etc.

One of my patients, incidentally, who is a sex educator for one of the schools in L. A., attends X rated movies then goes home and masturbates while he recounts the sex scenes to his wife. Many of the so-called sex experts of today, many of the free love advocates would say that man has perfectly normal relationships with his wife.

Many people say that sodomy,—and when I say many people I'm talking about the free love sexologists—many say that the oral-genital relationship is normal. Again, when I say many people, I mean the pornographers and their attendant sociologists, psychologists and other supporters.

Q. Let's see if we agree on what you mean. As I understand it, you're saying that in a movie like The Stewardesses sex is portrayed in a very unrealistic manner, is that correct?

A. I said that the portrayal of the female erotica is most unrealistic. Unfortunately, the scenes in the sex acts are quite realistic.

Q. Well, would scenes of normal sex acts on the screen have the same bad reaction that you have talked about?

A. Well, sir, I've mentioned to you that sex is an intimate affair. What you must understand, and maybe I didn't make it clear, is that in a normal

human sexual relationship between mature people engaged in mature sexual relationship, these two people in love, will tolerate a sharing of their affectionate love with children and with humanity in general, but they are completely intolerant about sharing their physical relationship with anyone else. When they have to share such relationships an extreme, intense feeling of jealousy occurs. If they were to regress to sharing sexual intimacies with others. They could no longer love. When sex partners become indifferent sexual objects and simply served for orgasm and no other purpose, love and being in love play no part.

Q. You would say then that the depictions of sexual acts on the screen, whether they're realistic or unrealistic, are both harmful?

A. I say your question is ambiguous. I said that I think the way these girls were shown having the penis thrust into them,—although that wasn't shown, it was obviously what was going on—is not in accord with normal feminine psychology. In the first scene when the picture opens the girl is engaged in a sexual act with a sailor or a member of the Armed Service, and I think that was very realistic, as far as copulation, but not feminine needs.

Q. Realistic or unrealistic?

A. Her lying in bed with her feet spread and the male on top is a realistic way of having genital sex. It's unrealistic as far as the female response and what the viewer is led to believe the female is like.

Q. Are you opposed to realistic depictions of sex on the screen?

A. Well, sir, my testimony here has shown why for quite awhile now.

Q. All right.

A. I mentioned sex is an intimate affair and when you engage in it openly you're regressing to a stage of development where love plays no part in sexuality.

Q. All right. Then we can agree on that. I just want to see if we can——

A. I agreed on that all along, I hope.

Q. Then to the degree that sexual acts portrayed on the screen, you feel that those movies are harmful to that extent whether realistic or unrealistic?

A. I'm afraid your taking my words out of context. I simply said that the portrayal of this--for example, the member of the Armed Service having intercourse with some girl named Wendy was a realistic display of the genital act.

Now, we may not have seen the penis actually in the vagina, but I don't think anyone could sit and watch that and not assume that genital relationships were going on. From that extent they were realistic. From the portrayal of the human emotion involved they were unrealistic.

Q. And they were equally harmful?

A. Well, the unrealistic emotion shown was a misrepresentation, and the open public display of sexuality is harmful to the normal civilized community.

Q. Your testimony apparently is that women have less sexual response than men, is that correct?

A. Women may have very great and intense sexual feelings and they may be as great as men. However, as far as orgasms are concerned, which everyone of our heroines in this movie seemed to be having most frequently, as far as orgasms are concerned Alfred Kinsey showed in his statistics that the average woman doesn't have an orgasm until she's 25.

Secondly, when she does it's no more than once or twice a month.

Now, this doesn't mean she isn't in love with her husband. It doesn't mean she doesn't enjoy his affection and his love and her making love and fusing with him in the genital act. The female orgastic response, which is portrayed in this movie as incessant does not come about that frequently.

Q. Do you think these——

A. And my experience clinically substantiates Alfred Kinsey, as well as most other physicians who have made a study of this.

Q. From your patients?

A. Yes. I think that's the only way a physician can learn is from his patients in matters of this nature.

Q. You understand that the Commission, the President's Commission found that women are just as interested if not more interested in erotic stimulations in the movies and in books than men?

A. Women have great sensual pleasures from fantasizing, but there is a difference between fantasizing and depicting what we are seeing here in this movie. Young girls especially are led to believe that their fantasies will be

equal to the real thing, and when they find that it isn't the disappointment leads to quite a bit of psychosexual problems.

Q. You feel that psychosexual problems are caused by the display of nudity in the movies?

A. Yes. Nudity requires that the individual, whether it's you or I or anyone—I mean if we're attending that theatre as a participant—if we're identifying with the hero and heroines of the picture, we must then assume their feelings, we must revert to being a voyeurist. And, again, the normal individual resents such intrusions in his sexual life and he would normally avoid it; but how can you. Man cannot avoid going to a movie, man cannot avoid reading a book. We need these outlets. They aren't something, as the pornographers would tell you, if you don't like it, don't go see it. Well, where are we to turn for relief from the normal frustrations and tensions everyone has?

Q. I suppose you would feel the same way about slick cover magazines that portray nudity?

A. Well, again I would say that if you are using that for the purpose of arousing your erotica, and for what other reason would you spend a dollar for the material, to that extent it is harmful, you're becoming a voyeur.

Q. I assume you're—strike that.

Are you referring to such publications as Playboy?

A. Again, sir, let me make it clear to you that——

Q. Can you answer that question?

A. Well, I'm trying to be truthful but sometimes you can't do it with a yes or no.

I'm perfectly aware Playboy has some literature in it that may be quite interesting from what I've been told, and occasionally when I've seen a copy I've seen articles that look like they would be. But that doesn't stop me as a physician from recognizing that the sensuous or sensual nudity that's portrayed in that magazine has the same connotation and is there for the purpose of arousing erotic desire, otherwise why should it be there. Are you looking at it medically? Does one buy it to study anatomy? Are you using Playboy for mammary studies on the female breast? What is the purpose except for erotica? And to that extent I say it's prurient, but I do agree the magazine can legally cover up the slime, the disease produced, by means of socially redeeming articles.

Q. Well, are such magazines as obnoxious to you as movies of similar kind?

A. I have no obnoxious feelings personally, sir. I happen to have five children, I've been married one time for 23 years and I think Jim will tell you very happily so, and it's not a personal problem. I'm very concerned about my patients and society and the fact that I feel this nation is being hurt by this sort of thing.

Q. By an undue emphasis on nudity both in movies and in magazines?

A. Well, again you're using the word nudity as though there is something bad about nudity. You know, I examine patients every day, gynecological examinations and so forth, and there is nothing wrong with that type of nudity, but we're talking——

Q. But you're talking about public nudity?

A. We're talking about nudity for the purpose of erotica.

Q. Right.

A. Yes, sir, I do think that's bad.

Q. You found, apparently, some phallic significance in the use of these pool cues by these stewardesses who were playing pool?

A. I would rather not go into explaining that phallic symbol to the Court. Unless one does hear the dreams of patients and have some knowledge of dream analysis and extensive experience with this matter it seems rather childish to talk about this phallic, but Freudian psychology and dream analysis definitely show such an object could be psychologically used as a penis replica.

Q. Did you feel that that appealed to the purient interest of the viewing audience?

A. I think that the viewing audience seeing this picture is led, in many ways to believe things subliminally, without realizing what's happening. I don't think the average person in the theatre I attended even knows the definition of the word phallic. However, the fact remains that it does influence them, and the subliminal psychodelic lights and the harm that was thrust on this

girl who was masturbating with the—with the head of a marble lamp, all of these things weigh on the viewers mind and it gradually builds up sexual impressions.

Q. Including the use of pool cues?

A. Well, let me strike my remark about the pool stick. I don't want to go into the psychological meanings of symbolism, if I can avoid it.

Mr. BRITZ. May I have just a moment, Your Honor. I think I'm nearing the end of this.

By Mr. BRITZ:

Q. You indicated, I believe, that the use of masturbation as a means of gratification shows character flaws, is that correct?

A. Well, again I must take just a moment to explain. Human sexuality goes through a process of growth. A child doesn't come in this world ready for genital sex acts with a love object. There is the early stage, the oral development, which some people get hung up in or revert to what we've been discussing, the oral-genital needs.

There is exhibition and voyeurism that exists at the age of five and six which is perfectly normal for that age group, which some people have a carryover and which is psychosexual development.

Between the ages of six and twelve there is what we call a latency period, a sexual stage in which direct sexual aims are converted into compassionate feelings for mothers and fathers when people are taking care of the child.

Between the ages of 13 and 21 there is a resurgence of genital interests, but during this process of resurgence of genital interests there is masturbation that occurs normally in the boy and girls to a lesser extent. This should not be condoned by family, teachers, parents or society. By redirecting this sexual desire, character is developed. The sublimation of masturbation does produce character within the individual.

By avoiding promiscuity there is developed within the girl and boy an idealization of their love object. The love they feel for their parents between the age of six and twelve is projected onto other individuals in the outside world. All of these things are normal development. This pornographic type of movie that we are looking at today in my judgment and in my clinical experience is devastating to the human sexual development to children and young people of all ages, as well as adults.

Q. You are aware, I assume, that there is a substantial as well as a respectable portion of the psychiatric profession who believes that such repression on masturbation causes guilt feelings which are much more harmful than any other type of difficulties which might be created by masturbation, aren't you?

A. You're misquoting me.

Q. I'm not quoting you at all.

A. Well, you're misquoting a statement that led into this.

I said there is a normalcy to a young person being an exhibitionist, a voyeurist and there is a normalcy to masturbation. But I'm saying, too, that the normal individual is led into or through these stages and let out of it. A pornographic environment, the condonations of family and society to sexual immorality stunt youths sexual growth and causes regression in some adults.

Q. If we don't condone masturbation, what do we do about it?

A. You don't reprimand the child unduly or harshly for engaging in sexual masturbation at let's say the age of 13. At the same time you don't show him techniques by which to do it, whether they be in the form of exhibitionism, voyeurism followed by masturbation, whether they be intravaginal masturbation, whether they be by any other type of perversity for achieving orgasm.

The normal parents, the normal family shows the child by example how to behave. Unfortunately, in our present day environment the family values are getting farther and farther away from what much of the entertainment media espouses. These influences make it extremely difficult for young people to make proper identifications in accord with a civilized society. It's like trying to mix oil with water to mix the family values with the pornographic values that are being spewed out upon them in today's environment.

Q. And have you been going to the movies over this period of time?

A. Well, before the time when you couldn't go to a movie without having to be a voyeur we—my wife and I—used to once a week to go to a movie.

Q. And the movies have become much more frank and candid over this period of time?

A. You can call it frank and candor, but that's not——

Q. Well, the movies have changed, you feel they have changed for the worse?

A. I didn't say for the worse in the sense of morality. I'm saying they have changed in that they are destructive to normal life instincts and because of this they're harmful to society.

Q. And you feel there is hardly a movie that you can see now days that doesn't have some of these harmful contents?

A. I cannot speak for your community. I can tell you in L.A. it's rather difficult to find a movie to take your kids to.

Q. All right. Forgetting about taking your kids to a movie and just going by yourself, you still find movies that you find—do you still find that movies in general today are offensive to you and——

Q. Well, the——

The Court. Wait until the question is asked.

The Witness. I'm sorry.

The Court. All right.

By Mr. Britz:

Q. Assuming you're not taking your children, you got a baby sitter tonight and you're going out with your wife, do you still find it difficult to find a movie that you can enjoy?

A. Quite honestly, as I mentioned earlier, I use the word "we" because, except for the Stewardesses, I don't remember going to a movie since I have been married without my wife unless maybe I've been out of town or something like that. But yes, the normal individual who has a mature relationship with the person he loves, an affectionate, compassionate relationship with esteem for that individual and desire to protect the love object is intolerant about sharing that person with voyeurists, exhibitionists, pornographers or group sex. Call it by any name you want, it's public sex, and when you involve yourself with public sex, sir, you are reverting to the primitive stage of sexual life in which love and being in love plays no part.

Q. And this is what you find offensive in American movies today, is it not?

A. What I said before—what is offensive is the destruction to the normal human sexual instinct, the debasement of this most vital life instinct, the degradation of the female, the destruction of the civilized society based upon the family unit. Civilization rests upon Judeo-Christian ethics that have been sustained for five thousand years and which support the normal sexual instinct, and that is, that sex is a private matter.

Q. And that's what you find objectionable to American movies today?

A. That's some of it.

Mr. Britz. All right, that's all.

Mr. Clancy. We have no questions.

The Court. You may step down.

The Witness. Thank you.

(Witness excused.)

REPORT OF FEDERAL CRIMINAL LAWS

WEDNESDAY, MARCH 22, 1972

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY
Washington, D.C.

The subcommittee met, pursuant to call, at 10:05 a.m., in room 2228, New Senate Office Building, Senator Roman L. Hruska presiding.

Present: Senator Hruska.

Also present: G. Robert Blakey, chief counsel, Malcolm D. Hawk, minority counsel; Robert H. Joost and Kenneth A. Lazarus, assistant counsels; and Mabel A. Downey, clerk.

Senator HRUSKA. The subcommittee will come to order.

The chairman of this subcommittee is engaged elsewhere on official business, and he asked that this Senator preside at this morning's hearing, and I am happy to do so.

At this time, we will resume our inquiry into policy questions presented by the Federal Criminal Code which has been prepared by the National Commission on Reform of the Federal Criminal Laws.

Because of the press of business in the Senate and a schedule which undoubtedly will call for votes during the day, it will be necessary again to ask the witnesses to abide by a 30-minute limitation. There will be a 5-minute warning so that they will be able to wind up their statement in proper time, and in that way we hope to get through with the hearing before the collection of votes on the floor will start running.

Our first witnes this morning is Mr. Sol Rubin of the National Council on Crime and Delinquency.

Will you step forward, Mr. Rubin?

STATEMENT OF SOL RUBIN, COUNSEL, NATIONAL COUNCIL ON CRIME AND DELINQUENCY

Senator HRUSKA. Mr. Rubin, you have a statement that has been handed to the subcommittee, a statement of the National Council on Crime and Delinquency. It will be printed in the record in full at this point.

(The prepared statement submitted by Mr. Rubin reads in full as follows:)

Statement of the National Council on Crime and Delinquency on the Proposed New Federal Criminal Code in the Final Report of the National Commission on Reform of Federal Criminal Laws

The National Council on Crime and Delinquency, organized in 1907, incorporated in 1921, has long had an interest in improving sentencing and the quality of our penal systems. Through surveys and consultation, it has worked in many states, studying existing systems, and recommending improved methods. It has published a number of model legislative acts, those most relevant to the present Proposed Code being the Model Sentencing Act, authorized by the Council of Judges of NCCD, published in 1963; and the Standard Act for State Correctional Services, by a joint committee of the NCCD and the American Correctional Association (published by NCCD in 1966).

In this statement, we deal principally with provisions that affect imprisonment and the prison system.

We start with Chapter 32, *Imprisonment*, since the character of a penal system is determined principally by the proportion of commitments to dispositions allowing a person to remain in the community, length of terms, flexibility of release, as well as other factors. Unless one takes pride in a swollen, expensive, wasteful, prison system, Chapter 32 requires change.

There are a number of elements proposed in this chapter that would very likely worsen the system of prisons and release in the federal jurisdiction. Terms would be needlessly lengthened, release procedures would be more complicated and less flexible. The net effect would be to substantially increase the prison population, already grossly swollen as compared with what might be expected of a prison system limited to federal violations. These ingredients are (a) long maximum terms, (b) automotic parole components in prison terms, (c) minimum terms of parole eligibility.

Maximum Terms

Section 3202 provides for maximum terms for felonies at 20 years for Class A, 10 years for Class B, 5 years for Class C. But it then authorizes higher terms than these if the court finds the defendant to be a "dangerous special offender," defined as follows:

(a) One who has previously been convicted of two or more felonies, of any kind, dangerous or not. The Model Sentencing Act rejects the notion that a repeated offender should be subjected to substantially longer terms than a defendant convicted for the first time, if the crime he commits is not a dangerous one. The repetition of offense may have little bearing on dangerousness. The increased penalty for a non-dangerous offender is really an increased term for a nuisance offender. Such studies as have been made of the habitual offender statutes, such as this subdivision, reveal that they are enforced without any guiding principle, that most defendants who might be subject to the statutes are not made subject to them, that their principal use is as a bargaining element for a negotiated plea, and that they do not serve the goals of either rehabilitation or public protection.

(b) One who commits a felony as part of a pattern of criminal conduct which constituted a substantial source of his income, and in which he manifested special skill or expertise. This extended sentence can be imposed on a sole offender, even on whose crimes are limited to property, and are never assaultive. It can be imposed on a first offender, presumably, and the other operative ingredients of the criminal career would be established presumably in the sentencing operation. To call such a defendant a "dangerous special offender" is to exaggerate the term. The Model Sentencing Act would limit any term of over five years to dangerous offenders defined as those who commit serious assaultive crimes, not a property offender under any circumstances (other than racketeering offenses).

(c) A felony offender—*any grade*—whose mental condition is abnormal. Again, if a defendant is not a seriously assaultive person, and his crimes are property crimes only, a long term of imprisonment serves no rehabilitative or deterrent purpose, and only clutters up the prisons with people who are likely to become worse after a period of time.

Subdivision (d) is a definition applicable in general to organized crime, calling as it does for a felony committed with others as a pattern of criminal

conduct. We support the idea that organized crime is a very serious menace, but if the *ordinary* terms are five, ten, and twenty years for felonies, certainly the twenty year term is adequately long, without calling for lengthening every grade of offense.

Subdivision (e) again reflects a proper concern that an offender who uses a firearm or destructive device is dangerous; but we repeat that the maximum term structure is long enough without increasing these terms.

In brief, the quite long terms provided for in the "general plan" is exceeded in a second set of maximum terms, most of which are needlessly long, not particularly protective of the public since those they affect are not markedly dangerous in the usual sense of the term.

To return to the general structure of terms: In cases in which the judge has not decided that the defendant fits into one of the "dangerous" categories, the maximum terms are—felony A, twenty years; felony B, ten years; felony C, five years.

Under the Model Sentencing Act, provision is made for lengthy terms of imprisonment—up to thirty years—imposed on dangerous offenders. But it then provides that the outside limit of a commitment of a non-dangerous offender may be five years, including parole. It permits, indeed requires, that the judge determine the maximum term within that. To provide, as section 3202 does, that even for the lowest grade of felony, class C, the maximum term must be at least five years, must have the effect, if enacted, of substantially increasing prison terms where the need for it is surely not established for these offenders.

We similarly oppose any provision that authorizes a class A or B felony sentence except for seriously assaultive crimes. We oppose such long terms for mere property offenses. Scanning the various crimes, we find such a crime in § 1751 (2), forgery or counterfeiting, made a grade B felony. There may be a few such offenses. We recommend that it be stated in the code as a general principle governing sentences that any offense not involving a seriously assaultive act or threatening serious bodily harm shall not be classified as more severe than grade C.

Parole Component

Section 3201 (2) provides that the maximum term of every indefinite sentence shall include a prison component and a parole component, the latter to be one-third of terms of nine years or less, which the judge can in any case make three years; three years for terms of 9-15 years, and five years for terms of more than fifteen years. The prison component is the remainder of the maximum term authorized.

The idea of a mandatory parole component is an innovation in American penology. As built into the proposed sentencing system here, it would (a) impede the free operation of a parole system, (b) it would once more lengthen actual time served by prisoners.

When a prisoner is released on parole and subsequently recommitted, he must serve not only the remainder of his parole time, but also the remainder of his prison time. Thus, on a felony B commitment, if the sentence is ten years, three years are said to be a parole component. But if paroled after three years, and revoked a year later, he must serve an additional six or seven years—§ 3403(3)(a). Thus, the "parole component" will often add to prison time, and the phrase "prison component" is seen to be deceptive. What first appears to be seven years of "prison component" (in our illustration) may turn out to be a few years more, in actual time required to be served.

Or, using the same illustration, the parole board may refuse parole until just short of the end of seven years. Again, if parole is violated, the seven-year-prison component may turn out to be nine years or more.

The idea of a mandatory parole component is an innovation in American penology. There is nothing in the history of parole that suggests that such an ingredient is needed. The entire history of parole has been characterized by an undesirable lengthening of terms of imprisonment. In view of the fact that prison terms in the United States are now substantially longer than in any other western country, without any justification in public protection or treatment needs, ingredients that serve to further lengthen terms are destructive. This is especially true for the federal system, which in earlier years was known for its relatively short terms, which were then quite adequate for public

protection, and so far as one can see would still be adequate. If there is anything the federal system does *not* need, it is devices that will lengthen prison terms for the general offender.

Minimum Terms

The Model Sentencing Act would prohibit the use of minimum terms, either fixed automatically by statute or at the discretion of the judge. The basic reason is that a minimum term prevents a parole board from releasing a prisoner who in its judgment is suitable for release before the expiration of the minimum term. It thus ousts parole boards from the full exercise of their responsibility. If minimum term is substantial, the usual parole decision must be to grant parole in most instances, since more than enough time to ready the prisoner for parole has expired. The parole operation becomes a negative one, rather than a positive approach to timely releases.

Section 3201(3) declares that generally there shall be no minimum term of parole eligibility in an indefinite sentence for a Class A or B felony. But it is provided that the judge *in any case* of an A or B felony may, if he wishes, fix a minimum term of up to one-third of the maximum, which is an appreciable period of time for Class A or B felonies. The discretionary feature belies the stated policy of no minimum terms; and permitting it at discretion assures disparity of sentences with respect to the minimum terms. The judge who for whatever reason likes the idea of a minimum term will impose it, others will not. The decisions will usually have little bearing on the needs of rehabilitation, treatment, or timely release.

The concept of parole and the indeterminate sentence is that a man will be released when ready. The introduction of minimum terms, which was brought in with parole, has had unfortunate results, in deterring releases, lengthening time in prison, and adversely affecting the moral or inmates.

Some years ago the Department of Justice said: "Many prisoners convicted of the commission of a felony are serving terms of 1 year and less. It frequently happens that such prisoners respond so well to the rehabilitation program that their release becomes most desirable. Yet, because of the present restriction against the release of such prisoners on parole, they are continued in confinement for the full terms of their sentences. This leads to the anomalous result of having prisoners sentenced to 1 year and 1 day eligible for release after serving four months, while a prisoner whose offense and record warrants his receiving a sentence of less than 1 year is required to serve his full term." (Federal Probation, Sept. 1951, p. 49.)

This observation would also suggest eliminating from section 3402 the sentence, "Except in the most extraordinary circumstances, a prisoner sentenced to an indefinite term of imprisonment for a felony which does not contain a minimum term under section 3201(4) shall not be released on parole during the first year of imprisonment." Probably not many instances would occur; but this would deter early paroles in those scattered cases in which it would be indicated.

We would also condemn the minimum terms—from ten to twenty-five years—for life terms, provided for in section 3601. Aside from all other observations already made about minimum terms, experience shows that defendants convicted of murder or manslaughter make unusually good parolees. In any event, we argue not for any mandatory release but only that the parole board have discretion to release, without the extraordinary minimum.

In summary, we express the fear that the sentencing structure will increase prison time, will increase the number of prisoners in the federal prisons. The federal prison population has increased from 12,964 in 1930, to 19,260 in 1940, 19,134 in 1950, 24,925 in 1961, the highest reached. It dropped in 1962 to 1967, but commenced increasing again in 1968 and at the end of 1968 was 20,183. The average length of federal sentences of those committed has risen steadily each year since 1959. In 1968 the average was 77.2 months.

Will the sentencing system proposed in this draft continue to swell the length of terms and the number of prisoners? If our analysis is correct, it will. We may be wrong; we may be right. *We suggest that a study be made as to what the impact on sentences would be if the proposed code were adopted, as compared with existing sentences, and sentences at an earlier period.*

Misdemeanors

§ 3003—Persistent Misdemeanants.—As stated above, we reject the idea of cumulating penalties for repeated offenses. If the offense is not a serious one, as presumably can be said of misdemeanors, the increased penalty is not meaningful for rehabilitation, or treatment, but only as retribution.

§ 3201—Sentence of Imprisonment for Misdemeanor.—This section does not permit parole on misdemeanor sentences of six months or less. There is a need in the field for improved standards of release on misdemeanor sentences, but most jurisdictions have one device or another (judge, sheriff or warden, parole board) with authority to grant conditional releases, and it appears to be useful. If the maximum is to be even three or six months we recommend some structure for parole.

In § 3201, the issue is raised as to whether the term for a class A misdemeanor shall be one year or six months. A term of six months rather than a year seems supported by several factors. Presumably a misdemeanor is a relatively minor offense, at least in a code, such as this draft, that attempts a rational structure basing classifications of crime on danger to society. To provide for misdemeanor sentences at one year, and felony sentences of over one year, is to make the difference one day only. To make the difference meaningful, a spread of six months would reflect the difference between serious and minor offenses.

But it should not be considered that six months is a short term. In the United States, sentences are so much longer than in other western countries that we forget that six months is quite a long time in a man's life.

The Supreme Court has chosen the cut off point of six months for cases requiring a jury trial. At least one state has responded to this by reducing misdemeanor penalties from one year to six months. This not only avoids the requirement of a jury trial but it makes a tangible distinction between misdemeanor and felony penalties.

If the foregoing supports the maximum for misdemeanors at not over six months, what argument supports continuing it at one year? Only that we fear to reduce penalties for crime. It is hard to justify the additional six months by suggesting that there is more deterrence in one year than in six months.

Split Sentence

Section 3106 provides that when imposing a sentence to probation the court in addition to imposing the usual conditions governing the probationer's behavior, may also require him to serve a term in jail.

To require incarceration and call it probation is to contradict probation usage, defeat the purpose of probation, which is to allow the defendant to remain in the community, and probably reduces the use of true probation. This type of sentence was criticized in *Watkins* v. *Merry*, 106 F. 2d 360 (1939). The Standard Probation and Parole Act does not authorize imprisonment as a condition of probation, as this section does.

A California study in 1969 found that felons admitted to straight probation did significantly better than those given probation and jail. (Superior Court Probation and/or jail sample, one year follow-up for selected counties. Criminal Statistics Bureau, Sacramento, California.) This is not surpising. Jail is a destructive experience and should be used only where necessary for public protection against serious offenses.

The people receiving a split sentence are not much different—if at all—from those receiving straight probation. Another California study found that fully one-half of all inmates in California prisons are no more serious offenders than others placed on probation. (Report on the Cost and Effects of the California Criminal Justice System, Assembly Office of Research, Sacramenta, 1969.) This would be even truer for those on split probation sentences.

Chapter 31 deals with probation and unconditional discharge. Section 3105 permits *unconditional discharge*. We support this provision. The counterpart in state law (suspended sentence without probation) is useful when no further controls are needed to prevent recidivism by the defendant. As the comment to this section points out, there is no legal provision in the federal law today to accomplish this.

However, the last section states that if the court imposes such a sentence "the court shall set forth in detail the reasons for its action." Setting forth *reasons for a sentence* is desirable, but there is no provision of this kind in the proposed code for sentences generally. There should be. The Model Sentencing Act requires that in felony cases the sentencing judge shall . . . make a brief statement of the basic reasons for the sentence he imposes."

Sentence of Death

§ 3601 The NCCD Board of Trustees in the formal position statement favors the abolition of capital punishment: and the Model Sentencing Act does not authorize the death penalty.

Review of Decisions

Section 3406 provides that "the federal courts shall not have jurisdiction to review or set aside, except for the denial of constitutional rights for procedural rights conferred by statute, regulation or rule," discretionary action of the Board of Parole with respect to release of a prisoner on parole, or any other decision.

This section is objectionable. The parole process, especially in decisions whether or not to release on parole, is comparable to the sentencing of a defendant by a judge, in that the decision determines whether the person will be at liberty or be imprisoned. Sentencing decisions are subject to review on many counts; and the proposed new code proposes that sentencing decisions shall be even more reviewable than they are now (§ 1291).

The courts have declared that they have the power to review abuse of discretion by a parole board, and it is hard to see how abuse of discretion should not be reviewable. Yet proposed § 3406 would appear to attempt to do that. It would be better to omit this section, if nothing positive for review of parole decisions is to be included. In most jurisdictions, the parole consideration process is a meager one, highly autocratic, and as a result having very bad effects on prisoner morale.

The federal parole process has not been exempt from this criticism. Kenneth Culp Davis, in *Discretionary Justice*, states, "An outstanding example of completely unstructured discretionary power that can and should be at least partially structured is that of the United States Parole Board. In granting or denying parole, the board makes no attempt to structure its discretionary power through rules, policy statements, or guidelines; it does not structure through statements of findings and reasons; it has no system of precedents; the degree of openness of proceedings and records is about the least possible; and procedural safeguards are almost totally absent." (P. 126)

Section 1291, as already noted, would clearly establish the power of federal courts to review sentences. To some extent courts already exercise this power. The commission comments on this section (p. 217) that the draft is intended to do more than express its view that there should be some kind of sentence review.

We suggest that the proposed amendatory language be amplified to give appellate courts the power to correct sentences of marked disparity. Disparity of sentences is a notorious defect in sentencing in the federal and state courts. Although equality of sentencing is constitutionally required, neither trial courts nor appellate courts pay much attention to this requirement. We suggest language such as the following: "Such review shall in criminal cases include the power to review the sentence and to modify it or set it aside if in violation of a defendant's right to a sentence not markedly unequal to other sentences imposed on defendants with similar backgrounds having committed similar crimes; or if it is excessive for the crime committed." See Rubin, "Disparity and Equality of Sentences—A Constitutional Challenge," 40 Federal Rules Decisions 55 (1966).

Commitment for Study

Section 3004 provides for presentence diagnostic workups, but in all instances requiring the defendant to be committed. In many cases the ultimate sentence will be a commitment, but in others a defendant will be placed on probation. To commit for ninety days would be destructive. The section should give the judge the choice of an out-patient diagnostic referral.

Use of Force Upon Children in Custody

Section 605(a) provides that a person responsible for the care and supervision of a minor under eighteen, or a teacher or other person responsible for the care and supervision of such a minor "for a special purpose," may use force upon the minor "for the purpose of safeguarding or promoting his welfare, including prevention and punishment of his misconduct, and the maintenance of proper discipline."

We oppose this provision. It is an invitation to use corporal punishment against children in detention facilities, training schools and reformatories, and even in schools. The same objection applies to subdivisions (b) with respect to force against an incompetent person in custody, and (d) permitting a parent, for example, to consent to force against a minor.

The thousands of children who are seriously injured by their parents of custodians each year—nowadays called "battered children"—are not the product of mentally ill parents. A study of thousands of such cases found that it is the result of the widespread acceptance among Americans of the use of physical force as a legitimate procedure in child rearing. The findings are reported in a book, "Violence Against Children," by Dr. David G. Gil. The American experience is contrasted by Dr. Gil with the very low incidence of abuse in cultures that have strong taboos against striking children, such as the American Indians. The Indians discipline their young mainly through example and shame.

Dr. Gil calls for a change in the laws that permit corporal punishment. Instead, we need laws that forbid it. At least, Section 605(a) should not be allowed to stand.

Crimes Without Victims

Attached to this statement is a policy statement issued by the Board of Trustees of the National Council on Crime and Delinquency on the subject of crimes without victims, that is, statutes making behavior criminal where it is not harmful to anyone else, often not even harmful to the person himself. These statutes are principally codifications in criminal law of moral positions on which people differ. The position we take is one held by many, including the President's Crime Commission.

Included in the proposed code are provisions making obscenity (dissemination of certain types of sexual material) a crime (§ 1851), and prostitution (§ 1843), and possession of drugs for one's own use (§ 1824). We urge elimination of these crimes.

CRIMES WITHOUT VICTIMS

A POLICY STATEMENT, BOARD OF TRUSTEES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY

Laws creating "crimes without victims" should be removed from criminal codes. They are based not on harm done to others but on legislatively declared moral standards that condemn behavior in which there is no victim or in which the only one hurt is the person so behaving. The commonest examples of such so-called crimes are drunkenness, drug addiction, homosexual and other voluntary sexual acts, vagrancy, gambling, and prostitution, and, among children, truancy and running away from home—acts which, if committed by an adult, would not be considered crimes.

Some types of victimless behavior are socially disapproved; none of them is criminal in any real sense. Whatever harm occurs is done to the participants, not to society.

The use of criminal penalties, in effect for many years, has proved ineffective in controlling these acts. The laws bearing on them are, in the main, disregarded: the alcoholic or drug addict remains addicted; the statutory threat of punishment does not deter homosexuality or any other voluntary sexual behavior. Widespread indifference to these laws in particular diminishes respect for the law in general. Moreover, the punishment of those who are apprehended under these laws carries no likelihood of producing any change in their behavior. Again, the addict released from jail remains an addict; the homosexual remains a homosexual, etc. They are not reformed; on the contrary, they become embittered and often criminalized.

At the same time, the prosecution of such individuals imposes on the criminal justice system an enormous burden, significantly sapping the capacity of the

police, courts, and correction to deal effectively with truly criminal conduct. Some measure of the problem is found in statistics: More than one-half of all arrests are for "crimes without victims"; more than one-third of all police arrests are for drunkenness or disorderly conduct (usually an alcohol-related act); one-half of all commitments to local institutions are for drunkenness. For many of these persons, the appropriate measures required are not the futile and destructive sanctions imposed by the police and the court and the jail but the voluntary services offered by a medical or social agency.

For these reasons, laws creating "crimes without victims" should be removed from criminal codes, and persons now prosecuted under these laws should be removed from the criminal justice system.

Senator HRUSKA. You may proceed in your own way, either to highlight it or to read it, whichever is your preference.

Mr. RUBIN. Thank you, Senator. I would, in fact, like to make some remarks as background for the statement, and somewhat begin in terms of the situation that the proposed revision of the Code relates to.

I will try not to repeat what is in the statement unless there is some need or occasion for it.

Senator HRUSKA. Very well.

Mr. RUBIN. I have a copy of the previous hearings. I picked them up only today, but I have glanced over them and I think that most of the statements that have appeared are interpretative and probably rather supportive. I feel badly when I am a critic as I am going to be today.

I think that a revision of this kind is an event that occurs very seldom in the jurisprudence of any State or the Federal Government. It comes along once in a generation or less, and I think that any proposed revision stems from the historical period in which it appears, and sometimes that historical period is not the best setting for developing a revision.

For example, I noticed that several State witnesses, several witnesses testified with respect to State revisions. We, as an agency, NCCD, the National Council on Crimes and Delinquency, have been involved in several of them in much the same way as here, except that on occasion we are consultants, and so we spend considerably more time in working staff. For example, one of the settings in which penal code revision occurred is the State of New York, and I noticed, I think it was several, articles, presentations as well as articles, describing the penal code revision in the State of New York. Our agency was also involved a bit in that revision, and one piece of writing on the subject was an article coauthored by Judge Alfred P. Murrah and myself which appeared in the Columbia Law Review prior to the adoption of the New York penal code revision.

Judge Murrah is chairman of the Council of Judges of NCCD, and it is the Council of Judges that produced the Model Sentencing Act published some years ago, which is a point of departure for our evaluation of sentencing provisions in a code.

In that Columbia Law Review article we analyzed the proposed New York Code, just as this statement undertakes to analyze the sentencing provisions of the proposed revision of the Federal Code.

Perhaps, I might submit a copy of that, if that would be appropriate, and I will make a note to do that.

Senator HRUSKA. We would be happy to have it for our records.

Mr. RUBIN. Thank you.

I mention that article because we warned in it, by referring to specific provisions on the substantive side of the code and the sentencing provisions, that the code did not promise any improvement in the penal system of New York State. We said that because it would appear to us that the principal ingredients in the sentencing structure and in the penal system, length of time, length of minimum terms, or parole elgibility approaches to habitual recidivist offenders, and things of that kind, were not going to be improved, and we said we would have the same kind of chaotic punitive penal system in New York State after the code revision as before.

Senator HRUSKA. May I ask, Mr. Rubin, when that code was proposed and the approximate date of this Columbia Law Review article?

Mr. RUBIN. I think it was 1966, and I cannot guarantee the date.

Senator HRUSKA. That gives a time element. Thank you.

Mr. RUBIN. The code has been in existence now for perhaps 5 years, so it was just prior to the adoption of the code, at a time I would say when we were still hopeful that we could persuade the legislators to delay its adoption and perhaps modify the sentencing provisions particularly.

I do not want to draw an absolutely direct line between what we consider to be the failure to change the penology and what happened in Attica last September. I am sure you know of the event I am referring to, when the prisoners rioted and 42 people were killed.

But I think you cannot avoid some relationship between the sentencing system, the parole system, these ingredients I have mentioned, length of time and minimum, and so on—you cannot avoid relating those to the morale of prisoners, their sense of desperation that leads them to take hostages and riot. There is not, really, an enormously unique character to the New York penology or those events. The prisons in this country generally are not doing something that we are proud of, either in the States or the Federal system.

Besides the hearings that are being held here, hearings are being held and several volumes have already been published by the House committee examining prisons and penitentiaries, and I think if you take only those hearings you have sufficient testimony that the prison system in this country is a failure.

In what sense is it a failure?

In our view, at least, and the view of many people that testified, prisons today make a very poor contribution to our society. They are violent places; they are, most people agree, destructive of personality. They do not prepare people for successful living upon release; they do not rehabilitate, and they do not protect the public as repressive and controlling as the prisons are. We have this code proposed at a time when the crime problem on the streets is almost a foremost problem in the consciousness of the people in this country.

The prisons are not making a useful protective contribution to that situation.

A prison system of that kind, I think it is applicable to the Federal system, and we have indicated some reasons for saying that in our statement. The prison system is not something that should be built up.

Over the last generation the prison system of the Federal Government has been built up. Starting in the thirties when we had a small prison population in the Federal system, a relatively small number of Federal prisoners, and over the years it has steadily increased, and we have twice as many prisoners today as we used to have.

Another characteristic of the Federal penology and penal code in those days was that the Federal system was characterized by shorter terms than most places. Men would be committed and released perhaps on an average of 15 months or so. I think the length of time they spend today, again, is double; it has steadily increased over the years.

I say that against the background of my introductory remarks.

Mr. Blakey. Is this true of Federal sentences?

Mr. Rubin. Yes; yes, and a reference appears in our prepared statement as to the increase both in Federal prisoners by numbers and in the length of time they serve, and I can find it in the statement, if you want me to.

Senator Hruska. You are speaking now of the terms actually, the sentences actually imposed, or those that are authorized?

Mr. Rubin. Actually imprisoned and time served, which, I think, is what you are pointing to. In other words, the terms of commitment, the maximum term of commitment, have increased, and the actual time served before release has increased.

Senator Hruska. Of course, the Youth Offender Act is an exception to that, is it not?

Mr. Rubin. No, I am afraid it is not.

Senator Hruska. You do not think it is?

Mr. Rubin. It is not, no. The statistics demonstrate that youthful offenders under the Federal Youth Corrections Act serve more time than adult offenders for the same offense.

Mr. Blakey. Is this true here in the District of Columbia?

Mr. Rubin. I do not know.

Mr. Blakey. Would your organization be willing to prepare some data for the committee on the experience of youth offender sentencing here in the District of Columbia?

If you read the newspapers here, they seem to indicate that youth offenders in the late teens are being sentenced for murder offenses where they are serving less than 2 or 3 years in prison.

Mr. Rubin. I must say that I do not have the District of Columbia data; and such data as we have used, it is not in here, by the way, because we are not pointing to that; but it is contained in The Law of Criminal Correction, a book that was sponsored by us and was published in 1963. That data is a bit old.

On the other hand, I did a paper for a Federal sentencing institute some years later, and I had data then. It may have been a half a dozen years ago. At that time, youthful offenders committed served longer than adults for the same offense.

I might say that we would be very willing, within our resources, to submit any further information of this kind that we are requested to. I think that I would say one other thing in response to that, and that is, after analyzing the components of the sentencing structure in the new proposed code, we said that since the code is not in existence and our analysis may not be right——

Mr. Blakey. I might indicate, for the record, Mr. Rubin, the subcommittee asked the administrative office of the courts to give us an analysis of Federal sentences, actually on imprisonment and time served, on approximately 17 offenses which represent over 50 percent of the bulk of the Federal prosecutions, and that data is or will be published in our hearings, and it is both consistent and inconsistent with what you have indicated today, that in some offenses the average sentence imposed and average time served have decreased over the last 5 years, in some other offenses it has increased, and that the uniform pattern you have indicated is at least inconsistent with the most recent study that the adminisrative office of the courts has done for us.

So, I put that in the record for whatever it is worth.

Mr. Rubin. I am very grateful to have that, because what I am coming to is a statement we made here. We said that we may be wrong, we may be right. We suggest that a study be made as to what the impact on sentences would be if the proposed code were adopted as compared with what the existing sentences and sentences at an earlier period were.

Mr. Blakey. That study has already been done.

Mr. Rubin. So, I look forward to seeing that, and I hope that we will be able to offer comments if they seem indicated on that material.

I might say that the statistical material available for an agency like us or for others who are studying the system is not the best. And I think it is fine that special data is being requested. I know that on the occasions I spoke of, in the preparation of the statement and the preparation of material on youthful offenders for the Federal sentencing institute, it was very hard to come by. I know that on the occasions I spoke of, in the preparation of the statement and the preparation of material on youthful offenders for the Federal sentencing institute, it was very hard to come by. I know that when I was looking for it while doing The Law of Criminal Correction, it was necessary to write to the Federal Bureau of Prisons and ask for certain specific data, and I obtained it but not all that I wanted.

So, I think if this statement is coming out, that is fine and I think that anything we say on the code has to be judged by what that statement will offer. If, in fact, it is in some sense supportive of what we are saying but not in others, I think that alone is an indication that some of the sentencing provisions have to be reexamined. But I would hope you would provide us with a copy of it when it is available, and I would like to have the opportunity of giving you some input on it.

But we did not take a dogmatic position on what we are saying here. We said that we worry that certain consequences will occur, and we wanted it checked out.

Now, with those introductory remarks, I would like to turn to the statement we submitted and not read from it—or not very much—but to summarize it and be at your disposal as to any supplementary comments that I might make.

The statement deals with two general areas. One is the matter which is of great concern, primary concern, in what I have said, namely, the penal system, the prison system, the parole system of the Federal Government. This is dealt with mainly here in the sen-

tencing and parole provisions. The other part that I would like to touch on more briefly is the bulk of the code that deals with substantive crimes.

We, as an agency, have developed standards on sentencing, correctional systems, parole, and so on, and that is why the bulk of what we have to say is derived from that and is pointing to those provisions. We have, however, entered to some extent into the issue of substantive definition of crimes, nothing comparable to the model penal code which the reporters on the Commission used, but there will be a few comments on it.

I would have quoted from a passage here—and perhaps I still should. We say in our statement:

> Since the character of a penal system is determined principally by the proportion of commitments to dispositions allowing a person to remain in the community, length of terms, flexibility of release, as well as other factors, unless one takes pride in a swollen, expensive, wasteful prison system, chapter 32 requires change.

Mr. BLAKEY. Mr. Rubin, do I understand that the central thrust of your statement is against imprisonment per se?

Mr. RUBIN. No, we cannot at this stage of our culture undertake to have that position; however, the essential aspect of the Model Sentencing Act, as you know—because you have worked with it, and I am sure Senator Hruska does, too—is to make a distinction between dangerous and nondangerous offenders.

Mr. BLAKEY. And with the premise of a danger to persons as opposed to dangers to property and other interests?

Mr. RUBIN. Correct.

Mr. BLAKEY. Why should not society be protected against dangers to property and other interests?

Mr. RUBIN. They should.

Mr. BLAKEY. Why should not imprisonment be a method to secure that protection?

Mr. RUBIN. It should, if it secures it, but if it does not secure it, then it is not justified.

Mr. BLAKEY. Well, on a very minimum level, while a prisoner is imprisoned he is, at least during that period of time, not recidivating; is that not correct?

Mr. RUBIN. That is correct. That makes me think of the data—and if you are thinking in that vein, I really suggest that you examine the ratio between the number of prisoners who are in prison for, let us say, theft, and the number of thefts that are being committed.

For example, speaking of the District of Columbia, take the ratio. If, in fact, you find that the number of prisoners is perhaps one prisoner to 1,000 thefts committed, and that prisoner does not serve more than a couple of years because theft is not a dangerous crime, then I wonder whether you feel that the prison system for the District of Columbia offers any part of the Federal system a success or a deterrent or a protection? We went into data of this kind. We took a position on preventive detention. We were opposed to preventive detention, but we submitted a statement, and we have published a statement that would have provided some alternatives.

Mr. BLAKEY. Let me ask you this——

Mr. RUBIN. I wanted to give you some statistics. They are related to what you have just asked.

I do not mind your interrupting, but that is what I wanted to give.

Do you want me to go ahead?

Mr. BLAKEY. Yes, go ahead.

Mr. RUBIN. We found, based on the study of another agency in the District, that preventive detention at best might have prevented 50 or 60 robberies during a period of time when 10,000 robberies during a year were being committed in the District. If, in fact, preventive detention made a substantial contribution to the protection of the community, we would have come up with a different policy position. And, if, in fact, imprisonment of thieves, because you are talking about property offenses or other property offenses——

Mr. BLAKEY. Well, can I change the terms of the question and ask you whether the ratio of prisoners for assaultive personal crimes versus the number of assaults or personal crimes in the community is any different than the ratio as to theft, and if it is not what impact does that have on your distinction between property crimes and nonproperty crimes?

Mr. RUBIN. My guess is that it is not very different.

Mr. BLAKEY. Well, why would you suggest that we imprison people for assaultive crimes, then?

Mr. RUBIN. Let us go back to our definition of dangerous offenders. You are familiar with it. We spell out criteria in our Model Sentencing Act, and we urge these criteria in place of the criteria you have in this report, for long-term offenders. In our view, these long-term offenders might not at all be dangerous; so, bear in mind that the Model Sentencing Act proposal defining dangerous offenders says these things: (1) the crime has to be a serious assault or serious bodily harm against the person——

Mr. BLAKEY. But the question——

Mr. RUBIN. I want you to know that the second reason is where we find that the person committing this crime is a person suffering from a severe personality disorder, based on clinical studies by a clinic and the sentencing judge, so that you would have a person who is determined to be one that has committed this crime or type of crime and whose mentality is such that ordinary control, either probational or short-term imprisonment, would not be effective. So, for those people, we submit that this definition is a much more specific one than any proposed code and is one that would be protective, and we are supporters of imprisonment, although we say imprisonment in the present system does not help any of these people. We would hope that the penal system would be changed so that the code would really invest some expertise, some therapeutic measures, for those long-term prisoners; and it does not exist today in the Federal system. If, in fact, you are pointing to this kind of data, then, I say it is important to get it. In other words, find out how many assaultive people are imprisoned and the degree of protection that is provided as against the number of assaults being committed during perhaps a year.

Mr. BLAKEY. And if we found it was no different than in the property area, would not that logically require you to suggest that we not imprison them for either property or assaultive offenses?

Mr. RUBIN. We are not taking an absolute position on either one. I could point to an article by Mr. Rector, for example, several years

ago, in the Journal of the American Adjudicature Society interpreting the kinds of sentencing that would be imposed under our view of dangerous and nondangerous, and he said that there are several categories of nondangerous offenders where the terms that we think adequate should be imposed. I cannot recall all of them, but he spoke of the repetitive property offender or offenders whose situations in the community were such that imprisonment for a relatively short time would bring them out of a particular atmosphere—cannot quote it with more specifics than that, but it is in Milton Rector's article in the Judicature, and he points out that there are several categories. They are not individually selected; they have to be individually selected by a judge, but we are not taking the position that all nondangerous offenders be released on probation, but, but, there is a passage in our statement that is critical of utilization of prison terms as a condition of probation. We have always opposed this as a contradiction in terms, and we do point out, we do point out in our statement, two studies from the State of California that found that the success with people who did not serve a jail term as a condition of probation was better than with those who did serve such a term, and that the nature of the people who received straight probation as compared with those who were committed for short terms was the same. So, I submit that, in looking at your data, you consider not only the ratio of such prisoners to such offenders but that you also look at the relative success of those who are placed on probation as compared with those who are nondangerous that go to prison.

You must remember that people who are nondangerous, whether in our definition or yours or anyone else's, do not serve terribly long terms, and whatever protection you are affording is for a relatively short period of time. And is that period of time disruptive; does it embitter these people and make it more difficult for them to succeed upon release? If so, then, that prison term is not protective in the long run.

Senator HRUSKA. Mr. Rubin, I sound now the 5-minute warning.

May I ask you to direct your thoughts and perhaps a comment to this proposition: In your statement you indicate that section 3202 prescribes maximum terms for felonies, and you name them, but then you say:

> But it then authorizes higher terms than these if the court finds the defendant to be a "dangerous special offender," defined as follows:
>
> (a) One who has previously been convicted of two or more felonies, of any kind, dangerous or not.

And then you have subparagraphs (b) and (c) and (e). This section is based on the present statute, is it not, the Organized Crime Control Act of 1970, and these sentencing procedures are already on the books?

Now, that was designed particularly for what we have come to designate as the field of organized crime. There comes a time when a man, in the judgment of this committee and of the Congress and of the President who signs the bill, if he lives the kind of life where he devotes his time and his talents, such as they are, to a course of crime of one kind or another and does nothing else, he is a professional, he is a full-time criminal.

As to them, the reasoning of this committee and the Congress was that he falls outside of that rehabilitative process that we like to think we are striving for in our penal code, and, therefore, the most wholesome treatment for him and for society's protection will be to put him in prison for a longer time. As indicated by Mr. Blakey, at least he is out of the way during that time and the time he can become a recidivist is postponed.

Sometimes the physiological aspect grabs hold and when he is released he is no longer the aggressive young driving force that is making a major contribution to organized crime. Father time takes care of some of these problems for society.

Now, what comments would you have on that general concept as developed in the Organized Crime Control Act and adopted in this section 3202?

Mr. Rubin. We are in complete accord with what you have just said. In our Model Sentencing Act we have two categories of "dangerous offender"—namely, people who are subject to a term that may be up to 30 years: one is the kind of assaultive individual that we have just been talking about; the other is the racketeer. And when S. 30 was being worked on, we tried our best—and Mr. Blakey knows—to contribute to that. When we, ourselves, drafted the Model Sentencing Act in 1963, we had something similar to what has been proposed here. We knew at the time—and we said it in our publication—that this is overbroad, that it is written in such a way that many offenders would be subject to a long term who should not be. But we could not arrive at a better resolution of that definition.

During the drafting of S. 30, a superior draft was contrived. I do not know at what stage it occurred, but it was one that said the person who is to be identified as a racketeer subject to a long term is one who a supervisory relationship to organized crime and it had various other ingredients that would identify him with some precision as being more than the run-of-the-mill employee in the rackets. We are now, in fact, drafting—we have already completed the work on a redraft of the Model Sentencing Act, and we have again included the racketeer in the category of dangerous offender subject to a 30-year term.

But we used that early draft of S. 30 on racketeering and perhaps modified it somewhat, and I would like to submit that to you, because we are in accord that, in addition to the individual who is so seriously assaultive, surely organized crime is the most serious kind of crime we experience in this country. And if, in fact, you could put away leaders of organized crime it should be for an appreciable term of imprisonment. But if you compare the proposed Federal code revision and the draft that we have arrived at in our new revision of the Model Sentencing Act, you will find that they are quite different. And that is why I say that the mere fact that a person has committed two or more felonies does not make him a racketeer.

Senator Hruska. No, but that is not the test that is set out in 3203. That is not the test. You see, to that extent your statement is a little misleading because you say how this dangerous special offender is defined, and then you say the repetition of offense may have little bearing on dangerousness and——

Mr. Rubin. Let me look at it.

Senator HRUSKA [continuing]. Anyone that commits two or more crimes does not necessarily fall within the definition contained in 3202. It takes two printed pages, two printed pages, of the book to define and describe what a dangerous special offender is, don't you see? And the mere commission of two or more felonies does not qualify him.

There have to be many other factors and many other elements that must appear, identified with him, before he fulfills that definition.

So, I would be hopeful that we would not oversimplify this problem to a point of saying that all you have to do to become a dangerous special offender is to commit two or more felonies. That is not true.

Mr. RUBIN. Is that not true under section 3202(2)(a)?

Senator HRUSKA. No, because there are many other factors.

Look at section 3202 which defines a dangerous special offender, and it starts about one-fourth of the page down, and it continues for the entire next page.

Mr. RUBIN. Yes, but the others are separated by "or." In other words, 3202(2)(a) defines this individual that we are talking about, and that is "or," "or" that he has committed.

Senator HRUSKA. That is right. But you see, by reading the text of the whole thing, it cannot be said that mechanically and automatically when a man commits two felonies he is immediately classified as a dangerous special offender. That is not true.

Mr. RUBIN. May I say that I think that the statute, the proposed statute, is overly broad in exactly the sense we have said. What I would like to do, therefore, is to submit a further memorandum on exactly this point, because I gather from you that if, in fact, the statute is overly broad in permitting a two-time loser or a three-time loser to be sentenced as a dangerous offender, you, yourself, would be critical of it. Am I correct?

Senator HRUSKA. I would, if that is the only factor being considered. But, you see, it takes more than that to qualify a man to become a dangerous special offender. It is not a mechanical, very simplistic proposition. You err twice and you are condemned for a longer term. It is not that. I submit that, because we have gone through this. This committee has gone through this and argued it, and we debated it on the floor as well as within the committee. That is why I asked you to comment on the concept.

Mr. RUBIN. I understand. That I understand, and that is why I think it is well that we have this exchange, because we may be in complete accord philosophically and conceptually, and I would like to pin this issue in an additional memorandum, because, as we read it, it is overly broad in exactly the sense we put into our statement.

Senator HRUSKA. Your time has expired, but if you have that new draft or any draft that you think would be an improvement on section 3202 within this concept, we certainly would be favored by receiving a copy of it.

Mr. RUBIN. Let me make a hasty note to do that.

Mr. BLAKEY. Mr. Chairman, there is one other thing that the record ought to indicate at this time. I have had a chance to look through that study, and I would like to indicate in the record what the study in general indicates. It shows on a study of 14 offenses

that the average length of sentences, three are up, eight are down, and three remain the same. On the percentage of sentences that were 5 years or more, it indicated that six were up, that eight were down, and on the use of probation in the same 14 crimes, it indicated that the use of probation was up in seven offenses, was down in three and was the same in four. So that the general thrust of the study is that less terms are being imposed and more probation is being granted in the bulk of Federal sentences over the last 5 years.

Senator HRUSKA. Mr. Blakey, will you identify that study for the record?

Mr. BLAKEY. This is the study that was done by the Administrative Office of the Courts for the subcommittee on the possible impact of the new code on existing sentencing practices of the courts.

Senator HRUSKA. Found within our hearings?

Mr. BLAKEY. It will be found within our hearings.

Mr. RUBIN. I would appreciate it if we could receive that and perhaps have an opportunity of commenting on it.

Senator HRUSKA. Yes, and if you have any comment, Mr. Rubin, please state it in writing and mail it to Mr. Blakey in care of this subcommittee. We would appreciate having it.

Mr. RUBIN. Yes, indeed.

Senator HRUSKA. Thank you very much for appearing.

The next witness is Mr. Richard A. Givens, director, New York Regional Office, Federal Trade Commission.

Mr. GIVENS. Thank you.

Senator HRUSKA. You have filed with the committee a statement, have you not?

Mr. GIVENS. Yes, Senator, and I am very grateful to you for permitting me to appear in your hearing.

STATEMENT OF RICHARD A. GIVENS, FORMER ASSISTANT U.S. ATTORNEY

Mr. GIVENS. I would like to point out that I am appearing in my individual capacity as a former Assistant U.S. Attorney and am not speaking on behalf of the FTC which has not formally voted on any of the issues which I will discuss.

Senator HRUSKA. Yes. We welcome your appearance here. We are glad for that explanatory note.

Your statement will be printed in the record at this point in full.

(The prepared statement submitted by Mr. Givens reads in full as follows:)

STATEMENT OF RICHARD A. GIVENS

I am extremely honored to have the opportunity to appear before this Subcommittee on the crucial subject of the proposed new Federal Criminal Code.

APPEARANCE IN INDIVIDUAL CAPACITY ONLY

I am appearing in my individual capacity as a former Assistant United States Attorney and former Chief of the Consumer Fraud Unit in the U.S. Attorney's Office in the Southern District of New York, and not in my present capacity as Regional Director of the New York Office of the Federal Trade Commission. Since I am not appearing on behalf of the Commission, the views

The proposed New Federal Criminal Code in the form submitted by the National Commission on Reform of Federal Criminal Laws would make a number of extremely valuable reforms in federal criminal law. But I believe it requires substantial further revision in order to advance both fair and effective law enforcement. Many of my views are similar to those of the Committee on Federal Legislation of the New York County Lawyers Association of which Vincent L. Broderick, former Police Commissioner of New York, is Chairman, and of which I am a member, and I am attaching a copy of the Committee's report as well as of a report of the Committee on Federal Legislation of the New York State Bar Association dealing with mental issues in criminal trials, with the request that they be made part of my statement.

NEED FOR PRESERVING PROTECTION OF THE PUBLIC UNDER EXISTING FEDERAL LAW

The Code as recommended by the National Commission relied primarily on state criminal law and the Model Penal Code prepared chiefly for state legislatures. In doing so, in my view, it failed to include the full reach of many important federal laws enacted by Congress to deal with national problems and which have been vital in the fight against such evils as organized crime and consumer fraud. Overprecision, where the draftsmen seek to anticipate every situation, can lead to far more serious problems than general statutes defining a basic evil and relying on the courts to fashion appropriate remedies. Wiping out existing case law under long-existing basic federal criminal laws is also certain to increase rather than lessen uncertainty as the courts grope for the meaning of new provisions in concrete situations. I therefore recommend that this Subcommittee give consideration to reincorporating into the new Code the full reach of all the most important existing general federal criminal provisions, such as, but not limited to the general federal conspiracy statute with its prohibition on conspiracies to defraud the United States (18 U.S.C. 371), the federal false statement statute (18 U.S.C. 1001), the mail and wire fraud statutes (18 U.S.C. 1341, 1343), so important in the fight against consumer fraud, the obstruction of justice statute (18 U.S.C. 1503) and the interstate commerce extortion statute (18 U.S.C. 1951), so important in the fight against organized crime. Of course, the proposed Code as prepared by the National Commission carries forward something from each of these, but never their full reach, and in many instances what emerges is frequently a misdemeanor even where serious conduct is involved.

THE MAIL FRAUD STATUTE: PRINCIPAL WEAPON AGAINST CRIMINAL CONSUMER FRAUD

Having prosecuted organized crime cases[1] as well as consumer fraud and other cases, I also feel justified in stating that criminal consumer fraud is becoming infiltrated and in some instances controlled by organized crime and racketeering.

Since a great deal of my professional work has been concerned with consumer fraud,[2] I also believe that I can testify with confidence that the mail fraud statute is our most important weapon against hard-core criminal consumer fraud. The following crucial advantages of the statute would be lost if it were replaced by a federal theft provision such as proposed code section 1732 with the definitions proposed in section 1741:

1. The essence of the crime is the existence of the scheme together with the requisite use of the mails. Actual loss to a specific victim need not be alleged or proved. This is crucial because any particular consumer fraud victim is always vulnerable to pressure or to being satisfied by a refund, so that requiring proof of actual loss to named victims would often defeat prosecution even of the most nefarious schemes. As one example of the type of pressure employed, in one case the mother of a witness known to the defense in a consumer fraud

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[1] E.g., United States v. Marquez, 424 F.2d 1174 (2d Cir. 1970; United States v. Tourine, 428 F.2d 865 (2d Cir. 1970); United States v. Tourine, 442 F.2d 1344 (2d Cir. 1971).

[2] E.g., United States v. Zovluck, 274 F. Supp. 385 (S.D.N.Y. 1967), aff'd without opinion, Dkt. No. 32652 (2d Cir. 4/7/69), denial of post-conviction motion aff'd, 448 F.2d 339 (2d Cir. 1971); United States v. Sterngrass, Dkt. No. 32704 (2d Cir. 12/18/68); United States v. Armantrout, 411 F.2d 60 (2d Cir. 1969); United States v. Farland, Dkt. No. 71–1112 (2d Cir. 1971); United States v. Wiseman, 445 F.2d 792 (2d Cir. 1971); see 115 Cong. Rec. § 3082 (daily ed. 3/24/69).

prosecution to be scheduled to testify the next day received a telephone call purporting to be from a private detective agency working for an employment agency. The caller asked if the daughter was married. In fact she was an unmarried mother and was so frightened that she refused to appear. Another witness in a consumer fraud case testified to being given $1,000 to leave the country and to bribe a second witness.[3]

2. Unlike the definitions in section 1741, the issues now presented to the jury are simple: a) was there a deliberate scheme to defraud, and (b) were the mails used to execute or attempt to execute the scheme? This simplicity would be lost were the basic concept shifted from the existence of a deliberate scheme to defraud to a theft concept, and then a series of complex definitions were superimposed.

3. The element of deliberateness of the scheme to cheat protects defendants against prosecutions for mere puffing, whereas section 1741 introduces a concept of express exclusion from the statute of "exaggerated commendation of wares" which would not deceive the "ordinary" persons in the group addressed. This would permit false sales pitch deliberately aimed at deceiving a targeted minority of those addressed. Likewise, the element of a scheme to defraud protects defendants who misrepresent immaterial matters. The express requirement of section 1741 that deceptions have "pecuniary" significance could immunize phoney charity schemes, schemes to get money from widows based on false promises of marriage, and other types of criminal schemes not foreseen by the draftsmen.

As the County Lawyers report indicates, pp.6, 27, the simplicity of the present mail fraud statute can readily be incorporated into the structure of the Code.[4]

NEED FOR FLEXIBILITY IN SANCTIONS

The mail fraud or a consolidated antifraud section, as well as indeed the Code generally, could be made more effective by a wider range of sanctions. I do not believe that separate sanctions for organizational offenses are necessary. If a crime is committed by an individual,[5] or an organization, the same kinds of sanctions (except, obviously, imprisonment for an organization) should be available if justified by the facts.

Most importantly, equitable relief of any kind appropriate to the case which could be obtained in a civil injunctive proceeding against the same conduct should be open to the Court as part of the judgment in a criminal case. If there is proof of guilt beyond a reasonable doubt, it would seem logical to permit remedies which could be imposed in an injunctive action based on a preponderance of the evidence—and without burdening the judicial system by bringing another suit. By leaving the precise boundaries of the relief to the discretion of the court based on the facts, the need for a laundry list of remedies such as giving publicity to a conviction would be obviated, and the need for separate consideration of sanctions for organizational offenses likewise eliminated.

Obviously, injunctive decrees can and should frequently go beyond merely prohibiting the conduct already illegal under the statute and remove the conditions tending to bring about or perpetuate the results of the violations. This should logically include restitution to victims of the crime in appropriate cases. At present, such restitution can only be arranged by means of a bargain whereby the defendant gets a lighter sentence in return for agreeing to make restitution. Where heinous conduct is involved, that kind of bargain is obviously against the public interest. Inclusion of authority for restitution to victims of crime need not await Congressional resolution of the broader problem of private class actions where there has been no conviction. A criminal conviction plus the decision of the Trial Judge that

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[3] See Brief for the United States, Appendix, United States v. Zovluck, 448 F.2d 339 (2d Cir. 1971), p.9a–14.

[4] The Committees on Federal Legislation, Federal Courts and Consumer Affairs of the Association of the Bar of the City of New York in a joint report have unanimously disapproved the replacement of the mail fraud statute as proposed by the National Commission. See "Proposed Federal Legislation to Protect Consumers," 10 Bulletin of Reports of the Association of the Bar of the City of New York Concerned with Federal Legislation No. 1, p. 1, 14 Fn. 13.

[5] See, in the consumer fraud field, the *Zovluck* case previously cited.

restitution should be part of the sentence is obviously the strongest possible "trigger" for restitution to an entire group, and involves no danger whatsoever of unjustified "strike suits."

Authority to order appropriate equitable relief in criminal cases should include inclusion of provisions of this type as conditions of probation as well as in a separate injunctive order (see County Lawyers report, p. 18, 28). In that event, there would seem to be no reason why a corporation as well as an individual could not be placed on probation in an appropriate case. There would thus be no reason for any distinction whatever in the Code between sanctions for the two types of defendants (the physical fact that organizations cannot be imprisoned requires no statutory declaration of this truism).

APPEALS FROM SENTENCES

In order to reduce sentencing disparities, I would favor allowing appeals from sentences as proposed by the Commission. This seems especially desirable if permissible types of sentences are to be broadened as recommended here. But procedural safeguards are crucial here to prevent overburdening of both the prosecutor and the appellate court by appeals from every sentence where the defendant would have preferrd more lenient treatment. My own solution would be a procedure similar to that on motions for rehearing, where the losing party may apply for further proceedings but no action is taken nor will the winning party be allowed or required to answer unless the court determines from the losing party's presentation that there is enough to justify a full hearing.

CORPORATE CRIMINAL VIOLATIONS UNDER THE CODE

Section 402 of the Code as proposed by the National Commission would drastically reduce corporate criminal responsibility for felonies by requiring proof that managerial authorities knew of the violation. According to the Working Papers this narrowing of corporate criminal responsibility is based on doubts as to whether corporate liability serves any purpose in such cases. My experience is that it does. In numerous cases corporate liability was bitterly contested because of the deterrent effect of publicity of the fact that misconduct has been established.[6] Further, the addition of additional types of alternative sanctions would make corporate criminal responsibility meaningful in the types of situations discussed in the Working Papers where a mere fine, ultimately falling on the shareholders, may have no meaningful effect. In my view, existing case law, imposing liability on corporations where the conduct involved was for a corporate purpose and committed by a corporate employee authorized to act in the field involved, should be continued (Working Papers, Vol I, p. 167–180). This is important for three reasons:

(1) Corporate shells are often taken over by organized crime for illegal purposes, often to the detriment of honest original shareholders.[7]

(2) A more lenient attitude toward corporate crime in serious cases would be directly injurious to the public—and especially to us as taxpayers where fraud against Government contracting authorities are involved.

(3) Unless criminal sanctions are as effectively available against corporate wrongdoers as against others, the erroneous image will be allowed to be promoted that our criminal law is only concerned with crime when it does not involve the large and powerful. This will in turn encourage disrespect for law.

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[6] E.g., see Improper Practices, Commodity Import Program, U.S. Foreign Aid, Vietnam, Hearings before the Permanent Subcommittee on Investigations, Committee on Government Operations, United States Senate, 90th Cong., 1st & 2nd Sess. (1967, 1968), p. 563–569; United States v. Olin Mathieson Chemical Corp., 368 F.2d 525 (2d Cir. 1966).

[7] One way this can happen is through use of funds derived from illegal sources maintained in secret foreign accounts. See Legal and Economic Impact of Foreign Banking Procedures on the United States, Hearing before Committee on Banking & Currency, House of Representatives, 90th Cong., 2d Sess. (1968); Foreign Bank Secrecy and Bank Records, Hearings before the Committee on Banking & Currency, House of Representatives, 91st Cong., 1st & 2nd Sess. (1969, 1970), on H.R. 15073.

EFFECT OF THE CODE ON OTHER LAWS

Section 3006 of the Code as submitted by the National Commission would automatically downgrade all crimes outside the Code to the status of misdemeanors. This represents a drastic reduction in the deterrent value of all federal laws not expressly included in the Code including those in areas given much study by Congress at the time the laws in question were adopted. Where the Code does expressly deal with such non-Title 18 laws it generally does not include the full scope of the existing law, e.g. in the case of the securities laws, and most particularly in the provisions for so-called regulatory offenses" (Code section 1006) under which even willful violation of a regulation creating substantial likelihood of harm to life would be a class A misdemeanor.

While overall rational consistency of maximum penalties throughout all 50 titles of the United States Code is a laudable objective, I submit that it is not achieved by these provisions, which in my opinion would do far more harm than good. To study each non-Title 18 area in depth, ascertain the purpose of each provision and the reason for the creation of a particular penalty is undoubtedly a Herculean task; but unless this is done, it would seem wrong to attempt to tamper with all of these provisions with a broad brush. Therefore, pending further study I would strongly recommend that both sections 3006 and 1006 be dropped and non-Title 18 penalties be left as they are, with the exception that the general alternatives which I have discussed, e.g. equitable relief, and fines based on the account involved as suggested by section 3301(2) of the Code, should apply to all crimes in all titles of the United States Code.

"CRIMINAL COERCION"

In some respects, the Code as prepared by the National Commission has created new federal crimes in such a manner that organized crime and also practitioners of frauds against the public could use these provisions to their advantage. A prime example is section 1617, the "Criminal Coercion" section which makes it a federal offense, with intent to compel another to engage in or refrain from conduct to, among other things:

"(c) expose a secret or publicize an asserted fact, *whether true or false*, tending to subject any person . . . to hatred, contempt or ridicule, or to impair another's credit or business repute; or

"(d) take or withhold official action . . . *or cause a public servant to take or withhold official action.*" (emphasis added).

It is an affirmative defense, the burden of showing which is on the defendant, that the defendant believed that the purpose of the threat was to stop misbehavior, etc. Federal jurisdiction under this section would be very broad, including any situation where instrumentalities in interstate commerce would be used.

The danger of this section is not much in the wrongful prosecutions likely to be brought under it, as in the "chilling effect" it would be likely to have on legitimate activities, and indeed activities necessary to deter crime.

The following situations conceivably could be claimed to fall under this section:

1. A company is selling large quantities of glassine envelopes or other paraphernalia likely to be used in narcotics distribution, in a community [8] and community leaders threaten to publicize this or to complain to law enforcement authorities.

2. A consumer buys a TV which doesn't work, and in addition is overbilled for it and finance charges are thereafter assessed while her request for a refund is pending. She then gets a harsh dunning notice, and threatens to complain to an Action Line reporter or to a Federal agency if the situation is not rectified.

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[8] See House Select Committee on Crime, Second Report, Heroin and Paraphernalia, H. Rep. 91-1808, 91st Cong., 2d Sess. (1971), p. 22-30.

3. A businessman finds that a substantial block of stock in his company has been bought by a "dummy" with funds derived from secret foreign accounts.[9] He threatens to complain to the Securities and Exchange Commission, to ask the U.S. Attorney to investigate, or to confide in a member of the press if the secret funds are used to buy any additional stock to seek to acquire control.

4. A Postal Inspector receives numerous complaints that a mail order firm is accepting checks from members of the public but not furnishing the merchandise. He indicates to the firm that a full-fledged investigation may be necessary if the situation is not rectified.

These activities should not be made prima facie criminal subject to an uncertain affirmative defense. In any of these situations, the primary wrongdoer would be handed a weapon by section 1617 to fight back against those who are seeking to contain his activities. In example 1, the seller of the paraphernalia would have an additional club to wield over the needs of community leaders who dared to threaten to expose his activities. In example 2, another weapon in the arsenal of a tough collector—the possibility of a prison term for the consumer merely for having threatened to complain—could be added. In example 3, another lever would be given the possible racketeer to seize control of legitimate business. In example 4, another roadblock would be placed in the path of an overworked agency trying to protect the public where actual prosecution in every case is beyond its capacity.

"Coercion" of the types described, should be prohibited only when exercised corruptly or for private gain, to which the parts would not be entitled. In my opinion, such a limitation on the scope of the section is imperative.

Similarly, the sweeping definitions of "threat" in section 1741(k) should be reviewed to ascertain whether they may not inadvertently cover legitimate activities. Indeed, there may be advantages to the use of such traditional terms as "extortion" which are defined by case law under existing statutes such as 18 U.S.C. 1951, rather than the introduction of many of the complex definitions contained in the proposed Code as drafted.

INSANITY DEFENSE

Another area in which I believe that the Code should be amended is in its statutory definition of the insanity defense (section 503). The insanity defense has never previously been established in a federal statute—it has been a judicial development. As set forth in the report of the Committee on Federal Legislation, New York State Bar Association (41 N.Y. State B.J. 394 (Aug. 1969)) a copy of which I have submitted today, many lawyers and psychiatrists are beginning to question whether insanity should be a separate defense. Instead, they believe that testimony relating to a defendant's mental state should merely be relevant to sentencing and to any appropriate element of the offense. This approach is discussed in Volume I of the Working Papers of the National Commission on Reform of Federal Criminal Laws, p. 247 et seq.

The original concept of the insanity defense was that commitment to a mental hospital would be preferable to imprisonment for insane defendants. But that is a better argument for expansion of flexibility in sentencing than for asking a jury to answer metaphysical questions involving free will and determinism such as whether a person lacked substantial capacity to conform his conduct to the requirements of the law due to a mental disease or defect.

Further, as a practical matter many defendants using the defense are seeking—and sometimes able to escape any compulsory treatment sanctions as a result of their conduct.[10] Interestingly enough, this has been especially true in tax cases, involving theft from all of us as taxpayers.

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[9] Compare the facts in United States v. Alo, 439 F.2d 751 (2d Cir. 1971).

[10] See United States v. Sheller, 369 F.2d 293 (2d Cir. 1966); Time, January 6, 1967, p. 80.

I believe that the alternative approach abolishing the defense should be adopted. If this is not done, then the defense should not be frozen by statute but allowed to develop by further judicial elucidation.

CONCLUSION

The consideration of a totally new Federal Criminal Code is an historic occasion, challenge and opportunity. I am extremely honored to have been asked to appear before your Subcommittee in its work in this important endeavor.

The draft Code as proposed by the National Commission can, I believe, be revised by this Subcommittee so that it will make a tremendous contribution to both fairness and effectiveness of law enforcement for the benefit of all Americans. I hope that my comments will have assisted at least in some small way toward that end. Please call on me if I can be of some further assistance in any way.

ADDENDUM

Since my testimony was prepared, the U.S. Court of Appeals for the Second Circuit, "with a heavy heart because the record reeks from the unconscionable practices of appellants" reversed the conviction of a furniture firm for false use of the initials "U.S." in collection of debts in violation of 18 U.S.C. 172. United States 1. Boneparth, Dkt. No. 712–1862 slip op. 1805 (2d Cir. 2/23/72).

18 U.S.C. 712 prohibiting false use of names indicating that a government agency is collecting private debts, would be dropped from the Criminal Code by the National Commission's draft and assigned to Title 4 of the U.S. Code. In what form the section would be reenacted is not specified. I believe this section is extremely important as indicated by its legislative history and situations where it has been used in the past.[11] Further, the revision of the Criminal Code should provide an opportunity for legislative correction of what the Second Circuit recognized was an unfortunate result in its *Boneparth* decision. In that case the Court held that the statute applied only to those collecting debts for others. It properly reached such a conclusion with a "heavy heart" because many criminally fradulent operators use exactly such false tactics to collect their own alleged debts.[12]

Mr. GIVENS. Thank you, Senator.

Senator HRUSKA. And you may proceed in your own fashion.

Mr. GIVENS. Therefore, I will not read it, but I would like to comment on certain aspects that I think may be particularly important.

The last witness emphasized the undesirability of long imprisonment for certain defendants, and I think he was right about that, and I think this is a very strong argument as to why the code might give the judge more latitude in imposing other sanctions in addition to the conventional imprisonment or probation.

Now, one of those would be the power on the part of the judge to grant an injunction as part of a sentence in a criminal case. I would say this would be justified for this reason: That if there is proof beyond a reasonable doubt that a defendant has committed a crime, certainly the civil standards of proof of preponderance of the evidence would also be satisfied.

Now, we have several instances right now where the law permits that.

For example, under the securities laws there can be a simultaneous injunctive proceeding and a criminal prosecution against the same stock fraud.

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[11] H. Rep. No. 874, 86th Cong., 1st Sess. (1959), 1959 U.S. Code Cong. & Admin. News, 2608.

[12] See Brief for the United States, p. 10, 20–21, 102a–103a, United States v. Zovluck, Dkt. No. 32652 (2d Cir. 4/7/69).

Many of the cases that I had as Chief of the Consumer Fraud Unit in the U.S. Attorney's Office under Mr. Whitney North Seymour, Jr., the U.S. Attorney for the southern district of New York, and his predecessor Robert M. Morgenthau, concerned consumer deceptions that we prosecuted as mail fraud.

Now, under those circumstances, there was no power for the judge to enter an injunction against the continuation of that conduct; so, the only course action that he had open to him, in order to make sure that this conduct was stopped, was to send the defendant to jail for perhaps a longer time that he would have had to if he could have granted an injunction. And there is no provision for an injunction against mail fraud in the existing criminal code.

So, therefore, one of my recommendations would be that at least for offenses similar to mail fraud there should be a provision empowering the judge to grant equitable relief.

And I also wish to submit that this would be appropriate for any type of criminal offense. The reason that this has not been done in the past is because the argument has been that since a crime is already illegal, there is no gain in enjoining the crime.

Now, I think that argument, which has been made in the past, is erroneous, because the injunction could be far more specific in dealing with the defendant and telling him exactly what he can and cannot do. And, of course, that has been found in the case of securities fraud and other cases.

Senator HRUSKA. Mr. Givens, in some consent decrees in antitrust cases, is that not found to be the thrust of some of the provisions of that decree?

Mr. GIVENS. Absolutely.

Senator HRUSKA. That the defendant is forbidden doing certain things that are very specific?

Mr. GIVENS. Absolutely so. So that the antitrust laws already contain this concept, that there can be an injunction and also a criminal prosecution, let us say, for example, as in a price-fixing conspiracy.

Senator HRUSKA. Yes. Now, is not the same idea and intent imparted in the parole and probation proceedings?

Mr. GIVENS. To a certain degree it is.

Senator HRUSKA. How would you sharpen that, or how would you make it more specific? Would that require statutory enactment, do you think?

Mr. GIVENS. I believe statutory enactment would greatly clarify it, because in the probation area the judges have generally tended not to go into the specific way in which the defendant carries on his activities.

For instance, I had a criminal prosecution where a defendant said that you would win 10,000 percent profit on horserace bets if you bought a system from him, and, as a matter of fact, if you complained and asked for your money back you got a note saying that your complaint was in violation of the mail-fraud statute and that the defendant was tentatively withholding your arrest to give you a chance to withdraw your complaint.

Now, if the judge had put him on probation the court could have said that he had to be engaged in a lawful occupation, that he can-

not take narcotics, and so on, but there have been decisions indicating that the judge might have been stepping beyond his powers if he said, "No use of the mails to advertise any systems for winning on horse races," without proving that the future system was a fraud, just saying, "You cannot do that anymore, based on your past conduct."

But in a regular civil injunction the court could do that, either in an antitrust case, as you mentioned, Senator, or in a securities fraud case.

So, my recommendation would be that, as stated in the report submitted by the New York County Lawyers Association, Committee on Federal Legislation, that Mr. Broderick submitted to this committee yesterday, that section 3001 concerning authorized sentences be amended to provide—and I am quoting from the County Lawyers Report on page 28:

> The court may enter orders appropriate to prevent . . . and restrain future violations of the statute shown by the evidence of plea to have been violated in the case before the court.

And I believe that would give the judge more power than he has under probation. Also, of course, putting a corporation or an organization on probation may present certain problems in that the sanction for violating the probation would merely be a fine. If there is an injunction, the court has the power to pursue an appropriate remedy for violating an injunction. For example, in the United Mine Workers coal strike of 1946, a fine of $500,000 was going to be imposed for violating that injunction. Now, if you had a corporation—and there are some small fly-by-night corporations that engage in very serious consumer frauds—you could have a fine for violating the injunction which might be more substantial than the remaining penalty for violating the underlying statute, and, again, this would be true in an antitrust suit where the penalty for violating the Sherman Act is a misdemeanor with a certain fine. If the court grants an injunction against price-fixing, and then there is a violation of that injunction, this can be more serious, because the court has specifically told the defendant not to do what he has been doing. In other words, there is a higher degree of warning to the defendant that justifies the possibility, at least, of more severe sanction.

Mr. HAWK. On page 6 of your statement, and I do not know if you plan to discuss appellate review of sentences——

Mr. GIVENS. I will, yes.

Mr. HAWK. I intended to ask Mr. Rubin this same question but I did not have an opportunity before his time ran out.

But you mention appellate review in your statement, and I do not know if you have had a chance to look at Senator Hruska's bill, S. 2228, which would seek to implement the recommendation of the Commission regarding section 1291.

I just wondered if you had an opinion as to whether appellate review of sentencing should be granted to both the prosecution as well as the defandant?

Mr. GIVENS. Well, first, let me say that granting it to the defendant must be very carefully set up procedurally, because if you allow every defendant to appeal in full from his sentence, as the National Commission on Reform of Criminal Laws would propose,

I think the appellate courts would be absolutely inundated with these appeals.

Now, I think the defendant should be allowed to appeal from the sentence, and I would suggest, as a way of accommodating this, that a procedure similar to the certiorari procedure in the U.S. Supreme Court should be followed.

Mr. HAWK. Each circuit should have, essentially, a certiorari kind of discretion?

Mr. GIVENS. That is correct, where the appeal is solely from the sentence. If there is an appeal anyway, I would allow the court to look at the sentence along with the rest of the problem so that the procedure would also be similar to a petition for a rehearing in the court of appeals.

When I practiced in the Second Circuit, if the defendant wanted to move for rehearing from the affirmance of his conviction, the Government did not have to answer that unless the court requested an answer.

Now, turning to the question that you specifically asked me, I am aware that in many nations prosecution appeals from sentences are allowed. However, I think the practical utility of prosecution appeals from sentences would be much less than another type of appeal by the prosecution, which I would feel is very important—namely, an appeal by the prosecution from an adverse ruling by the court prior to verdict, because, as of now, the defendant can get an appellate review of any decision against his rights at the end of the trial and after any conviction. The Government, on the other hand, is completely foreclosed.

Let us say that in a major trial of an important racketeer who should receive a severe sentence under the discussion you had with the last witness, the judge arbitrarily excludes some very important evidence. Now, the defendant has been acquitted, and that is the end of the ball game, and this defendant can go on and commit further crimes. So that, as a trade-off if you want for giving the defendant the right to appeal from the sentence, I would suggest this type of appeal for the Government. We have that now where a motion to suppress evidence is granted, but I think it should be available in any case where the Attorney General certifies that the matter is important enough to justify this extraordinary procedure.

I think the other suggestion you made would tend to create problems of double jeopardy and fears of double jeopardy. So, I would urge you to consider the approach that I just mentioned in lieu of prosecution appeals from sentences.

Senator HRUSKA. Mr. Givens, would you care to examine S. 2228 as a bill——

Mr. GIVENS. Yes, Senator.

Senator HRUSKA (continuing). And favor this committee with a written statement on it and your views, in view of the comments you have made?

Mr. GIVENS. I would be delighted to do that.

Senator HRUSKA. If you feel it is sufficient in some ways, because of that idea, either of appeal or the necessity to respond, or if it is inadequate in its attempt to try to have that flavor of the writ

of certiorari, would you advise us? We would be happy to have any suggestions you have.

Mr. GIVENS. Thank you very much, Senator. I will certainly do that. [Letter appears at p. 1602.]

Now, coming back to my original statement—unless there are further questions on this point—I would like to urge the committee to retain the thrust of the present mail fraud statute, 18 U.S.C. §1341.

Mr. BLAKEY. In that connection, Mr. Givens, may I ask you this question: On the assumption that the code will go forward with the present proposal, to separate criminal conduct from jurisdictional base, would you comment on the problems that might be presented by framing a substantive statute in terms of "pure scheme to defraud?"

Mr. GIVENS. I think the essence of the moral element of the offense should be a scheme to defraud. I do not think that theft is the same as the scheme to defraud, and it would seem to me we would lose a great deal of protection for widows who are taken for a great deal of money by people who lead them to expect marriage, as well as for the consumers who are the victims of consumer frauds if theft were substituted for a scheme to defraud as the essence of the crime.

Mr. BLAKEY. Would you suggest that there be something in addition to simply showing the existence of the scheme?

Mr. GIVENS. Yes. I think there should be some kind of overt act requirement, so that the crime would not consist merely of having the bad state of mind.

Now, under the existing mail fraud statute, in addition to having a scheme to defraud, the defendant must cause the mails to be used in the execution of the scheme. I think some similar type of requirement should be included in the proposed new code.

Mr. BLAKEY. Would you want the overt act to rise to the level of an attempt?

Mr. GIVENS. Well, not necesarily, but I think if the attempt is defined as being an act corroborative of the intent to commit the crime, then the same standard could apply here.

Mr. BLAKEY. If we adopted that suggestion, would it be appropriate to have the general attempt provision applicable to this section?

Mr. GIVENS. No; I think this would be a substitute for having the attempt section applicable. You do not need an attempt to commit an act which involves a state of mind, plus an overt act as in conspiracy cases. In other words, the mail fraud section as it now exists—and has not been criticized as far as I know—has been very effective for about 100 years, and it is somewhat similar to a conspiracy, that you have on evil state of mind, a scheme to defraud, plus an overt act. Now, the overt act in the mail fraud section is the use of the mails, and I think you could provide that the existence of a scheme to defraud, plus causing any act such as the use of the mails or facilities of interstate commerce which would provide a basis for federal jurisdiction would constitute a violation. As an alternative, the existence of a scheme to defraud, plus any significant or substantial act to carry out that scheme, or any act corroborative

of the intent to carry out the scheme, or similar language, plus the existence of any basis of Federal jurisdiction under the code would constitute a violation. Burglary also involves an overt act plus conduct evincing an intent even though the ultimate violence or threat may not occur. I believe this would be a satisfactory solution, and I would be strongly opposed to using the theft concept which is completely different and has never been effective in prosecutions of fraud. And I also think that it is very important that the definitions now in section 1741 of the code either be deleted or not applied to the fraud concept.

Mr. BLAKEY. May I interrupt and ask you a question?

Mr. GIVENS. Yes.

Mr. BLAKEY. May I ask you to extend your reasoning, perhaps, in a slightly different direction? If your criticisms of the proposed code in reference to consumer fraud are valid, what would be your comments on the failure of the proposed code to retain the conspiracy to defraud provision, in reference to the Government?

Mr. GIVENS. I believe the provision prohibiting any conspiracy to defraud the United States is a very important one, and that the proposed code is seriously deficient in omitting that. For example, I prosecuted a case in which pictures of nudes were brought in labelled as cups and saucers, and there was an agreement to bribe the customs official to look the other way. And, now, we could not prove that there was actually a bribe, or that the people who made the bribe or said they paid the bribe had known about this false invoicing. So, this was prosecuted successfully as a pure conspiracy to defraud the United States, and the conviction was affirmed in *U.S.* v. *Tourine*, cited on page 2 of my memorandum.

Now, if this provision is to be taken away, then it seems to me that this committee should add some other provision that would have the same value.

For example, if you prohibited any scheme to defraud the United States where there was an overt act or prohibited fraud against the United States with the applicability of a general attempt statute, you would accomplish the same result. That would also help in another situation that I happened to be involved in as a prosecutor, where a competitor called up another competitor and said "Let's agree to rig bids on a government contract. You do not put in a bid, and I will put in a bid of so much."

Now, unfortunately for him, the other man immediately called the FBI, and a meeting was set up at which marked money was passed. However, the prosecution was unsuccessful. There was no conspiracy, since the two men did not agree. The second man immediately reported the matter. There was no proof of an interstate phone call, nor no mailing; so we did not have a mail fraud or wire fraud. There was no false statement made, so it did not come under the existing section 1001 of title 18.

Mr. BLAKEY. So, what you are suggesting is that if the citizen had been a little less mindful of his duty and the FBI a little less vigilant, you might have been successful in the prosecution?

Mr. GIVENS. That is correct. So, it seems to me if we eliminate this important provision prohibiting conspiracy to defraud the

United States, it would be very important to have a substitute, and the substitute could have the further advantage of covering the case that I just described.

Mr. BLAKEY. So, your criticism really is of the present law——

Mr. GIVENS. Both.

Mr. BLAKEY (continuing). For having only a conspiracy to defraud and not a substantive fraud provision?

Mr. GIVENS. That is right. And I think the proposed code by the national commission is a step backwards.

Mr. BLAKEY. It is a step backwards, in that it takes half of what was necessary in a two-step process in the present code and leaves you with nothing?

Mr. GIVENS. That is correct.

Mr. BLAKEY. Let me ask you this: Do you think it would be necessary to define the phrase "to defraud?"

Mr. GIVENS. No. As a matter of fact, the attempt to do so in section 1741 of the code is one of the worst catastrophes in this entire 400-page book, in my opinion. The phrase "to defraud" has worked well both under the mail and wire fraud statutes, 18 U.S.C. 1341 and 1343, and in the prohibition of conspiracies to defraud the United States in 18 U.S.C. 371, and further definition has never been necessary, nor do I think further definition would be workable or desirable where the courts have construed such language over a period of years.

Mr. BLAKEY. Do you think the existing case law that has worked with that word has made it sufficiently definite to comply with the due process clause?

Mr. GIVENS. Certainly, I know of no complaints about the mail fraud statute that has used that term with the words "a scheme to obtain money or property by false representation, pretenses or promises." The courts have interpreted these words "to defraud" for a century or more successfully, and the attempt to codify it in about two pages of fine print in section 1741 is, I think, really a terrible abortion, because they have covered many things that should not be covered, and they have excluded things that should be covered.

For example, the statement that "puffing" which would not deceive the ordinary person in a group addressed cannot constitute deception would mean that we would take away the protection from the unsophisticated members of the society who need it the most.

So, I would strongly endorse the notion of simply using the term "to defraud." And, as a matter of fact, I think this general approach should be taken throughout the code, that where we have language such as the term "extortion" in the Hobbs act, title 18, section 1951, we should keep that and we should resist the temptation to try to play God, if you will, and write everything all over again.

The definition of "threat" is also a very difficult one in code section 1741, and would include many things that I do not think should be covered, as well as making it very difficult to instruct a jury. For example, section 1741(k) says that if you threaten "to take or withhold official action as a public servant, or cause the public servant to take or withhold official action," that would be a violation.

Now, suppose a businessman is the victim of an attempt by or-

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ganized racketeers to take over his company and they threaten to bomb his factory if he does not take out a loan from a certain racketeer enterprise. And suppose he then calls up the Securities and Exchange Commission, and the Securities and Exchange Commission says to the racketeer, "Look, you may be doing something wrong, and if you do this we may have to proceed."

The SEC man could be guilty of a violation.

If the businessman said to the racketeer: "Now, look, if you do not cut this out, I am going to get the SEC to start an investigation," he could be taking an illegal act, constituting a violation.

Now, that problem arose because the draftsman of the code was trying to codify everything instead of using the case law under the term "extortion," which has been very well interpreted for years, and I think the question you asked me applies to that as well.

The comment I just made about the case of the innocent businessman and the racketeer also would exist under section 1617 of the code which creates a new crime known as criminal coercion. This is supposed to be an antiblackmail provision. However, I think it goes much too far. It has a section (d) under 1617 which makes it a violation to threaten to cause an official action to be taken. So, if say, a housewife says, I am going to complain to the Federal Trade Commission if the company does not send me the merchandise I paid for, that could be a violation.

Section 1617(c), covers to threaten to expose a secret or publicize an asserted fact, whether true or false, tending to subject any person, living or deceased, to hatred, contempt, or ridicule, or to impair another's credit or business repute becomes a violation.

Now, suppose that someone using a secret bank account for funds derived from the sale of narcotics tries to buy control of a legitimate business and the businessman says "Look, if you do not cut this out I am going to tell the press about this." He might be guilty of threatening to reveal an asserted fact which would be true, and, therefore, the racketeer could tell him, "Well, you have just violated a Federal criminal statute." Or, again, suppose the housewife says: "I have pictures of roaches in my apartment, and unless you call the exterminators I am going to send this picture to the New York Daily News," which, of course, is mail across State lines, the housewife would be threatening to reveal an asserted fact which happened to be true, if the company renting the apartment did not call the exterminators. That might become a Federal offense.

So, I hope that this committee will either delete section 1617 or restrict it to conduct that should be criminal by using such language as "extortion" which has been judicially defined and has been adequate in the past.

Senator HRUSKA. Do you see any salvation in part 2 of section 1617 which has to do with setting out the defenses, having in mind that no Federal official would institute a prosecution if that defense were plainly visible and credible?

Mr. GIVENS. I do not think that is enough, Senator, because people can be intimidated by the fact that what they are doing is prima facie criminal, even though, perhaps, no prosecutor would proceed.

Now, an affirmative defense puts the burden on the defendant to

prove to the satisfaction of the jury that what he is doing is legitimate. I think that is wrong. If the person is exercising what I think should be his constitutional right to complain to the Government agency or to complain to the press about facts that are true, I do not think you should have to worry that maybe he will not succeed in carrying his burden. And I also, even though I am a former prosecutor, do not think we should lay complete trust in all of the prosecutors throughout the United States in all of the judicial districts. I think there is a potential for abuse here, but much more serious—since undoubtedly you are right, Senator, that most prosecutors would not abuse this—there is a chilling effect on the exercise of constitutionally protected rights in the fact that something is made a crime even though there is an affirmative defense.

So, what I would recommend is that the ingredients of that affirmative defense be transferred into the division on the definition of the crime. In other words, if the prosecution could prove it was done for malicious motives or as an extortion, then it should be a violation.

Senator HRUSKA. Well, of course, that potential abuse in the hands of the prosecutor is inherent in any case brought before him.

Now, I would—and if the prosecutor would want to—I would want to disregard section 2 in the assessment of the case, and so on. He could do so, and if he chose not to do so, he would be derelict in his duty and I think he would be very vulnerable to heavy criticism and perhaps some disciplinary action.

Mr. GIVENS. I think you are right.

Senator HRUSKA. Would the situation be helped semantically if you said provided—instead of a defense, affirmative, at the end of section 1, say, "Provided, however, that the foregoing will not be an offense in the following elements or any of them appear?"

Mr. GIVENS. Well, I think it should be actually an element of the offense to prove that it was done for sinister motives. In other words, I think what you just said would help, Senator, but I think it should not be an affirmative defense, that the burden should not be on the defendant at all, and I think that the use of traditional language like extortion would also solve the problem.

Now, I think you are right about the prosecutor probably not abusing this, but what I am concerned about even more is the intimidation of the citizen by somebody who may be doing something wrong, because the housewife in my example or the businessman in the racketeer example will not have read this section and if they respectively call somebody and say, "Look, if you do not get the exterminator," or "if you do not stop trying to take over my small business, I am going to complain" or whatever he wants to do, then, he may be greeted by the other end of the line saying "Well, you have just committed a Federal offense." Now, I do not think the citizen should be subjected to that, that he has prima facie committed a Federal offense for doing something completely proper. I think the definition of the crime should only cover those things that this committee would consider to be wrong.

Senator HRUSKA. No. But he has not committed a Federal offense.

Mr. GIVENS. Well, subject to an affirmative defense.

If he does not hire a lawyer——

Senator HRUSKA. That is semantics, is it not? That is semantics. And even suppose you have it in the definition as you suggest, that could still be done by somebody. Saying "You just committed a Federal offense," the man will shrink and say, "For goodness sake, forget what I said. Come do whatever you want to with my business."

Mr. GIVENS. I think it is a matter of degree, and I think this section should be looked at very carefully to see if it could not be narrowed or tightened up.

Senator HRUSKA. Your suggestion is to treat it in the definitions?

Mr. GIVENS. One suggestion I would make would be to incorporate it in the form of the offense as far as an element of the crime.

My second suggestion would be to substitute the Hobbs Act concept of extortion and just drop this section as such, because it has not existed in the Federal criminal law in the past.

There has been no need for it. We have had extortion statutes, and the Hobbs Act which has worked very well.

Prosecutors have been satisfied with it, and unless the Department of Justice would come before you or this committee and urge the need for this, I do not think the fact that it is in the draft of the National Commission should be enough to show the necessity for getting into this area, an area that is sensitive. And it is especially so, because it involves freedom of expression, the communication of a truth or fact, a request to an agency to investigate which has a special privilege or desirability attached to it in many cases.

Senator HRUSKA. Yes. Well, thank you very much, Mr. Givens. Your time has expired. But bear in mind to give us a comment on S. 2228.

Mr. GIVENS. Thank you very much, Senator.

Senator HRUSKA. There will appear at an appropriate place in the transcript of today's hearing the text of the bill, S. 2228, and material included in the reprint of the proceedings in the Senate on July 7, 1971.

Mr. GIVENS. And, Senator, may the report on the insanity defense and the *Boneparth* decision that I have given to Mr. Blakey also be attached to my testimony?

Senator HRUSKA. That will be done.

[Material referring to S. 2228 and the *Boneparth* decision follow:]

BY MR. HRUSKA (FOR HIMSELF, MR. BAYH, MR. BURDICK, MR. FONG, MR. GURNEY, MR. HART, MR. MATHIAS, MR. SCOTT, AND MR. TUNNEY)

S. 2228. A bill to amend chapter 235 of title 18, United States Code, to provide for the appellate review of sentences imposed in criminal cases arising in the district courts of the United States. Referred to the Committee on the Judiciary.

APPELLATE REVIEW OF CRIMINAL SENTENCES

Mr. HRUSKA. Mr. President, I introduce for myself and eight additional members of the Committee on the Judiciary (Mr. BAYH, Mr. BURDICK, Mr. FONG, Mr. GURNEY, Mr. HART, Mr. MATHIAS, Mr. SCOTT, and Mr. TUNNEY) a bill to amend chapter 235 of title 18 of the United States Code, to provide for the appellate review of Federal criminal sentences. I ask unanimous consent that the full text of the bill be printed at the conclusion of my remarks and that the bill be appropriately referred.

The PRESIDING OFFICER (Mr. GRAVEL). Without objection, it is so ordered. (See exhibit 1.)

Mr. HRUSKA. Mr. President, this legislation is identical to S. 1561 which I introduced in the 91st Congress and S. 1540 which was passed unanimously by the Senate in the 90th Congress. It is my sincere hope that both the Senate and the House will promptly consider and pass this bill this session.

Mr. President, the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee is presently considering a total reform of the Federal Criminal Laws. This project stems from the work of the National Commission on Reform of Federal Criminal Laws which issued its final report on January 7 of this year. This Senator was very privileged to have been a member of that commission, along with my distinguished colleagues from Arkansas (Mr. MCCLELLAN) and North Carolina (Mr. ERVIN).

The final report of this group embraced the concept of appellate review of sentencing with this suggested amendment of title 28:

"§ 1291. The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District and the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands, except where direct review may be held in the Supreme Court. *Such review shall in criminal cases include the power to review the sentence and to modify or set it aside for further proceedings.*" (Amendment Italicized.)

This simple amendment reflects the commission's view that there should be some form of appellate review of sentences. It does not set forth the form that the review should take nor the contours of its jurisdiction. However, the entire sentencing scheme recommended by the commission is predicated on the idea that appellate review of sentences will be included in the revised code. I am introducing this bill today so that the Subcommittee on Criminal Laws and Procedures may examine it and consider including it in the total revision of the Federal criminal code as implementation for the idea set forth in section 1291.

The bill will correct one of the greatest single injustices existing in our Federal criminal process today: The lack of authority and machinery to review unreasonable sentences. Extensive studies have shown that unreasonably harsh sentences are imposed on many individuals who stand convicted of a violation of our laws. Many of these unreasonable sentences are imposed on individuals with fine families and good backgrounds, on individuals who strayed from the path on a single occasion and under trying circumstances, on individuals whose only offense was minor in comparison to those of others who have yet received far lesser sentences.

The problem of disparity of sentences has concerned Congress, bar associations and legal societies, students, and workers in the field of penology and, indeed, the executive branch of our Government and the courts for many years.

Putting aside what may be the ultimate or most desirable goals of a rational and humane sentence, we have in modern times been receiving from the practice of enacting statutes calling for a mandatory fixed sentence. A greater number of our criminal laws now provide for a wide range of permissible sentences. The practical effect of this is obvious. As the final determining factor in the sentence to be imposed, the judge's discretionary power becomes increasingly important.

By and large the wisdom of this policy of delegating the function to the trial judge has been clearly demonstrated. Our district judges are exceedingly conscientious, knowledgeable, and experienced. They are best able, informed, and qualified to deal fairly with the convicted defendant. However, they are the first to recognize the inadequacies in the present system. The exercise of judgment in this delicate area is not easy.

The responsibility for determining the proper sentence is so great as to justify and warrant the means of review. There is little wonder that judges have openly commented on the incongruity of the situation that the power to impose a sentence is the only discretionary power vested in the Federal trial judge which is not subject to appeal.

A study of the Federal statutes and the interpretation given them by the courts establishes that no authority exists for an appellate review of the sentence imposed by the judge in a criminal case so as to determine whether

the sentence is excessive. A sentence will be modified only when it is unauthorized by law as not being within the limits fixed by a valid statute.

In the 85th Congress the concern about the problem of sentence disparities brought about pioneering legislation: the Sentencing Act of 1958 which provided for institutes and joint councils on sentencing. Their value cannot be overestimated. The institutes have been described as giving "the Federal judges themselves an opportunity to assume the initiative in eliminating sentences which may appear biased, capricious, or the result of defective judgment."

However, this and other related legislation have not been a complete answer to the problem. The Judicial Conference of the United States rejected appellate review legislation in 1958, reconsiderd it in 1961, and then approved appellate review legislation in 1964. When we review the actions of the Judicial Conference, it is logical to ask what caused such a substantial shift in judicial opinion. While a redraft of the bill and increased interest in the problem may have played a part in this change, it is clear that the original objection of the Judicial Conference was to the principle of appellate review, and not the language of any particular bill. In retrospect, it seems that a consensus in favor of the principle did not develop until it became manifest that the problem of excessive sentences was not going to be resolved by the extensive use of the facilities provided in the Sentencing Act of 1958 or by other existing legislation.

Twelve years of experience under the act has demonstrated that such procedures and techniques are not enough.

Nor has indeterminate sentencing proven to be the answer to the problem. For various reasons, many judges have declined to impose indeterminate sentences, or have imposed such sentences only infrequently.

To adequately cope with the problem of excessive sentences—to correct injustices once they have occurred—the practice of appellate review is required.

In order to illustrate the injustices which this bill attempts to correct, let me cite some fiscal year 1970 statistics regarding average sentences imposed by U.S. district courts. The table below lists seven types of crimes over which Federal courts have jurisdiction. Besides them are stated the figures—in months—for the district with the highest and the district with the lowest average sentence given, as well as the national average sentence for all convictions in each category in fiscal year 1970. These statistics are for districts which had 25 or more convictions in each of these categories during this period.

AVERAGE FISCAL YEAR 1970 SENTENCES (IN MONTHS) BY TYPE OF OFFENSE

[25 or more convictions per district]

Offense	Shortest average district	Longest average district	National average all sentences
Bank robbery	68	184	140
Auto theft	26	52	36
Forgery	26	52	33
Marihuana	45	56	47
Narcotics	55	101	80
Immigration	2	16	7
Liquor laws (Internal Revenue)	6	23	14

Just to take the figures for bank robbery sentences as an example, should a person be tried and convicted in district A, he could expect to receive a sentence in the neighborhood of 68 months. But should he be unfortunate enough to have committed the same offense in district B, he could expect to receive a sentence approximately three times as long, or some 184 months. While it should be noted that all of these sentences were lawful within the limits stated by Congress, it seems somehow unfair for similar crimes to receive such disparate sentences from one district to another. This bill would permit, but not require, that sentences like that imposed in district B could be reviewed by the circuit courts of appeal in order to bring about a greater consensus regarding length and severity of sentences imposed for a particular type of offense. I believe that these figures just cited give graphic illustration of the great disparity of sentences that exist.

In the past when speaking of the need for appellate review of sentences, I have cited specific cases where the sentence seemed to be out of line with the

facts of the case. I believe that these average figures are more meaningful and illustrative of the need for this legislation than isolated examples for which special explanation may be available.

Mr. President, excessive and disparate sentencing prevent the rehabilitation of those who have been unjustly sentenced, they contribute to disorder in our prisons, and they increase disrespect for our criminal process which weakens the moral fiber of our citizens and which can only result in increasing violations of our laws.

As Justice Potter Stewart wrote in 1958, prior to the time of his appointment to the Supreme Court of the United States:

"Justice is measured in many ways, but to a convicted criminal its surest measure lies in the fairness of the sentence he receives."

The importance of the sentencing process is evident when it is observed that in fiscal 1970, 24,111 defendants were convicted in our district courts by pleas of guilty and nolo contendere, whereas only 4,067 defendants were convicted by jury and court trials.

Mr. President, the real anomaly and injustice of the existing lack of review of sentences was pinpointed by the introductory statement of the tentative draft of the American Bar Association's Advisory Committee on Sentencing and Review, "Standards Relating to Appellate Review of Sentences" when it stated:

"One of the most striking ironies of the law involves a comparison of the methods for determining guilt and the methods of determining sentence. The guilt-determination process is hedged in with many rules of evidence, with many procedural rules, and, most importantly for present purposes, with a carefully structured system of appellate review designed to ferret out the slightest error. Yet in the vast majority of criminal convictions in this country—90 percent in some jurisdictions; 70 percent in others— the issue of guilt is not disputed.

What is disputed and, in many more than the guilty-plea cases alone, what is the only real issue at stake, is the question of appropriate punishment. But by comparison to the care with which the less-frequent problem of guilt is resolved, the protections in most jurisdictions surrounding the determination of sentence are indeed miniscule."

The protections in our Federal courts surrounding the determination of sentences are indeed miniscule and the situation must be corrected.

Mr. President, the concept of appellate review of sentences is not new to criminal law in the United States. Prior to 1891 the Federal Code provided a right to appeal a case on the basis of disproportionately severe sentence. However, due to an oversight or inadvertence, a revision of the statute in 1891 did not mention sentences and the courts subsequently held that the power had been withdrawn by Congress.

The situation that presently prevails in the Federal courts stands in marked contrast to the practice of 17 States, many foreign nations, including England and Canada and our military courts. Indeed, the Federal jurisdiction is a singular example of an advanced system of jurisprudence that does not allow review of sentences.

Under our existing Federal law the determination of the sentence in a criminal case is the only matter that is left to the unsupervised discretion of the district judge before whom the case is pending. As long as the sentence imposed is within the statutory limits provided by the law, the sentence is unreviewable by appeal. No matter how excessive or unjust the sentence might be, an appellate court is legally powerless to modify it in any way.

The basic shortcoming in our criminal procedure is unique to our judicial system and has allowed serious inequities and disparities in the sentences which have been imposed.

Another unfortunate aspect of the present practice is that harsh and irrational sentences have often led appeal courts to reverse convictions on technical or minor points and on strained interpretations of the law, interpretations which will serve justice and society in future cases.

I do not suggest that this bill will solve all of the difficult problems in the determination of proper sentences. However, it will provide a significant tool for improving the sentencing process and for correcting unjust sentences when they are imposed. It also will facilitate the development of proper sentencing practices and standards. In other words, an important gap in the present system will be closed.

Other phases of the work of trial judges are subject to appellate review and supervision. Only sentencing errors are immune to correction on appeal. The reasons for such a gap are for the most part historical. Such reasons are becoming irreconcilable with the standards of due process and are not in step with the need for a fair and just sentencing system.

This legislation will not allow one judge or a panel of judges, simply to substitute their judgment for that of the trial judge. Mere whim or fancy will be insufficient reason to modify the sentence. Only when it reasonably appears from the circumstances that a sentence was excessive will be appellate court act. Although the system will be made flexible by allowing review, it will remain the trial judge's duty to weigh the facts and appraise the defendant.

Valid reasons exist for variations in sentences for the same crime. Certainly a sentence which may be quite proper in a case involving one defendant and one set of circumstances may be grossly inadequate in dealing with the same offense committed by a different type of individual or under aggravated circumstances. But where the same crime has been committed by similar offenders under similar circumstances, the punishment should be reasonably uniform. Disparities based solely upon the personality of the judge passing sentence are unjust.

The determination of a proper sentence involves many considerations. Sentencing is not nor can it be reduced to an exact science. The exercise of sound judgment is an indispensable part of the process, but that does not justify arbitrary determinations. When judgments cannot be reconciled with reason, the appellate courts will be empowered to prevent a miscarriage of justice.

Mr. President, it is my hope that Congress will correct this injustice. Every effort has been made to produce a bill in the best form possible. Briefly, it provides as follows:

Subsection (a) provides that a defendant may apply to the court of appeals for leave to appeal a felony sentence of imprisonment or death imposed by a district court.

Subsection (b) provides that the court of appeals may in its sole discretion grant or deny an application for leave to appeal a sentence. A denial of leave to appeal is final in the matter. If leave to appeal is granted, the court may review the sentence to determine if it is excessive.

Under subsection (c) the court of appeals is authorized to take or direct any action on the sentence that it believes is required under the circumstances of the case, except to increase the sentence.

Subsection (d) provides that the appeal procedure is to be synchronized with the appeal rules generally and if an appeal is taken from an order of conviction as well, it allows the matter to be heard at the same time.

Subsection (e) provides that the defendant shall have the same access to presentence reports on appeal as he had at the district court. The sentencing judge is required to state for the record his reasons for selecting the particular sentence imposed in each felony case where a felony sentence of imprisonment or death is imposed.

Subsections (f) through (i) insure that appellate review does not complicate other phases of criminal procedure. Subsection (f) defers the time for filing an application for leave to appeal whenever a diagnostic study is ordered prior to imposing sentence. Subsection (g) makes certain that credit is given for time served during the pendency of a sentence appeal. Subsection (h) makes explicit that bail opportunities would not be enlarged by the enactment of the bill. Subsection (i) provides that the act shall apply only to sentences imposed 6 months after the effective date of the act. This latter provision avoids the argument about retroactivity and affords the courts time to prepare for the new procedures.

Mr. President, there are two scholarly writings in favor of an improved sentencing procedure which I wish to bring to the Senate's attention today. They are: "Appellate Review of Sentences: To Make the Punishment Fit the Crime." 20 Stanford Law Review 405 (1968) by Hon. Stanley A. Weigel; and "Appellate Review of Legal but Excessive Sentences: A Comparative Study," 21 Vanderbilt Law Review 411 (1968) by Prof. Gerhard O. M. Mueller and Fre La Poole. Mr. President, I ask unanimous consent that these two law review articles be printed in the RECORD at a point immediately following the printing of the bill in the RECORD.

Mr. President, I also ask unanimous consent that a brief appendix, which I have prepared listing several additional examples of cases where excessive sentences have been imposed, be printed in the RECORD immediately following the close of my remarks here on the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 2.)

Mr. HRUSKA. Mr. President, as a member of the Judiciary Committee, I have authored and coauthored a number of proposals concerning crime and improvements in our legal system. Many of these bills have been designed to assist the prosecution in bringing criminals to justice. At the same time, I have been concerned with the rights of the defendant. We must strive to insure that the criminal legal process is at all times fair and just.

Excessive sentences, which are inexplicable by any circumstances or logic, are an injustice to the individual and are a discredit to the entire criminal justice system. This is why the principle of appellate review is supported by the Judicial Conference of the United States and the American Bar Association, and why appellate review is the practice in many foreign nations, including England and Canada, in our Armed Forces, and in 17 of the States.

This bill is intended to correct this injustice.

Again, I express the sincere hope that the Senate and the House both will promptly consider and pass this needed legislation.

EXHIBIT 1

S. 2228

A bill to amend chapter 235 of title 18, United States Code, to provide for the appellate review of sentences imposed in criminal cases arising in the district courts of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 235 of title 18, United States Code, is amended by inserting immediately after section 3741 thereof the following section:

"§ 3742. Appeal from sentence

"(a) An application for leave to appeal from the district court to the court of appeals the sentence of imprisonment or death imposed may be filed by a defendant with the clerk of the district court in any felony case in the following instances:

"(i) after a finding of guilt by a judge or jury, whether following a trial or the acceptance of a plea;

"(ii) after the revocation or modification of an order suspending the imposition or execution of a sentence or placing the defendant on probation;

"(iii) after a resentence under any other applicable provision of law.

"(b) Upon granting leave to appeal, the court of appeals may review the merits of the sentence imposed to determine whether it is excessive. This power shall be in addition to all other powers of review presently existing or hereafter conferred by law. If the application for leave to appeal is denied by the court of appeals, the decision shall be final and not subject to further judicial review.

"(c) Upon consideration of the appeal, the court of appeals may dismiss the appeal, affirm, reduce, modify, vacate, or set aside the sentence imposed, remand the cause, and direct the entry of an appropriate sentence or order or direct such further proceedings to be had as may be required under the circumstances. If the sentence imposed is not affirmed or the appeal dismissed, the court of appeals shall state the reasons for its action. The defendant's sentence shall not be increased as a result of an appeal granted under this section.

"(d) The application for leave to appeal from sentence shall be regarded as a notice of appeal for all purposes, and the procedure for taking an appeal under this section shall follow the rules of procedure for an appeal to a court of appeals. A denial of the application for leave to appeal on the ground that sentence imposed is excessive shall not prejudice any aspect of the appeal predicated on other grounds. If the application is granted all issues on appeal shall be heard together.

"(e) When an application for leave to appeal is filed, the clerk of the district court shall certify to the court of appeals such transcripts of the proceedings,

records, reports, documents, and other information relating to the offense or offenses of the defendant and to the sentence imposed upon him as the court of appeals by rule or order may require. Any report or document contained in the record on appeal shall be available to the defendant only to the extent that it was in the district court. In each felony case in which sentence of imprisonment or death is imposed the judge shall state for the record his reasons for selecting that particular sentence.

"(f) When a judge has adopted the sentencing procedure set forth in section 208 (b) of title 18, United States Code, an application for leave to appeal may only be filed after a judgment or order is entered by the judge following the completion of the study provided by such section.

"(g) The provisions of section 3568 of title 18, United States Code, shall be applicable to any defendant appealing under this section.

"(h) This section shall not be construed to confer or enlarge any right of a defendant to be released following his conviction pending a determination of his application for leave to appeal or pending an appeal under this section.

"(i) This section shall become effective six months after its approval and shall apply only to sentences imposed thereafter."

(b) The analysis of chapter 235 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"3742. Appeal from sentence."

EXHIBIT 2

[From the Stanford Law Review, February 1968]

APPELLATE REVISION OF SENTENCES: TO MAKE THE PUNISHMENT FIT THE CRIME

(By Stanley A. Weigel*)

Unjustifiable disparities in the sentencing of criminal offenders have become a matter of serious concern to many observers of the criminal process.[1] The key word is "unjustifiable." Reasonable disparity is necessary to achieve the purposes of sentencing, which include prevention of further criminality on the part of the offender, rehabilitation, and deterrence of the commission of similar offenses by others. Such purposes cannot be achieved without providing some range of sentencing alternatives to allow adjustment for the special facts of each crime as well as the record and character of each convicted individual.

These considerations are reflected in the broad discretion allowed the sentencing judge by statute in the federal and in many state jurisdictions. However, most of these jurisdictions, including the federal, fail to provide any effective remedy for abuse of that discretion.

The absence of such a remedy is a serious defect in the sound administration of the criminal law, even though the number of unjust or aberrant sentences may be very few. In the words of Mr. Justice Stewart, "It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this most important dimension of fundamental justice." [2]

The seriousness of that neglect is underscored by the fact that sentencing is the only significant adjudication performed by the trial judge in the overwhelming majority of criminal cases. This is so because the overwhelming majority of criminal defendants plead guilty or nolo contendere.[3] Moreover, sentencing is generally the most difficult determination a judge must make, one made even more difficult by the increasing variety of possible dispositions and by the paucity of meaningful guidelines to assist the judge in his choice.

In light of the foregoing, it is indeed surprising that few American jurisdictions offer meaningful remedies to the victims of unjustified severity in sentencing. This absence is all the more striking in that a comparison with other nations indicates that those American jurisdictions failing to provide a remedy stand largely alone in this respect.[4]

Recognizing that inequitable and disparate sentences constitute "a major and justified complaint against the courts," [5] the President's Commission on Law Enforcement and Administration of Justice has recommended that "[p]rocedures for avoiding and correcting excessive, inadequate, or disparate

sentences should be devised and instituted."[6] Progress has been made in the federal judiciary in recent years to encourage the development of rational, uniform sentencing criteria and practices. There are sentencing institutes for district judges,[7] and a number of district courts have set up a system of panels to assist the sentencing judge in his determination of the proper sentence.[8] However, there is a need to supplement these practices with procedures designed for the correction of grossly inequitable sentences.

I. DISPARITY AND INEQUITY IN FEDERAL SENTENCING

The past few years, then, have been marked by increasing concern over the breadth of the disparities in sentences meted out for the same crimes.[9] This concern is especially applicable to the federal system, in which the wide range of sentencing alternatives available to its trial courts[10] and a great regional diversity tend to invite sentencing disparities.

Congress has, over the years, added significantly to the choices available to district courts in setting sentences.[11] A brief summary will be illuminating.

(1) Imprisonment for a determinate length of time. Offenders so sentenced are eligible for parole after having served one-third of the sentence.[12]

(2) Imprisonment of indeterminate length. Under this alternative the sentencing court may reduce or eliminate minimum terms for parole eligibility, leaving the release of the offender to the discretion of the board of parole.[13]

(3) Probation. Probation cannot exceed a period of 5 years but may otherwise be granted upon "such terms and conditions as the court deems best."[14]

(4) Split sentence. This procedure allows a court a split a sentence between confinement of up to 6 months in a penal or treatment institution and probation for the remainder of the sentence.[15]

(5) Youth Corrections Act. This Act[16] is applicable to offenders under the age of 22 and, at the discretion of the sentencing judge, to those between 22 and 26.[17] Offenders sentenced under the Act may be placed on probation, committed for treatment and supervision for fixed or indeterminate terms, or sentenced under any other applicable penal provision.[18]

(6) Juvenile Delinquency Act. This Act[19] applies to offender under the age of 18.[20] Proceedings under the Act are regarded as adjudications of status rather than as criminal trials.[21] Juveniles found to be delinquent may be placed on probation for a period not exceeding their minority, or committed to special custody and treatment for a term not exceeding their minority or the maximum term for the offense committed, whichever is less.[22]

(7) Other dispositions. These include fines, suspended sentence, deportation, and disqualification. In addition, a district court may defer sentencing and commit an offender for a period of study, by the Bureau of Prisons, not to exceed 6 months.[23]

In my view, the number of incidents of unjustifiable disparities in sentencing by federal judges is very small in relation to the large number of offenders sentenced.[24] Nevertheless, that such disparities do occur despite all efforts to eliminate them is suggested by a number of relevant facts.

There have been significant variations in the terms of imprisonment imposed by federal district court judges[25] and in the use of the various sentencing alternatives that are available. Average terms of imprisonment for all offenses vary widely from circuit to circuit[26] and from district to district within the circuits.[27] There is a great deviation in the average terms for specific types of offenses.[28] Similar variations are to be found in the frequency of use of split sentences[29] and indeterminate sentences,[30] in the application of provisions of the Youth Corrections Act[31] and Juvenile Delinquency Acts[32] and in the use and duration of probation.[33] To some extent these disparities may be attributable to variations in the types of offenses committed within particular districts or circuits. The Administrative Office of the United States Courts has devised weighted averages, however, which take account of such variations and which show disparities of a magnitude almost equal to those indicated by the raw data.[34]

Certainly, careful analysis of these incidents of disparity would reveal rational justifications for a great majority of the sentences imposed. It would show, for instance, that many similarities between offenders and offenses are more apparent than real, and that many sentencing deviations result from proper considerations of factors unique to individual defendants. But such

analysis would certainly also expose a small but important residue of cases in which the disparities are so excessive and the facts so similar that they preclude such justifications. That such cases do exist is confirmed by the reports of federal judges who regularly point to cases from their own experience in which substantially different treatment was accorded offenders with similar records, ages, and backgrounds who had committed the same or similar offenses.[35]

The principal reason for the existence of inequities is clear. They occur because each judge, just as each person he sentences, is a unique individual. Each judge is the product of a different inheritance and life experience. It follows inexorably that there are differences among judges in senses of values, reactions, predilections, and points of view.

There are at least some judges who tend habitually to "lay it on" convicted or contessed offenders.[36] They may do so out of antiquated or misguided notions about the functions of sentencing, or as a consequence of more obscure personal factors. Whatever the reasons for their actions, the results are aberrant and unfair sentences. These few judges do not seem to respond to persuasion or reason in regard to their sentencing practices. Since most of them are excellent judges in every other respect, discipline or removal would be a remedy worse than the disease and, if applied to the federal judiciary, would unwisely undermine its independence.

There are also a few judges who apparently regard one type of offense as particularly heinous. They may, for example, impose the maximum sentence allowable in every instance of narcotics violation or bank robbery. Their appraisals of the danger or evil of these crimes may be quite right, but the automatic imposition of the maximum penalty for a particular crime contradicts the judgment of Congress in providing for a range of punishment, and contributes to irrational disparities in the system as a whole. Differences in regional attitudes toward certain crimes may similarly contribute to disruption of the uniform implementation of national penal policies.

Finally, the best of judges make mistakes. Some federal judges in metropolitan districts sentence as many as 1,000 defendants in a single year, and rare indeed is the federal judge in any district who sentences fewer than 100. In each case the judge must study carefully the presentence reports, make his personal assessment of the defendant, and appraise the sentencing alternatives available to him. Not only is this judgmental task complex, but the judge can turn to few standards to guide him. The limited statutory criteria are nebulous,[37] and because there is no relevant appellate review, no common-law standards have evolved. It is hardly surprising, therefore, that seriously inequitable disparity is occasionally to be found in the sentences imposed.

Sentencing disparities create serious problems for the federal courts and correctional institutions quite apart from the manifest unfairness of subjecting some offenders to inordinately severe penalties. The recipient of an excessive sentence will learn, through comparison of his own sentence with those of his fellow prisoners, that he has been the victim of injustice.[38] His resentment inevitably breeds unrest and disciplinary problems,[39] and, in addition, may well undermine his reformation.

Furthermore, the impossibility of direct challenge to unfair sentences results in a great volume of appeals on tenuous technical grounds[40] and a corresponding tendency on the part of the appellate courts to find merit in otherwise questionable allegations of error, or to find error prejudicial where it would normally be considered harmless.[41] Needless to say, these attempts to redress indirectly the inequity of excessive sentences make bad law.

Finally, public confidence in the judicial system must suffer when grossly unfair sentences go unredressed, in visible violation of a most basic principle of legal justice—that similarly situated individuals be treated alike. This loss of public confidence becomes particularly troublesome where members of minority groups interpret uncorrected disparities as a form of legally sanctioned discrimination.

II. PRESENT MEANS FOR ALLEVIATING SENTENCING ERRORS IN THE FEDERAL SYSTEM

The federal system does provide for some limited means of correcting inequitable sentences. While they have been used more frequently in recent years than in the past, analysis will indicate they are inadequate.

A. The present scope of appellate review

Federal defendants may, of course, obtain redress for illegal sentences[42] such as those that exceed statutory limits for the offense charged,[43] or are ambiguous with respect to the time and manner in which the term is to be served,[44] or do not adequately specify punishment for individual counts.[45] However, where the trial judge remains within statutory bounds and observes formal and procedural requirements, review of his sentencing discretion is sharply limited.

In the 19th century the circuit courts as then constituted exercised review over the sentences imposed by federal trial courts.[46] Save for that brief historical exception, federal appellate courts have consistently refused to review the sentencing discretion of district-court judges if sentences were within the prescribed statutory limits.[47] They have occasionally suggested in dicta that they might intervene if a trial court were to exercise extreme abuse of its legal discretion,[48] but such extreme abuse has apparently never been discovered. The refusal to review district-court sentences is more commonly stated in absolute terms: "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." [49]

A few limited exceptions to the rule of nonreview have developed over the years. Where an offense has no statutory maximum penalty, as in the case of criminal contempt, the appellate courts will review the discretion of the sentencing court.[50] This review is justified on the grounds that "where Congress has not seen fit to impose limitations on the sentencing power . . . [a]ppellate courts have . . . a special responsibility for determining that the power is not abused, to be excised if necessary by revising themselves the sentences imposed." [51]

Additional exceptions have been recognized by the courts of appeals as a result of the decisions of the Seventh Circuit in *United States v. Wiley.*[52] In that case the trial judge refused to consider probation for Wiley, one of several codefendants, because he would not plead guilty on charges of possession of property stolen from an interstate shipment.[53] The circuit court reversed this "arbitrary" refusal to consider Wiley's application for probation, but the trial judge, on remand, considered and denied Wiley's application and reinstated his term of imprisonment. In a second appeal the Seventh Circuit again set aside the sentence and remanded, this time on the ground that the district court had arbitrarily sentenced Wiley more severely than it had his codefendants who had pleaded guilty.[54]

Although several federal courts have limited the *Wiley* doctrine to cases of disparity among codefendants based upon different pleas,[55] the language of *Wiley* supports the broader proposition that any demonstrably arbitrary disparity among codefendants may require remand for resentencing.[56] While *Wiley* has failed to provide the basis for any significant review of disparate sentences, it has obliged a number of courts to hear challenges similar to those in *Wiley* and to assess the reasons for the disparities involved in those cases.[57]

Arbitrary refusal to utilize diagnostic procedures provided by statute may also constitute grounds for appellate review of sentencing.[58] Lastly, in a series of recent cases, several courts of appeals have held that increases of sentence on retrial must be acceptably justified and will be reversed if arbitrary.[59]

These exceptions to the rule of nonreview are important steps in developing means of redress for sentencing inequities in very limited areas. But even if they were firmly established in all the circuits, these exceptions would reach only a small fraction of all the disparities that demand consideration.

A few commentators and judges[60] have argued that the federal appellate courts have always had authority to review all sentences by virtue of section 2106 of the Judicial Code, which empowers them to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order . . . and direct the entry of such appropriate judgment . . . as may be just under the circumstances." Others have argued that review and correction of disproportionate sentences is constitutionally required, either because excessive and irrational sentences constitute cruel and unusual punishment[61] or because unreasonable disparity in the treatment of essentially similar defendants violates the equal protection clause.[62]

Whatever the merits of such arguments, federal courts have shown little inclination to adopt them. For the present, federal appellate judges are likely to continue to express the view, perhaps with some reluctance that "[u]nless we are to over-rule sixty years of undeviating federal precedants, we must hold that an appellate court has no power to modify a sentence,"[63] and that problems relating to the power of the judiciary to review sentences are "peculiarly questions of legislative policy."[64]

B. Some nonappellate remedies

1. Indeterminate Sentencing

Indeterminate sentencing might appear, at first glance, to provide a solution to the problem of disparate sentences. Because the judge simply sentences the defendant to "the term prescribed by law,"[65] he is relieved of the responsibility for any disparities in the length of imprisonment. But the real effect of the indeterminate sentence is to shift the burden of social justice from the judge to a parole board or parole authority. While I have the highest respect for such bodies, I believe that for some time to come, in view of the methods of their appointment and the shortage of qualified personnel to assist them,[66] they will certainly be no more competent to determine lengths of imprisonment than is a conscientious and independent judge. Moreover, because parole authorities of necesity operate on a committee basis, have relatively little time for each prisoner, and use more or less standard classifications, they are likely to be less responsive to the special situation of a particular offender than is a single judge concerned solely with the case before him.

The day may come when the quality, qualifications, and quantity of prison personnel and of assisting psychiatrists and sociologists, and the methods of their selection and tenure, will combine to make the indeterminate sentence the best means of avoiding unjustifiable disparity in sentencing. But that day is not here nor likely soon to be. The great majority of district-court judges apparently agree, if one may judge by the reluctance of so many to impose indeterminate sentences.[67]

2. Panels of Judges for Advance Consideration of Sentences

Various district courts have experimented with "sentencing councils," in which panels of judges regularly consider dispositions proposed by the sentencing judge and offer non-mandatory recommendations for his consideration.[68] This is a step in the right direction, but, for several reasons, it is not the best solution now available.

To begin with, nearly half of the federal districts have fewer judges than are required for such a system.[69] In these districts, to convene sentencing panels would entail travel, delay, and other complications. Even in districts with enough judges, such panels would encroach upon the working time of already overburdened jurists. Furthermore, those judges most in need of such guidance would likely be those least affected by the views of their peers.

III. THE CASE FOR APPELLATE REVIEW

The reasons that have been stated for supporting appellate review in the federal system are not claimed to be novel or unique. So much has been said and written on the general subject that there are few new arguments for or against it.[70] The best that a trial judge can offer is a point of view that is part the product of personal experience and part a personal evaluation of the considerations urged both for and against appellate review.

I am convinced that sentencing, at least for the present, ought to remain a judicial function. Courts should not abdicate their powers or responsibilities in this area. At the same time, they should be armed with every means of assuring wise, reasonable, and just exercise of this heavy power to deprive individuals of property and freedom. At present, trial judges are granted very broad discretion by Congress in the sentencing of criminals. Surely that discretion over the fate of human beings should not be held sacrosanct, particularly since no such immunity attends the exercise of discretion by trial judges in civil cases.

Some contend that appellate judges are not qualified to ascertain whether a trial judge has abused his discretion in imposing sentence.[71] This argument.

seems to me to be invalid. For one thing, many judges of the courts of appeals serve there after long experience on the trial bench. For another, it seems to me to be plainly desirable, in case of harsh sentences, to permit review by a group of jurists detached from the pressures and immediacies of the trial courtroom. The passage of time between sentencing and review may afford a better perspective. There is nothing so esoteric about sentencing that the decision of one man should be held sacred and beyond the proper scope of appellate review.

Some have argued that the trial judge is better acquainted with the true character of the defendant because of personal contact or observation.[72] For a number of reasons, this contention cannot withstand careful scrutiny. Frequently the judge's contact with the defendant is limited to visual observation because, in many cases, defendants do not testify. But whether the observation is exclusively visual or is supplemented by an assessment of the defendant's testimony and demeanor on the witness stand, is it really a reliable basis on which to judge whether the defendant should be imprisoned for 2 years or for 20? Who, as a defendant, would want to have that vital determination turn upon one man's assessment of his personality under such unusual and difficult circumstances? My admiration for my brothers on the federal trial bench throughout the country and for their exceptional insights into human beings is second to none, but it has not convinced me that they or I possess some unique capacity to make a sentence fit the crime on the basis of personal observation of a defendant during the course of his trial.

One more consideration should be adduced against the argument that the judge's opportunity to observe the defendant is a *sine qua non* for justice in sentencing. The great majority of defendants convicted of federal crimes have pleaded guilty.[73] In these cases, the "eyeball-to-eyeball" confrontation between judge and defendant, including the defendant's right of allocution,[74] is usually a matter of 10 or 15 minutes at the most. I do not urge that this person-to-person communication is without value. It has worth to all concerned. But great as that value is, it is not a sound predicate for the notion that, lacking such confrontation, an appellate court cannot adequately review a sentence imposed by a trial judge. So far as justice in sentencing turns upon appraisal of the defendant's personal traits, I doubt that there is a worse time to make that evaluation than when that always anxious, often frightened, individual stands before the judge for sentencing.

The federal trial judges recognize this. The principal sentencing aid for nearly all is the written presentence report of trusted and independent probation officers.[75] If these reports are available to the court of appeals along with the full record of the lower court proceedings, the appellate court will have before it all the material most significant to the trial court's imposition of sentence.

I should add that the trial judge, in his consideration of the presentence report, can and often does confer informally with the probation officer who prepared it. These conferences aid the judge in a better understanding and evaluation of the presentence report. The court of appeals might not have the benefit of these informal conferences. But such a lack, even if it were substantial, would not negate the wisdom of appellate review. To have an adequate basis for wise and effective review, an appellate cohrt need only have sufficient information to examine intelligently what the trial court did. Then, giving due weight to the advantages that the trial court had in making its original decision, the appellate court can determine whether the trial court abused its discretion. The courts of appeal can be given more than sufficient information to make such a determination in the review of sentencing.

Furthermore, it is highly unlikely that any court of appeals would regularly substitute its judgment of the proper sentence in a case for that of the federal trial judge. On the contrary, exercise of the power to change a sentence imposed by a district judge would undoubtedly be restricted to those relatively infrequent—but extremely serious—instance where the sentence imposed was clearly excessive. Such a scope of review would no more demean the power and dignity of the federal trial judge than does the similar scope of review now exercised by the courts of eppeals over innumerable rulings and decisions that are generally within the discretion of the district courts.

One hears the argument made against appellate review of sentencing that to allow it would be to open the gates to a flood of frivolous appeals. The best

answer to this contention is that experience des not support it. Appellate courts review trial-court sentences regularly in 15 states and occasionally in others; [76] the same practice has been a regular feature of other civil-law and common-law jurisdictions for many years.[77] There has been no such flood of appeals in these jurisdictions.[78] If it be true, as I think it is not, that a very large number of defendants are victimized by excessive sentences, then justice would call for a great number of appeals. And even if there were many frivolous appeals, I have observed no incapacity in our courts of appeals to make short shrift of them.

In fact, I think it is likely that appellate review will ultimately reduce the total number of appeals. As mentioned above,[79] many appeals on the merits are generated only because of the imposition of an unduly harsh sentence, and many appellate courts, dealing with an appeal on the merits where the sentence has been unduly severe, are prone to seize upon error in the trial as a sufficient ground for reversal and retrial. Provision for review of trial-court sentences would eliminate any need for unmerited appeals and for reversals motivated primarily by the harshness of the sentences involved.

IV. PROPOSALS FOR APPELLATE REVIEW IN THE FEDERAL SYSTEM

In recent years a number of proposals to permit review of sentences by the courts of appeals have been introduced in Congress.[80] The last of these was reported favorably by the Senate Committee on the Judiciary [81] and passed in the Senate on June 29, 1967.[82] The Advisory Committee on Sentencing and Review of the American Bar Association has also suggested statutory provisions for appellate review.[83] Each of these proposals would empower appellate courts to review sentences appealed on the ground of excessiveness. They differ, however, in the categories of sentences made reviewable, the powers of the reviewing court, and the procedures for review of sentences.

A. Sentences reviewable

The ABA advisory committee's report on appellate review of sentences recognized that although "[i]n principle, judicial review should be available for all sentences imposed in cases where provision is made for review of the conviction . . . it may be desirable, at least for an initial experimental period, to place a reasonable limit on the length and kind of sentence that should be subject to review." [84]

The first five of the recent series of bills would have permitted review of all convictions where no mandatory sentence was required by law.[85] Each of the other bills would limit review to sentences of imprisonment or death in felony cases,[86] or to sentences of imprisonment exceeding specified periods.[87]

Appellate review would probably not prove very useful in correcting excesses in short sentences. Given present workloads and appellate procedures, most defendants who have been sentenced to terms of less than 1 year will have been free on good behavior before their appeals can be heard. Furthermore, however invalid the argument that the courts of appeals would be overwhelmed by a flood of appeals, it may be wise initially to limit review to sentences of appreciable severity, where the more critical disparities would occur.[88] Review could readily be extended to lesser periods of imprisonment, terms of probation, fines, and commitments under the Youth Corrections and Juvenile Delinquency Act [89] as the courts of appeals acquire experience in handling such cases and develop techniques for the prompt disposition of frivolous claims.[90]

B. Powers of the reviewing court

The ABA Advisory Committee on Sentencing and Review has recommended that courts reviewing sentences be empowered to remand for resentencing or to substitute any disposition of the offender originally available to the sentencing court—except that the offender's sentence could not be increased either on appeal or on remand.[91] All of the proposed bills [92] would permit reduction of sentences by the courts of appeals. Several would permit modification of sentences,[93] and of these almost all would permit increase of sentences within limits.[94] The most recent bill would authorize the reviewing court to "dismiss the appeal, affirm, reduce, modify, vacate, or set aside the sentence imposed,

remand the case, and direct the entry of an appropriate sentence or order or direct such further proceedings to be had as may be required under the circumstances," but would forbid any increase in sentences.[95]

The reviewing court should be empowered to select from the full range of statutory alternatives open to the district courts, but neither the reviewing court nor the trial court on remand should be empowered to increase the original sentence. To do so would raise serious constitutional objections, particularly in view of the recent line of federal cases holding increases of sentences on retrial unconstitutional.[96] Also, because of the threat of an increase in sentences, such a procedure would deter legitimate appeals and thus make appellate review illusory for many aggrieved defendants. Finally, experience in those jurisdictions that permit review but deny power to increase sentences indicates that, contrary to the argument urged in favor of allowing longer resentences, the absence of this threat does not result in a flood of frivolous appeals.[97] The courts of appeals can readily control the volume of appeals in other, less objectionable, ways—through limitations on the category of cases subject to review and procedural techniques in the handling of appeals.

C. Review procedures

The ABA advisory committee recommended that all appeals from sentences be of right except to courts with discretion to refuse consideration of appeals from convictions.[98] A few of the bills in Congress likewise specified that all appeals from sentences would be of right.[99] However, other bills, including the latest, require defendants to seek and be granted leave to appeal by the courts of appeals.[100] Although it may be thought that aggrieved defendants should have an appeal of right against the severity of their sentences, it is undoubtedly wise as an initial step to give the courts of appeals discretionary review to allow adjustment to and control over the new caseloads that might be generated by sentence review.[101] Similarly, at first the decisions of the courts of appeals should be final,[102] at least until experience under the new procedures demonstrates that such an added caseload can be handled without further overburdening the Supreme Court and that the problem of disparity among the circuits deserves the Supreme Court's attention.[103]

The ABA advisory committee[104] and the last few bills in Congress[105] would require the sentencing judge to state reasons for the imposition of each sentence that might later be subject to review. The object of these provisions, of course, is to encourage carefully considered and reasoned sentences by the trial judge and to inform the reviewing court of the factors that led to the particular sentence imposed. However, I doubt that these objectives would be very well served by such a requirement. Most judges do state their reasons for sentences, and these statements are readily available to the courts of appeals.[106] To require a statement of reasons in every case might well focus concern on making a record rather than on matters of substance. Plausible rationalizations can often be adduced to support excessive sentences and, conversely, infelicitous reasoning can confuse and cast doubt upon reasonable sentences. I think that the possibility of review will in itself do enough to ensure more careful and complete consideration by trial judges of all relevant factors. It should be sufficient to authorize the courts of appeals to order statements by the sentencing judge where such statements are deemed particularly useful.

Finally, special provision is made in nearly all of these proposals empowering the reviewing court to order the production of all materials available to the sentencing judge.[107] This is, of course, undoubtedly desirable as a general proposition and is usually feasible. Special problems arise, however, with respect to material given in confidence to the sentencing judge by probation officers. There has been great controversy over the propriety and constitutionality of withholding such reports from defendants.[108] Nonetheless, while these reports must of course be available to the courts of appeals, they should not be disclosed to defendants without prior consultation with the probation officers who prepared them.[109] Such precaution is necessary to prevent family bitterness or even violence, which might result if a defendant learned the source of frank information given in confidence, and to avoid drying up confidential sources. I realize that, although the defendant usually knows the facts about himself and his actions that are revealed by such reports, there is some unfairness in

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withholding from the defendant any of the factors that may have been taken into account in sentencing. I realize, too, that "confidential" information is often not worth much and that trial judges are little influenced by it. On balance, I think it best to provide the probation officer with an opportunity to acquaint the reviewing court with the possible consequences of disclosure.

In all other respects, procedures for review of sentences should be identical to procedures for review of convictions, and all appeals on the same case should be considered together. This would eliminate the possibility of confusion and of fragmented appeals. The most recent proposals so provide.[110]

CONCLUSION

There are many good reasons for adopting a means of appellate review of federal district-court sentencing: It would right serious wrongs to individuals. It would promote public respect for and confidence in the law and the judiciary. It would ease the problems of discipline in prison and aid in the rehabilitation of those prisoners who otherwise might be permanently alienated from society by the knowledge that a cruel wrong imposed on them had not been righted. It would encourage greater rationality in sentencing practices. Overall, the institution of general appellate review would bring needed improvement in an important aspect of the administration of criminal justice. The latest bill before Congress, with the few modifications I have outlined, would appear to be a sound vehicle for achieving this much-needed reform.

FOOTNOTES

*A.B. 1926, J.D. 1928, Stanford University, Judge, United States District Court for the Northern District of California. The author wishes to acknowledge the research assistance of Michael John Matheson, editor, *Stanford Law Review*.

[1] The problem of disparity in sentencing is treated generally in Joint Comm. on Continuing Legal Education of the ALI and the ABA, The Problem of Sentencing 56–77 (1962); M. Paulsen & S. Kadish, Criminal Law and Its Processes 162–68 1962); *id.* at 55–56 (Supp. 1967); McGuire & Holtzoff, *The Problem of Sentence in the Criminal Law*, 20 B.U.L. Rev. 423 (1940): Rubin, *Disparity and Equality of Sentences*, 40 F.R.D. 55 (1966).

[2] Shepard v. United States, 257 F.2d 293, 294 (6th Cir. 1958).

[3] During fiscal year 1964, 91.2 percent of all cases ending in conviction were concluded without trial, Administrative Office of the U.S. Courts, Federal Offenders in the United States Disrict Courts 1964, at 15, table S (1965).

[4] *See Hearings on S. 2722 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 83–102 (1966).

[5] President's Comm'n on Law Enforcement and Administration of Justice, the Challenge of Crime in a Free Society 145 (1967).

[6] *Id.* at 146.

[7] The Judicial Conference of the United States is authorized under 28 U.S.C. § 334 (1964) to convene institutes and councils of federal judges to study sentencing.

[8] *See generally* Smith, *The Sentencing Council and the Problem of Disproportionate Sentences*, Fed. Probation, June 1963, at 5; Doyle, *A Sentencing Council in Operation*, Fed. Probation, Sept. 1961, at 27.

[9] *E.g., Hearings on S. 2722*, *supra* note 4, at 10–54, 69–82, 109–22; Address by Mr. Chief Justice Warren, American Law Institute Annual Meeting, May 18, 1960, *reprinted in* 25 F.R.D. 213 (1960).

[10] For an analysis of the sentencing structures of American jurisdictions see Note, *Statutory Structures for Sentencing Felons to Prison*, 60 Colum. L. Rev. 1134 (1960).

[11] Congress has authorized the following procedures: in 1925, the use of probation in lieu of imprisonment, Act of Mar. 4. 1925, ch. 521, § 1, 43 Stat. 1259. 18 U.S.C. §§ 3651–58 (1964); in 1938, special custody and treatment for juvenile offenders, Federal Juvenile Delinquency Act, ch. 486. § 4, 52 Stat. 765 (1938), 18 U.S.C. § 5034 (1964); in 1950, special custody and treatment for youth offenders under the age of 22, Federal Youth Corrections Act, ch. 1115, § 2. 64 Stat. 1087 (1950), 18 U.S.C. §§ 5006(e), 5011 (1964); in 1958, indeterminate sentencing. special commitments for study by the Bureau of Prisons, and commitments of offenders under the age of 26 as youth offenders, Act of Aug. 25, 1958, Pub. L. No. 85–752. §§ 3–4, 72 Stat. 845–46, 18 U.S.C. §§ 4208–09 (1964); and, finally, in 1966, special confinement and treatment of offenders addicted to narcotics, Act of Nov. 8, 1966, Pub. L. No. 89–793, § 201, 80 Stat. 1443, 18 U.S.C. § 4253 (Supp. II, 1965–66).

[12] 18 U.S.C. § 4202 (1964).

[13] 18 U.S.C. § 4208(a) (1964).

[14] 18 U.S.C. § 3651 (1964). The power of the court to impose conditions of probation is fairly broad. *Compare* Berra v. United States, 221 F.2d 590 (8th Cir. 1955) (employment or office holding in labor union forbidden), *and* United States v. Worcester, 190 F. Supp. 548 (D. Mass. 1961) (disclosure of evidence required), *with* Karrell v. United States, 181 F.2d 981 (9th Cir. 1950) (restitution of funds in transaction not involved in indictment improper).

[15] 18 U.S.C. § 3651 (1964).

[16] 18 U.S.C. §§ 5005–26 (1964).

[17] 18 U.S.C. §§ 4209, 5006(e) (1964).

[18] 18 U.S.C. §§ 5010, 5017 (1964).

[19] 18 U.S.C. §§ 5031–37 (1964).

[20] 18 U.S.C. § 5031 (1964).

[21] *See* United States v. Borders, 154 F. Supp. 214 (N.D. Ala. 1957), *aff'd*, 256 F.2d 458 (5th Cir. 1958).

[22] 18 U.S.C. § 5034 (1964).

[23] 18 U.S.C. § 4208(b) (1964).

[24] Others have been of the opinion that the frequency of unjustifiable disparities is relatively great. *See* authorities cited note 1 *supra; Hearing on S. 2722, supra* note 4, at 10–54, 69–82, 109–22. Mr. Chief Justice Warren, for example, expressed concern in 1960 about "the wide diversity in the use of probation and other sentencing practices in our several courts and the great disparity in the sentences pronounced by our judges." Address by Mr. Chief Justice Warren, *supra* note 9, at 215.

[25] *See* Glueck, *The Sentencing Problem*, Fed. Probation, Dec. 1956, at 15, 17–18; Note, *Due Process and Legislative Standards in Sentencing*, 101 U. Pa. L. Rev. 257, 259–60 (1952); Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 Yale L.J. 1452, 1458–59 (1960).

[26] The average sentence in each of the circuits for all persons committed to federal institutions in fiscal year 1965 varied from 28.3 months in the First Circuit to 45.1 months in the Seventh Circuit, *Hearings on S. 2722, supra* note 4, at 150–53.

[27] The range of lowest and highest districts in average sentences for all offenses within the various circuits is as follows: First Circuit, 21.9 months to 40.3 months; Second Circuit, 16.6 months to 37.2 months; Third Circuit, 18.0 months to 45.1 months; Fourth Circuit, 19.4 months to 57.0 months; Fifth Circuit, 20.9 months to 44.8 months; Sixth Circuit, 22.1 months to 49.6 months; Seventh Circuit, 27.7 months to 50.0 months; Eighth Circuit, 23.4 months to 63.5 months; Ninth Circuit, 0.5 months to 67.4 months; Tenth Circuit, 30.3 months to 44.3 months. *Id.*

[28] For example, the average sentence for narcotics violations varied from 44.4 months in the Third Circuit to 82.3 months in the Eighth Circuit and 82.8 in the Tenth Circuit; for forgery, from 15.8 months in the First Circuit to 35.9 months in the Eighth Circuit; for liquor violations, from 8.4 months in the Ninth Circuit to 22.3 months in the Third Circuit. Variations among individual districts were even more extensive. *Id.*

[29] The frequency of use of split sentences in fiscal year 1964 varied from 2.5 percent of all convictions in the Fifth Circuit to 7.4 percent in the Fourth Circuit, and more widely among districts within the circuits, Administrative Office of the U.S. Courts, *supra* note 3, at 76–77.

[30] Use of indeterminate sentences varied from 1.7 percent of all convictions in the First Circuit to 8.0 percent in the Sixth Circuit, with wider variations among the districts. *Id.*

[31] Use of the Youth Corrections Act varied from 1.7 percent of all convictions in the First Circuit to 7.8 percent in the Tenth Circuit, with wider variations among the districts. *Id.*

[32] Use of the Juvenile Delinquency Act varied from 0.3 percent of all convictions in the First Circuit to 8.6 percent in the Tenth Circuit, with wider variations among the districts. *Id.*

[33] Use of probation in fiscal year 1965 varied from 44.3 percent of all convictions (excluding violations of immigration laws, wagering tax laws, and federal regulatory acts) in the Sixth Circuit to 63.8 percent in the Third Circuit, with wider variations among the districts. Administrative Office of the U.S. Courts, Persons Under the Supervision of the Federal Probation System, Fiscal Year 1965, at 102–05 (1967). The percentage of probationers under supervision for less than 2 years varied from 69.3 percent in the Fourth Circuit to 83.7 percent in the First Circuit. *Id.* at 94–95.

[34] *See* Administration Office of the U.S. Courts, *supra* note 3, at 26–27, 32–33, 78–83. A total of 20 districts exceeded or fell short of the national weighted average by 20 percent or more in the use of probation, and 19 districts by a similar percentage in the overall severity of sentences. *Id.*

[35] As examples of possible abuses, Judge Sobeloff of the Court of Appeals for the Fourth Circuit points to the 15-year sentence imposed upon a first offender who wrote a $58 bad check to pay for rent, food, and his ailing wife's medical bills, and to the sentence of life imprisonment without parole given a feeble-minded 20-year-old Mexican boy who sold a shot of narcotics to his 17-year-old friend. *Hearings on S. 2722, supra* note 4, at 25–26. For examples of abuses in consecutive sentencing on multiple counts *see id.* at 14; 46 Iowa L. Rev. 159 (1960).

[36] *See* Glueck, *The Sentencing Problem*, Fed. Probation, Dec. 1956, at 15, 17.

[37] The following standards are typical of the statutory criteria governing the use of the various sentencing alternatives: "when in its opinion the ends of justice and best interests of the public require . . . ." 18 U.S.C. § 4208(a) (1964) (indeterminate sentencing); "when satisfied that the ends of justice and the best interest of the public . . . will be served . . .." 18 U.S.C. § 3651 (1964) (probation); "[i]f the court is of the opinion that the youth offender does not need commitment . . . ," 18 U.S.C. § 5010(a) (1964) (probation for youth offenders).

[38] *See* Ashe, *A Warden's Views on Inequality in Sentences*, Fed. Probation, Jan.–Mar. 1941, at 26–27.

[39] *See Hearings on S. 2722, supra* note 4, at 166–67. *But see* Ashe, *supra* note 38, at 27.

[40] *Hearings on S. 2722, supra* note 4, at 11, 35.

[41] *See, e.g.*, United States v. Hoffman, 137 F.2d 416, 422 (2d Cir. 1943).

[42] 28 U.S.C. § 2255 (1964) states: "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

Furthermore, under Fed. R. Crim. P. 35, a court "may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner" within 120 days of the imposition of sentence, dismissal of appeal, or denial of review by the Supreme Court.

[43] *See, e.g.*, Herndon v. United States, 207 F.2d 412 (4th Cir. 1953); United States v. Baldwin, 128 F. Supp. 739 (S.D. Ohio 1953).

[44] *See* Scarponi v. United States, 313 F.2d 950 (10th Cir. 1963) (dictum).

[45] *See* Benson v. United States, 332 F.2d 288 (5th Cir. 1964).

[46] Act of Mar. 3, 1879, ch. 176, § 1, 20 Stat. 354, which remained in effect until the appellate jurisdiction of the circuit courts was transferred to the circuit courts of appeals in 1891, was interpreted as empowering the circuit courts to modify excessive sentences on appeal. *See* Bates v. United States, 10 F. 92 (C.C.N.D. Ill. 1881). *See generally* Hall, *Reduction of Criminal Sentences on Appeal*, 37 Colum. L. Rev. 521 (1937).

[47] *See, e.g.*, Gore v. United States, 357 U.S. 386, 393 (1958); United States v. Baysden, 326 F.2d 629 (4th Cir. 1964); Boerngen v. United States, 326 F.2d 326 (5th Cir. 1964); Martin v. United States, 317 F.2d 753 (9th Cir. 1963). For an exhaustive compilation of cases denying review in each of the circuits see 10 DePaul L. Rev. 104, 105 n.8 (1960).

[48] *See* United States v. Hetherington, 279 F.2d 792, 796 (7th Cir. 1960) ("manifest abuse"); Livers v. United States, 185 F.2d 807, 809 (6th Cir. 1950) ("gross abuse"); Tincher v. United States, 11 F.2d 18, 21 (4th Cir.), *cert. denied*, 271 U.S. 664 (1926) ("gross or palpable abuse").

[49] Guerera v. United States, 40 F.2d 338, 340–41 (8th Cir. 1930).

[50] *See* Yates v. United States, 356 U.S. 363 (1958); Green v. United States, 356 U.S. 165 (1958) (dictum); *cf.* United States v. United Mine Workers, 330 U.S. 258 (1947).

[51] Green v. United States, 356 U.S. 165, 188 (1958).

[52] 267 F.2d 453 (7th Cir. 1959); 278 F.2d 500 (7th Cir. 1960) (second appeal).

[53] The trial judge stated flatly: "Had there been a plea of guilty in this case probably probation might have been *considerd* under certain terms, but you are all well aware of the standing policy here that once a defendant stands trial that element of grace is removed from the consideration of the Court in the imposition of sentence." United States v. Wiley, 184 F. Supp. 679, 681 (N.D. Ill. 1960) (emphasis in original).

[54] Wiley, a minor participant in the crime, received a sentence of 3 years, while the ringleader and three other minor participants received terms of from 1 to 2 years. Wiley's criminal record was less serious than those of some of his codefendants. *See* United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

[55] *See* United States v. Martell, 335 F.2d 764, 766 (4th Cir. 1964); Ellis v. United States, 321 F.2d 931, 933 (9th Cir. 1963); *In re* Cohen's Petition, 217 F. Supp. 240, 244 (E.D.N.Y. 1963).

[56] The Court of Appeals for the Seventh Circuit stated that "where the facts appearing in the record point convincingly to the conclusion that the district court has, without any justification, arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon the co-defendants, this court will not hesitate to correct the disparity." United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960). However, "the presumption is that the court acted reasonably," and an appellant "must make allegations at least indicating some unreasonable basis for the disparity of sentences." Simpson v. United States, 342 F.2d 643, 645 (7th Cir. 1965).

[57] *See, e.g.*, United States v. West Coast News Co. 357 F.2d 855 (6th Cir. 1966); United States v. Gargano, 338 F. 2d 893, 897 (6th Cir. 1964); United States v. Vita, 209 F. Supp. 172, 173 (E.D.N.Y. 1962).

[58] *See, e.g.*, Leach v. United States, 334 F. 2d 945 (D.C. Cir. 1964) (refusal to order mental examination of prisoner under previous psychiatric care); Peters v. United States, 307 F. 2d 193 (D.C. Cir. 1962) (unreasonable refusal to order presentence investigation).

[59] Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967); Marano v. United States, 374 F.2d 583 (1st Cir. 1967); Short v. United States, 344 F.2d 550 (D.C. Cir. 1965).

[60] *See, e.g.*, Smith v. United States, 273 F. 2d 462, 468 (10th Cir. 1959) (Murrah, C. J. dissenting).

[61] *Cf.* Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, Douglas, Brennon, J.J., dissenting from the denial of certiorari), which suggest that the imposition of a sentence of death upon a convicted rapist might constitute cruel and unusual punishment.

[62] *See* Rubin, *supra* note I, at 62–69.

[63] United States v. Rosenberg, 195 F. 2d 583, 604 (2d Cir. 1952).

[64] Gore v. United States, 357 U.S. 386, 393 (1958).

[65] *Eg.*, Cal Penal Code § 1213.5(b)(3) (West 1956).

[66] For a discussion of the problems of the lack of adequate resources and qualified personnel available to parole authorities see D. Dressler, Practice and Theory of Probation and Parole 231–34 (1959).

[67] About 6 percent of the federal offenders sentenced in fiscal year 1965 received indeterminate sentences. Administrative Office of the U.S. Courts, *supra* note 3, at 18.

[68] *See* authorities cited note 8 *supra*.

[69] *See Hearings on S. 2722, supra* note 4, at 13.

[70] *See, e.g., Hearings on S. 2722, supra* note 4, at 2–3, 7–8. 34–38, 61–66, 111–12; ABA, Standards Relating to Appellate Review of Sentences 21–31 (1967); *Sobeloff, A Recommendation for Appellate Review of Criminal Sentences*, 21 Brooklyn L. Rev. 2 (1954). For a complete bibliography see *Hearings on S 2722, supra* note 4, at 146–49.

[71] *See Hearings on S. 2722, supra* note 4, at 127.

[72] *Id.*

[73] *See* note 3 *supra*.

[74] Fed. R. Crim. P. 32(a)(1) provides: "Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment."

[75] Fed. R. Crim. P. 32(c) requires a presentence investigation and report "unless the court otherwise directs." The report must contain "any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court."

[76] ABA, *supra* note 70, at 13. A more complete survey of the law in the various states may be found in Mueller, *Penology on Appeal; Appellate Review of Legal but Excessive Sentences*, 15 Vand. L. Rev. 671 688–97 (1962).

[77] *Hearings on S. 2722, supra* note 4, at 83–100.

[78] Studies of several such jurisdictions have been made and in no case was there found to be an excessively troublesome problem of administering numerous frivolous appeals. In Britain, only 8 percent of convicted prisoners appeal their sentences. *Id.* at 29. In Massachusetts, procedures for sentence review have apparently even reduced the number of appeals taken with regard to the merits of criminal cases. *Id.* at 163. *See also* Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 Yale L.J. 1453, 1464 (1960).

[79] *See* notes 40–41 *supra* and accompanying text.

[80] *See* S. 1540, 90th Cong., 1st Sess. (1967) ; S. 2722, 89th Cong., 1st Sess. (1965) ; S. 823, 88th Cong., 1st Sess. (1963) ; S. 2879, 87th Cong., 2d Sess. (1962) ; S. 1692, 87th Cong., 1st Sess. (1961) ; S. 3914, 86th Cong., 2d Sess. (1960) ; H.R. 270, 85th Cong., 1st Sess (1957) ; S. 1480, 84th Cong., 1st Sess. (1955) ; H.R. 4932, 84th Cong., 1st Sess. (1955).

[81] S. Rep. No. 372, 90th Cong., 1st Sess. (1967).

[82] 113 Cong. Rec. S132–33 (daily ed., June 29, 1967).

[83] *See* ABA, *supra* note 70.

[84] *Id.* at 13 States permitting review of sentences generally limit the scope of review according to the length or type of sentence; the type of proceeding for determining guilt or sentence, or the general authority of the reviewing court, *Id.* at 15–16.

[85] S. 1692, 87th Cong., 1st Sess. (1961) ; S. 3914, 86th Cong., 2d Sess. (1960) ; H.R. 270, 85th Cong., 1st Sess. (1957) ; S. 1480, 84th Cong., 1st Sess. (1955) ; H.R. 4932, 84th Cong., 1st Sess. (1955).

[86] S. 1540, 90th Cong., 1st Sess. § 3742(a) (1967).

[87] S. 2722, 89th Cong., 1st Sess. (1965) (aggregate of more than 1 year) ; S. 823, 88th Cong., 1st Sess. (1963) (5 years or more) ; S. 2879, 87th Cong., 2d Sess. (1962) (5 years or more).

[88] About ¾ of all possibly appealable sentences of imprisonment exceed 1 year; about ¼ exceed 5 years. *Hearings on S. 2722, supra* note 4, at 39. It has been estimated that a 1-year limit would reduce the average volume of sentence appeals to 88 annually for each circuit, and that a 5-year limit would further reduce it to about 32 per circuit. *Id.* at 29.

[89] *See* text accompanying notes 16–22 *supra*.

[90] The courts of appeals should, of course, have authority to review sentences imposed after revocation of orders suspending sentence or granting probation, and after periods of confinement for study. The latest congressional bill specifically provides for such review. *See* S. 1540, 90th Cong., 1st Sess. §§ 3742 (a), (f) (1967).

[91] ABA, *supra* note 70, at 53–55.

[92] *See* authorities cited not 80 *supra*.

[93] S. 1540, 90th Cong., 1st Sess. (1967) ; S. 2722, 89th Cong., 1st Sess. (1965) ; H.R. 270, 85th Cong., 1st Sess. (1957) ; S. 1480, 84th Cong., 1st Sess. (1955) ; H.R. 4932, 84th Cong., 1st Sess. (1955).

[94] S. 2722, 89th Cong., 1st Sess. (1965) ; H.R. 270, 85th Cong., 1st Sess. (1957) ; S. 1480, 84th Cong., 1st Sess. (1955) ; H.R. 4932, 84th Cong., 1st Sess. (1955).

[95] S. 1540, 90th Cong., 1st Sess. § 3742(c) (1967).

[96] *See* Patton v. North Carolina, 381 F. 2d 636 (4th Cir. 1967) ; *cf.* Marano v. United States, 374 F. 2d 583 (1st Cir. 1967) ; United States v. Russell, 260 F. Supp. 265 (M.D. Pa. 1966). *See also* 80 Harv. L. Rev. 891 (1967).

[97] All but three of the states that provide for review permit no increase of sentences by the reviewing court. *Hearings on S. 2722, supra* note 4, at 38. The Uniform Code of Military Justice provides for mandatory review of the sentences of courts-martial without possibility of increase, 10 U.S.C. § 871 (1964), and this system appears to have functioned without difficulty. *See Hearings on S. 2722, supra* note 4, at 140. European jurisdictions rarely permit increases in appeals by defendants, and then only with careful safeguards such as a requirement of unanimity on the part of the reviewing court. *Id.* at 85. After 60 years of experience with a system of sentence review permitting increases, the British Parliament withdrew from its appelate courts the power to increase sentences imposed at trial. Criminal Appeal Act 1966 § 4(2), c. 31.

[98] ABA, *supra* note 70. at 36.

[99] H.R. 270, 85th Cong., 1st Sess. (1957) ; S. 1480, 84th Cong., 1st Sess. (1955) ; H.R. 4932, 84th Cong., 1st Sess. (1955).

[100] S. 1540, 90th Cong., 1st Sess. (1967) ; S. 1692, 87th Cong., 1st Sess. (1961) ; S. 3914, 86th Cong., 2d Sess. (1960).

[101] At the very least, the court of appeals should not be required to grant a full hearing on all such appeals. *See* S. 2722, 89th Cong., 1st Sess. (1965) ; S. 823, 88th Cong., 1st Sess. (1963) ; S. 2879. 87th Cong., 2d Sess. (1962)

[102] The latest bill in Congress provides specifically that the court of appeals' denial of appeal is final. S. 1540. 90th Cong., 1st Sess. § 3742(b) (1967).

[103] *See* notes 26–28 *supra*.

[104] ABA, *supra* note 70, at 42.

[105] S. 1540, 90th Cong., 1st Sess. (1967) ; S. 2722, 89th Cong., 1st Sess. (1965) ; S. 823, 88th Cong., 1st Sess. (1963) ; S. 2879, 87th Cong., 2d Sess. (1962).

[106] At present, the court reporter is required to transcribe and certify all "proceedings in connection with the imposition of sentence in criminal cases. . . ." 28 U.S.C. § 753(b) (Supp. II, 1965–66). This transcript would be available to the courts of appeals through Fed. R. Crim. P. 39(b), and also through provisions, in most of the bills, authorizing the courts of appeals to order the production of all trial documents. *See* S. 1540, 90th Cong., 1st Sess. (1967) ; S. 2722. 89th Cong., 1st Sess. (1965) ; S. 823, 88th Cong., 1st Sess. (1963) ; S. 2879, 87th Cong., 2d Sess. (1962) ; S. 1692, 87th Cong., 1st Sess. (1961) ; S. 3914, 86th Cong., 2d Sess. (1960).

[107] *See* S. 1540, 90th Cong., 1st Sess. (1967) ; S. 2722, 89th Cong., 1st Sess. (1965) ; S. 823, 88th Cong., 1st Sess. (1963) ; S. 2879, 87th Cong., 2d Sess. (1962) ; S. 1692, 87th Cong., 1st Sess. (1961) ; S. 3914, 86th Cong., 2d Sess. (1960) ; ABA, *supra* note 70, at 42.

[108] *Compare* Smith v. United States, 223 F.2d 750, 754 (5th Cir. 1955), *and Hearings on S. 2722, supra* note 4, at 117–18, *with* United States v. Durham, 181 F. Supp. 503 (D.D.C. 1960), *and* Barnett & Gronewold, *Confidentiality of the Presentence Report*, Fed. Probation, Mar. 1962, at 26.
[109] Two of the bills in Congress specifically require the courts of appeals to "take such appropriate measures as may be necessary to safeguard the secrecy of any such presentence reports and other evaluations." S. 823, 88th Cong., 1st Sess. (1963) ; S. 2879, 87th Cong., 2d Sess. (1962).
[110] *See* S. 1540, 90th Cong., 1st Sess. (1967) ; S. 2722, 89th Cong., 1st Sess. (1965).

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Appellate Review of Legal, but Excessive Sentences: A Comparative Study

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(The American criminal statutes do not generally establish criteria to be followed by the trial judges in sentencing; therefore, the right of judicial review of sentences as a matter of law is largely unavailable due to the almost total exercise of judicial discretion in the sentencing process. The authors will examine and evaluate the continental system in which the criminal codes generally provide sentencing guidelines, thus enabling sentence review to be obtained as a matter of law.)

I. Emergence of Sentence Review

Classical penology was conceived in France in the eighteenth century,[1] and then eclipsed all over the world in the nineteenth, when Lombroso conjured up the picture of the born criminal. It was finally laid to rest in the United States in the twentieth century. Its basic tenet had been simple enough: the legislature in its infinite wisdom would seek and find the appropriate punishment for every crime. This can be accomplished if a crime is defined narrowly enough, perhaps by the creation of subcategories of that crime, so as to encompass all potential perpetrators who will each incur the same amount of criminal guilt. All perpetrators in the same subcategory are then entitled to the exact same amount of punishment in expiation of their criminal guilt. This system, so it was thought, ideally adjusts the punishment to achieve a balance between the crime and its harm and the criminal and his guilt, without going into undue subtleties of minute variations in the guilt of perpetrators in the same subcategory. Consequently the codes of the eighteenth and nineteenth centuries could satisfy themselves with defining and categorizing crimes in terms of the harm created and the specific means are in question.

The punishments in such a scheme of things, being almost entirely designed to serve the goals of retribution and deterrence of all nondescript members of a class, could be almost entirely stereotyped. A system which does not admit of variation among members of its various categories of perpetrators needs little variability of its punishments. Therefore, whether in an American state or European nation in the nineteenth century, nearly all first degree murderers were rewarded with death, and nearly all thieves received a stereotyped penitentiary sentence. To the extent that the need for variability was recognized, such variability—like its historical ancestor, the benefit of clergy—was regarded primarily as a matter of mercy to be dispensed by the sovereign. However, in nearly all countries the legislative scheme of crimes and punishments did permit a minimum of variation, usually in terms of alternate punishments, or sometimes regarding the quantum of punishment. "The duration and quantity of [fine and imprisonment] must, says Blackstone, frequently vary from the aggravations, or otherwise of the offense, the quality and condition of the patries, and from innumerable other circumstances . . ."[2]

In a system of relatively stereotyped punishments for static guilt and harm, practically no question of reviewability of sentence can arise as long as each sentence is within the narrow legislative frame. However, such an argument could not survive a recognition that the infinite variety of subjective and objective factors, which exist in the personality of every offender, and in the harm and guilt, must be reflected in the criminal sanction. Likewise, the criminal sanction must be adjusted to serve the needs of a variety of aims of penal policy. While new variants in the personality of the perpetrator and in the aims of penal policy were first scientifically recognized and stated in Europe, especially by the Italian positivists, it was in this country that the

first significant breaks with the established stereotyped and static penal scheme occurred. Among the devices of the new penology we find the following: (1) the mini-max statute, which allows the court to choose an appropriate sentence within a framework of a minimum and maximum sentence provided by the legislature; (2) the alternate sentence, providing for either one form of punishment or another, or both; (3) additional sentences, *e.g.*, forfeiture of office, added to imprisonment; (4) the open-ended sentence, which allows the court to individually fix either the minimum or the maximum and to make the other limit to the sentence depend on subsequent factors; (5) good conduct and good time provisions, resulting in deductions from initial punishment; (6) parole rights and duties; (7) probation; and (8) an infinite variety of commitments to special institutions.

With such a potpourri of penal dispositions available, the modern judge needs a degree of guidance unimagined in the nineteenth century. Now, a significant choice has to be made in every case, a choice which was generally not possible a few decades ago. Therefore, it seems that a legal machinery is needed to guard against the wrong choice. How does the law usually protect the defendant against a wrong choice on the part of a judge? It grants appellate review of criminal sentences was workable and lawful in the nineteenth century, it can be neither proper nor lawful at the present time. It can be attributable only to chance or ignorance that the American system, which permits no review of judicial choice in sentencing, has not been declared unconstitutional.

Elsewhere we have demonstrated that a movement is underfoot to provide American convicts with a machinery for the review of criminal sentences alleged to be excessive, though lawful. From the modest beginning of a single American jurisdiction which granted such review in 1858, we now have reached the point at which such remedies are available in fifteen jurisdictions, albeit on a very limited scale.[3] It does not take much courage to predict that in the foreseeable future, all American jurisdictions will adopt sentence review procedures.

II. THE LACKING CRITERIA OF SENTENCE REVIEW AT HOME

While the need for reviewing the exercise of judicial choice in sentencing may be quite apparent, what makes one pause is the lack of criteria by which we can measure the propriety of a given choice. It must be noted that we are here interested primarily in the judicial choice. There is also a legislative choice, which is subject to review. Thus, the constitutionailty of a statute permitting any prison sentence from one day of life and/or a fine of any magnitude for the crime of shoplifting may well be subject to some doubt. Indeed, the supreme courts of the nineteenth century at first were considerably hesitant to uphold as constitutional, against charges of uncertainty and vagueness, statutes allowing penological variety which seemed to permit the exercise of judicial choice, unguided by fixed legislative criteria. For all practical purposes, the legislatures have not provided the judiciary with criteria to guide them in exercising sentencing discretion. If there are no criteria to begin with, how can it be charged that the wrong criteria have been used? Our system has muddled along with vague expressions like "the sound exercise of judicial discretion," "recognition of the crime and the criminal," "the gravity of the deed," "the guilt of the perpetrator," and "the protection of society." None of these slogans is law. Appellate review, however, has been customarily available for judicial violations of law—not slogans, and it is arguable that slogans are not entitled to appellate review.

Elsewhere we have endeavored to state the real criteria which have prompted court to play with the legislative choices in sentencing and which we found to be conditioned by the infinite variety of life, manifested in the perpetrator and his crime, but always limited by the scope of the penal purposes. This limitation, designed to protect society from initial or repeated harm through crime, extends to vindication of the law, retribution for the wrong committed, penitence of the perpetrator, neutralization of the still dangerous actor, deterrence of potential wrongdoers, and above all, resocialization of the offender.[4] While these observations may properly describe reality, they are not positive law. There is a need for appellate review of criminal sentences. But upon what criteria should such review proceed and to what end?

To solve these perplexing problems we have turned to the experience of other members of the family of civilized nations. While their experiences are not likely to be dispositive of our problems, they are likely to be helpful, for all antions are endeavoring only to find the most appropriate method of insuring the establishment and continuance of the most effective sentencing policies. Although these problems appear predominantly theoretical at first glance, they have the potential of becoming explosively practical in the not-too-distant future. The Supreme Court of the United States recently held unconstitutional for vagueness a statute which permitted the jury to impose costs upon an acquitted criminal defendant, *without guidance as to when costs were or were not to be imposed.*[5] By dictum the majority added that the distribution of varying punishments based solely upon the reprehensibility of a convicted offender would certainly violate the due process clause. Mr. Justice Stewart, concurring, contended that much of the reasoning in the opinion cast grave constitutional doubt upon the settled practice of many states to allow the jury in its unguided discretion to determine the nature and degree of punishment to be imposed.[6] Also, consideration must be given to the problem of the judge's use of his unguided discretion in the sentencing process. It appears that in the near future sentencing criteria and the aims of penal policy may become matters of positive law and, therefore, subject to appellate review as questions of law. By looking at the advanced continental experience, we may be able to delineate the course that we should follow.

III. GENERAL SCHEME IN CIVIL LAW COUNTRIES

As in our system, continental code provisions contain sentencing alternatives and sentence ranges. Many foreign codes set some guidelines for the exercise of sentencing discretions, both in th penal provisions and in special sentencing sections of the more general parts of the codes. These sentencing frames and criteria have become matters of positive law, and, like all other matters of law, are subject to appellate review. However, there are many code and statutory provisions which contain no criteria for guiding sentencing choice; frequently there are found in cases where a crime category (*e.g.*, homicide) has been subdivided into minute subcategories which are descriptive of different offender types. Thus, the old, but still subsisting German Penal Code provides in section 211 that "murder shall be punished by confinement in a penitentiary for life." This stereotype sentence for all murderers is understandable only if it is considered that this provision also describes a murderer in terms of specific personality characteristics and that the murder provision is followed by eight subsequent provisions on homicide which are descriptive of other stereotypes, including: manslaughter section 212) ; manslaughter under extenuating circumstances section 213) ; mercy killing (section 216) ; infanticide (section 217) ; genocide (section 220a) ; negligent homicide (section 222) ; and assault and battery with fatal consequences (section 226). Each of these variations form the basic form of criminal homicide carries its own penal sanction which differs from that of the basic form. Some of these penal sanctions also allow a certain amount of variation (*e.g.*, for "mitigating circumstances," as in section 216.2, or for "serious cases." as in section 212.2).[7]

By far the most frequent sentencing variables which the continental codes place at the disposition of judges are in terms of minimum-maximum sentences and alternative sentences. For example, under the Italian Penal Code the punishment for mercy killing is "confinement in a penitentiary from six to fifteen years." [8] As regards imprisonment, the legislature has sometimes set only maximum [9] or only minimum terms [10] for each offense. Under statutes with open-ended provisions, the judge has to find the limit for the open-end in the penal provisions of the General Part of his code. For example, the Dutch Code provides: "Temporary imprisonment may be imposed for a term of at least one day and not exceeding fifteen years. . . ." [11] Under some codes the minimum and maximum standards may be extended in case of mitigating or aggravating circumstances, which may be of either a general or a more limited nature.[12] Some codes/statutes set further standards for judges by establishing what might be termed "judicial arithmetics." [13] For example the Spanish Penal Code presents a veritable "price list" of criminal wrongs by giving consideration to a multitude of aggravating and mitigating circum-

stances, which is, in effect, a catalogue of human emotions (*see* Appendix A.).

We do not regard it as possible or desirable to emulate the Spanish example. Apart from the hopelessness of any effort to achieve completeness in the list of factors to be considered in sentencing, the attribution of weight measures of these human emotions amounts to an objectification of applied psychology, which is totally at odds with an individualized system of criminal justice, administered by relatively sophisticated judges and correctional officers, rather than automations.

IV. GUIDELINES FOR AND EVIDENCE OF JUDICIAL DISCRETION

Within the legal framework described and with variations to be noted, sentencing in civil law countries has remained a matter of some judicial discretion. The legislature, however, may provide guidelines. Many criminal codes (*e.g.*, the Brazilian, Bulgarian, Danish, Greek, Swedish, Swiss and Yugoslav Codes and the German Draft Penal Code) tell the judge what factors should be taken into account when imposing sentence. Different legislatures have shown a fair amount of agreement on this subject. Factors frequently mentioned are: the dangerousness of the offense and its harmful consequences; the motives of the offender; the intensity of his criminal intent or criminal negligence; his previous criminal record; his personal and economic conditions; and his behavior during and after the act (*see* Appendix B.).

From the nature of the different factors to be taken into account in sentencing, it is apparent that punishment is not meant to serve one goal exclusively. Rather, multiple goals—such as retribution, deterrence (both general and specific prevention), and rehabilitation—seem to have their place. Some legislatures seem to express a preference for one of these goals, while others allow the judge to determine which goal should be primarily considered in a specific case. The latter is the position of those codes which contain specific provisions on the goals of punishment (e.g., the Soviet Union and Czechoslovak Codes) (*see* Appendix C.). These lists of goals are not dissimilar to those comparable to the American Model Penal Code provisions in point.[14] All such lists are subject to the criticism that they remain codified social science and philosophy and are scarcely subject to empirical validation as to their effectiveness. Nevertheless, the codification of correctional policy may be a necessary first step toward effective judicial administration of the ultimate preventive goal of all penal law.[15]

All correctional policy exhortations in penal codes are bound to remain ineffectual until there is evidence of the extent to which such exhortations have influenced judicial choice in sentencing. Consequntly, in most European countries trial judges are obligated to write detailed opinions justifying their sentences in terms of the codified correctional policy.[16] A judge who fails to give evidence that he abided by the codified standards is likely to have his sentences set aside on motion of either party.[17] The Italian Supreme Court has ruled expressly that it will not accept standardized or cliche formulas adhering only formally to the codified standard.[18]

V. APPELLATE REVIEW OF SENTENCES

Most continental countries do not distinguish between appellate review of convictions and sentences. They do, however, distinguish between appellate review on matters of fact and law and on matters of law only. The former is primarily meant to serve the purpose of correction of errors of the trial court; while the latter primarily assures the uniform interpretation of the law. Generally, appeal solely on matters of law is available only if all other appellate rights have been exhausted. An appeal concerning matters of fact and law may result in a review of the sentence. This is due to the fact that European codes, unlike American statutes, prescribe sentencing rules which must be respected by the trial judge. Also, in some countries, the appellate courts interpret "law" broadly and, consequently, have an extensive power of review.

In some countries, the system of appeal differs from that just described. Norwegian law provides that a so-called "appeal proper" may be directed against a sentence for the reason, among others, that the punishment is not appropriate because it is too severe or too lenient.[19] This indicates that such

appeals may be brought by either prosecution or defense;[20] however, it is not likely that a defendant will appeal a sentence he considers too lenient.[19] This indicates that such appeals obligated to see that the law is properly applied, may appeal a sentence which is too severe, as well as one he considers too lenient. So as not to discourage sentence appeal by convicts, many codes provide that "the judgment may not be amended to the prejudice of the defandant, insofar as kind and amount of punishment are concerned, if the appeal was initiated by the defendant alone."[21] This doctrine, which is referred to as the prohibition of *reformatio in pejus*, has no applicability when the sentence is appealed by the prosecution for being too lenient. In that case, the appellate tribunal could either increase or decrease the punishment. This is also true where both defendant and prosecutor have appealed the sentence, as long as the sentence increase is not the result of the defendant's appeal. In the Netherlands the punishment may be increased even if only the defendant has appealed, provided that all judges of the appellate court concur.[22] Finally there is some doubt in Europe, as there is in this country,[23] as to what in fact constitutes an increase of punishment (*i.e.*, an amendment of the sentence prejudicial to the defendant). Thus, while both the German and Dutch courts hold a longer suspended sentence to be heavier than a shorter non-suspended sentence,[24] it can be doubted that the defendants agree.

VI. PERMISSIBILITY AND SCOPE OF APPEAL ON FACT AND LAW

Most European nations permit, as of right, an appeal on fact and law. In France and the Netherlands, an appeal lies from practically all criminal judgments, except those involving small penalties.[25] However, in France no such appeal is possible from the judgment of a jury court,[26] since there, as formerly in England,[27] the judgment of the jury is regarded as unimpeachable. Also, in France no fact-and-law appeal is posible from the judgments of a number of special courts.[28] In the Netherlands and some other countries, a defendant may not appeal a judgment of acquittal rendered "for lack of evidence," despite the fact that such a judgmnet leaves him under a shadow of suspicion, which he may wish to have removed by the more favorable judgment of acquittal because of "innocence."[29] In Germany, the only difference between the two types of acquittal lies in the availability of compensation for detention suffered pending trial for those acquitted because of "innocence."[30] The German Code of Criminal Procedure, which is generally regarded as providing the most limited appeal on fact and law (*Berufung*), only allows such appeal against judgments of some of the least significant criminal courts. This results in allowing a defendant tried in a minor court for a minor offense to have a fact-and-law appeal and a pure-law appeal; while a defendant tried in a major court for a major offense is limited to an appeal of law only.[31] This is regarded a sone of the most serious shortcomings of the German Code of Criminal Procedure.[32]

Where partial appeals (*i.e.*, those restricted to a single issue) are permissible, the judgment unlike that of the general appeal, is subject to review only insofar as it has been attacked.[33] Ordinarily it is not advisable for a defendant to lodge a partial appeal, since this may be held to bar the appellate court from amending the judgment in the defendant's favor with respect to matters not called to its attention. Thus, the German Supreme Court has held that where a convict appeals solely on the ground that his sentence is excessive, the court has no jurisdiction to reverse and enter a judgment of acquittal for lack of criminal responsibility.[34] Where the defendant chooses to appeal the sentence only, it has been held that an appeal may not be limited to the type of punishment, and therefore, type and duration of punishment are also regarded as being reviewable.[35] Thus, when not limited by a partial application, the reviewing court will proceed to a reexamination of the entire case. It may receive new evidence,[36] or it may use only the evidence before the trial court which has become a matter of record.[37] If the court considers the appeal well-founded, it will either render a new judgment or remand the case for a new trial. Rarely will it remand the case to the trial court whose judgment was attacked.[38] The German courts have held themselves competent to review such questions as whether a commitment to an institution for cure and care was justified[39] and whether the lower court had been right in cancelling the defendant's driver's license or in imposing other supplementary penalties.[40]

VII. PERMISSIBILITY AND SCOPE OF APPEAL ON LAW ONLY

In practically all continental countries final criminal judgments are subject to appeal on matters of law. However, there are a few exceptions, such as acquittals rendered by French jury courts[42] and judgments rendered which acquit for lack of evidence or are appealable by another remedy of which the defendant has no availed himself.[42] If the appellate court finds that the law appeal is well-founded, it may reverse the judgment attacked, or it may decide the matter itself, if it can do so without a further inquiry into the facts.[43] Generally, however, it will remand the matter to a trial court other than the one which rendered the judgment attacked.[44] In Germany and the Netherlands, the court to which the case is remanded is bound to respect the higher court's decision.[45] In an appeal solely on law, the scope of inquiry is much narrower than in an appeal on fact and law.[46] The court is bound to the facts as stated in the judgment below and the review is limited to points listed in the petition for review.[47] As stated previously, appeal on law only includes sentences which under American law would not be reviewable.

In Switzerland and Austria the appellate courts hold themselves incompetent to review the determination of punishment, as long as the judge has exercised his discretion within the legal framework, but in case of clear arbitrariness, a sentence might be reversed.[48] Thus, these two alpine countries follow the same procedure as the Supreme Court of Pennsylvania.[49] According to German theory, the discretion of the trial judge is not subject to review in an appeal on matters of law.[50] But a judgment and sentence are subject to such a review if the standards of law have not been properly applied by the judge. The following are examples of successful reviews of legally "improper" sentences which nevertheless had been within the statutory framework: the trial judge had only taken into account deterrence without considering the retributive guilt of the offender;[51] the punishment imposed though within the legal framework was not proportionate to the guilt of the offender and, in that sense was excessive;[52] the trial court had not considered all aspects of the offense and the offender by taking into account all essential goals of punishment;[53] and the maximum penalty had been imposed, although it was "obvious" that the punishment should have been closer to the minimum.[54]

In Norway, the Supreme Court has full authority to reverse sentences when the punishment is too lenient or too severe, that is, excessive in either direction. Nevertheless, the Norwegian judge is given a wide discretion in sentencing.[55] Extracts from the Norwegian Supreme Court decisions show that the Court does not limit itself to reviewing sentences which are truly outrageous, but in fact does sometimes substitute its own discretion for that of the trial judge (*see* Appendix D). The Supreme Court considers the particulars of each offender and offense and decides what should be the principal objective of punishment in that particular case. If there is a reasonable possibility of rehabilitation, the Court tends to let this consideration prevail over reasons of general prevention. The Norwegian judges, as those of all other nations which have not catalogued the objectives of punishment, are ultimately driven to finding the right criteria in their own internalized notions of the proper objectives of criminal justice.

VIII. CONCLUSIONS

This study of continental schemes of appellate review of legal but excessive sentences has the reassuring effect of informing us that we do not stand alone with our problems. The benefit of comparative study extends beyond theoretical reassurance; it reveals that continental law, more readily than ours, regards a proper criminal sentence within the legislative framework to be a matter of law, and therefore reviewable. The difference between review of an ordinary error of law and an error in legal sentence is one of standards for determining the error. While our legislatures have rarely seen fit to provide the judiciary with legal criteria for the imposition of legally proper sentences, many European legislatures have provided their judges with such criteria. These criteria are of two kinds: (1) the recognized aims of penal-correctional policy; and (2) the proper criteria by which the perpetrator and his deed should be evaluated.

We are not convinced that any foreign code has provided a truly acceptable list of penal-correctional aims. Nevertheless, even a hodgepodge of stated aims,

as that contained in the Model Penal Code of the American Law Institute, can usefully serve as a convenient guide, the total disregard of which would be considered illegal. In any event, in accordance with continental experience, a statement of penal-correctional aims appear to us to be a necessary step toward developing a sound sentencing and sentence review system. We are totally unimpressed by the efforts of some nations in cataloguing the enormous range of human emotions and character. This approach, designed to provide a legal (and thus reviewable) framework in which the trial court may evaluate the crime and the perpetrator in imposing sentence, views man, including both the judge and the judged as a mechanical monster.

If the European experience teaches us anything, it is that an imaginative, free-thinking judge, properly guided by the codified basic penal-correctional objectives, must be trusted to find the right sentence. Since the sentence is then a matter of law, it is subject to review and revision by an appellate court which has its own criteria and approach for interpreting the legal goals of punishment and correction. These appellate court interpretations make precedent and build tradition. Several European judges have assaured us in personal conversation that no one factor is as strong a sentence review criterion as the custom of the court.

Criteria and custom have been developed through appellate decisions in several European countries (Norway and Germany have been cited as leading examples)). While we have cited Norway as a leading example of an enlightened practice, Norway also acquaints us with an all-too-liberal law of sentence review. We wonder whether an appellate court's view of a sentence is truly more expert than that of a trial judge. It strikes us that the proper limitation for sentence review may have been stated by the English Court of Criminal Appeal:

"In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial judge has seen the prisoner and heard his history and any witness to character he may have chosen to call. It is only when a sentence appears to err in principle that the Court will alter it! If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene." [56]

It is doubtful whether the appellate court should be empowered to increase the sentence. In Europe, an increased sentence usually prevails only on an appeal by the prosecutor, a procedure which is not available in the United States. In England, the Court of Criminal Appeal has such power, but it has recently been proposed that this power, which was rarely used, be abolished. In 1963, out of 1976 applications for leave to appeal received by the English Court, the sentence was reduced in one hundred forty-five, quashed in thirteen and increased in only six cases. In England, as elsewhere, it is felt that an increase in sentence on appeal is basically unfair. Nor is there any evidence that the existence of the power to increase a sentence on appeal serves as a substantial barrier to frivolous appeals.[57] If, per chance, there are policy reasons—which we cannot detect—favoring the existence of the power to increase sentences on appeal, we would urge that the Dutch practice, requiring unanimity of all judges of the appellate court, be followed.

FOOTNOTES

*Professor of Law, Director, Comparative Criminal Law Project, New York University School of Law, Ploen College, Germany, 1947; Keil University Faculty of Law, 1949; J. D. University of Chicago Law School, 1953; L.L.M. Columbia University, 1955. This article is based upon a study made by the authors as advisors to the Senate Committee on the Judiciary and is a follow-up of Professor Mueller's American study. *See* Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 Vand. L. Rev. 671 (1962).

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[1] *See Canals, Classicism, Positivism and Social Defense*, 50 J. Crim. L.C. & P.S. 541 (1960).

[2] Frese v. State, 23 Fla. 267, 270, 2 So. 1, 2 (1887), upholding fine provision without maximum as constitutional.

[3] Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 Vand. L. Rev. 671 (1962).

[4] Mueller, *Punishment, Corrections and the Law*, 45 Neb. L. Rev. 58–98 (1966).

[5] Giaccio v. Pennsylvania, 382 U.S. 399 (1966).

[6] *Id.* at 405.

[7] All citations of the German Penal Code are to G. Mueller & Buergenthal (transl.), The German Penal Code (Vol. 4, American Series of Foreign Penal Codes, 1961).
[8] Italian Criminal Code (hereinafter It. C. Pen.) art. 579 (1930).
[9] *E.g.*, in the Netherlands.
[10] *E.g.*, It. C. Pen. art. 575.
[11] Dutch Penal Code art. 10 (1881).
[12] *Compare, e.g.*, Dutch Penal Code art. 44 *with* art. 288; *see also* note 8 *supra* and accompanying text.
[13] See Schmidt, Die Strafzumessung in Rechtsvergleichender Darstellung 124 (1961).
[14] Model Penal Code § 1.02 (Official Draft 1966).
[15] *See* Mueller, *Punishment, Corrections and the Law*, *supra* note 4, at 86.
[16] *See, e.g.*, Dutch Code of Criminal Procedure (hereinafter WvSv) art 359; French Code of Criminal Procedure (hereinafter Fr. C. Pro. Pen.) arts. 485, 543; German Code of Criminal Procedure (hereinafter StGB) art. 267.
[17] *See, e.g.*, WvSv art. 359; Italian Code of Criminal Procedure (hereinafter It. D. C. Pro. Pen.) art. 574.
[18] Court of Cassation, Jan. 30, 1935 (La giustizia penale 1935, 310).
[19] Norwegian Ministry of Justice, Administration of Justice in Norway 80 (1957).
[20] *Compare* Fr. C. Pro. Pen. art. 497, *with* WvSv art. 404 *and StGB* ¶296.
[21] StGB ¶ 331; StGB art. 358; Fr. C. Pro. Pen. art. 515; WvSv art. 424.
[22] WvSv art. 424.
[23] See State v. Fisher, 126 W. Va. 117, 27 S.E. 2d 581 (1943).
[24] Oberlandesgericht (herinafter OLG) Oldenburg (Monatschrift fur Deutesches Recht 55, 436); Hoge Raad (hereinafter H.R.) December 18, 1933 (Nederlandse Jurisprudentie 1934, 298).
[25] Fr. C. Pro. Pen. art 546; Dutch Law on Court Organization (hereinafter Wet. R. O.) 44.
[26] Fr. C. Pro. Pen. art 370. But cases brought before the Jury Court have been evaluated in the pre-trial stage by two judicial authorities, the investigating magistrate and the Chamber of Indictments.
[27] In England, before the introduction of the Criminal Appeal Act in 1907, there was no appeal in a criminal trial. Only in very few cases did the trial judge decide to reserve a point of law for consideration by the Court for Crown Cases Reserved which would quash the conviction. Under the 1907 Act (§ 3), a person convicted on indictment may appeal against conviction as of right if a question of law, alone is involved. If his appeal is based on a question of fact or mixed law and fact, he may appeal only after having obtained the leave of the Court of Appeal or of the judge who tried the case. Appeal against sentences is permissible only on leave of the Court of Appeal. Compare: Interdepartmental Comm. on the Court of Crim. App., Report, Cmd., No. 2755, at 3, 6 (1965).
[28] Court of State Security, Military Courts, etc. *See* Stefane-Levasseur, Procedure Penale 18 (1964).
[29] WvSv art. 404; StGB § 267.V distinguishes between the two kinds of acquittals, but the distinction has no bearing on the permissibility of appeal. (*See* StGB § 313).
[30] *See* German Law Concerning Compensation for Innocently Suffered Preliminary Detention of July 4, 1904.
[31] StGB ¶ 312–13.
[32] *See* Hirschberg, Das Amerikanische und Deutsche Strafverfahren 83 (1963).
[33] Fr. C. Pro. Pen. art. 509; StGB ¶ 327.
[34] Reichsgericht (hereinafter RG) (Deutsche Rechtszeitung 22 (1930).
[35] RG (Juristische Rundschau 1927 nr. 667).
[36] Fa. C. Pro. Pen. art. 513; WvSv art. 414; StGB ¶ 323.
[37] Fr. C. Pro. Pen. art. 513; WvSv art. 422; StGB ¶ 325.
[38] Fr. C. Pro. Pen. art. 514–20; WvSv art. 423; StGB ¶ 328.
[39] Compare ¶ 42b German Penal Code.
[40] Court Freiburg (Deutsche Rechtszietung 140 (1941)).
[41] Fr. C. Pro. Pen. art. 572.
[42] Wet. R.O. 96; WvSv art. 430. The rule is otherwise in Germany, where a defendant may waive his initial right to appeal on fact-and-law and proceed immediately to his appeal on law only (so-called "leap revision"). *See* StGB § 335.
[43] St.GB ¶ 353–54; Fr. C. Pro. Pen. art. 617; WvSv art. 441. Compare Minkenhof, Nederlandse Strafvordering 296 (1948).
[44] Fr. C. Pro. Pen. art. 609 et seq.; WvSv art. 441; StGB ¶ 354.
[45] In France this is not the case. If, however, after reversal of a first decree or final judgment, the second decree or second final judgment, rendered in the same case between the same parties, is attacked on the same ground as the first, it will be decided by the united divisions of the Supreme Court. If a reversal results, the court to which the matter is remanded is bound to respect the decision of the united divisions, unless the decree rendered by these is different from that passed by the Criminal Division in the first place. Fr. C. Pro. Pen. art. 619.
[46] Fr. C. Pro. Pen. art. 567; Wet R.O. 99; StGB ¶ 337.
[47] StGB ¶ 353.
[48] Compare Schmidt *supra* note 13 at 29 & 43 (1961).
[49] Commonwealth v. Green, 396 Pa. 137, 161 A. 2d. 241 (1959).
[50] Kern. Strafverfahrensrecht 203 (1959).
[51] RG 76, 325; OLG Freiburg (Hochstrichterliche Entscheidungen in Strafsachen 2, 112).
[52] OHGst 1, 174. Compare State v. O'Dell, 240 Iowa 1157, 39 N.W.2d 100 (1949). But within this range of factors the trial judge's discretion is decisive. *See* OHGst 2, 145. Compare State v. Sullivan, 241 Wis. 276, 5 N.W.2d 798 (1942).
[53] OGHst 2, 94.
[54] Bundesgerichtshof 2 StR 45, 50. Compare Dalcke, Strafrecht und Strafverfahren 1365 (1955); Lowe-Rosenberg, Strafprozessordnung 1301 et seq. (1962).
[55] Compare Norwegian Penal Code 52-65.
[56] Regina v. Ball, 35 Crim. App. 164, as quoted by Interdepartmental Committee on the Court of Criminal Appeal, Report, Cmd. No. 2755, at 43 (1965).
[57] *Id.* at 42–47.

Appendix A—Provisions on Sentencing Taken From the Spanish Penal Code

(1870, modified in 1944)

CHAPTER III: MITIGATING CIRCUMSTANCES

Article 9

The following are mitigating circumstances:

1. All those mentioned in the preceding chapter, when the requirements needed for complete exemption from liability in each situation did not concur.
2. Intoxication which is neither habitful nor self-induced for purposes of committing an offense.
3. Minority below the age of eighteen years.
4. The fact that the criminal harm caused is more severe than the perpetrator intended.
5. Sufficient antecedent provocation or threats on the part of the victim.
6. When the act was committeed in proximate vindication of a grievous offense against the actor, his spouse, his ascendants or descendants, his legitimate, natural or adoptive brothers, or his relatives by affinity in the same degrees.
7. The fact that the deed was motivated by moral, altruistic or patriotic reasons of considerable importance.
8. The fact that the deed was committed under such powerful excitement as to cause rage or loss of self-control.
9. The fact that the perpetrator, prior to having knowledge of the institution of judicial proceedings against him, and moved by his own voluntary repentance, proceeded to make amends in whole or in part for the harm caused, to offer satisfaction to the victim, or to confess his infraction to the authorities.
10. And lastly, any other circumstance of like significance to the above.

CHAPTER IV: AGGRAVATING CIRCUMSTANCES

Article 10

The following are aggravating circumstances. The fact that:

1. The act was committed with perfidy. Perfidy is present whenever the perpetrator commits an offense against persons through such means, forms or kinds of execution which directly and particularly insure the success of the criminal act without those risks to his own person which would result from the defensive action the victim might otherwise take;
2. The offense is committed for a price, reward or promise;
3. The offense is committed by means of flood, fire, poison, explosion, destruction of an aircraft, grounding of a ship or other willful damage, derailment of locomotives, or by any other highly destructive means;;
4. The offense is committed by means of printed matter, radio broadcasting or other means facilitating publicity;
5. The ordinary harm of the offense is willfully aggravated by causing additional harm unnecessary for the commission of the offense;
6. The act is perpetrated with known premeditation;
7. Trickery, fraud, or disguise are employed;
8. Advantage is taken of superior strength or through the use of means which weaken the victim's defense;
9. The victim's confidence is misused;
10. The perpetrator makes use of his official position;
11. The crime is committed during a fire, shipwreck or other calamity or misfortune;
12. The offense is committed with the aid of armed companions or persons who provide or secure impunity;
13. The act is committed at night, in secluded locations, or by a gang; a gang is present whenever three or more armed persons jointly engage in the commission of an offense;
14. The perpetrator is a general recidivist. A general recidivist is one who at the time of the commission of the deed, has previously been sentenced for another offense which carries an equal or greater punishment, or for two or more offenses which carry a lighter punishment.

15. The perpetrator is a specific recidivist. A specific recidivist is one who, at the time of the commission of the deed, has already been (executorily) sentenced for one or more offenses within the same Title of this Code.

16. The deed was committed against public authority or with disrespect toward the dignity, age or sex of the victim, or in the victim's home, provided the victim did not provoke the act.

17. The deed was committed in a sacred place.

CHAPTER V: CIRCUMSTANCES WHICH MAY EITHER MITIGATE OR AGGRAVATE CRIMINAL LIABILITY, DEPENDING ON THE FACTS

Article 11

The fact that the victim is the perpetrator's spouse, ascendant, descendant, legitimate, natural or adoptive brother, or a relative by affinity within the same degrees of relationship, may attenuate or aggravate his criminal liability depending on the nature, motives or effects of the offense.

*Article 61**

Whenever the punishment prescribed by law is composed of three degrees, the Courts shall impose it according to the following rules depending upon the concurrence of aggavating or mitigating circumstances:

1. If only one mitigating circumstance is present in the deed, the punishment prescribed by law shall be applied in its minimum degree.

2. If one aggravating circumstance is present, the punishment shall be applied in its maximum degree.

However, in cases where the maximum degree is the death sentence, and only one aggravating circumstance is present, the Courts, after considering the nature and circumstances of the felony and of the perpetrator, may refrain from imposing the death sentence.

A death sentence shall never be imposed due to the aggravation of a punishment prescribed for a felony unless prescribed in this Code for such felony.

3. When both aggravting and mitigating circumstances concur, the punishment shall be determined after reasonably weighing them in view of their relative importance.

4. In the absence of either aggravating or mitigating circumstances, the Courts shall apply the punishment prescribed by law in the degree they consider adequate, in view of the harm caused by the deed and the personality of the offender.

5. When two or more, or when one highly mitigating circumstance alone, concur in the absence of aggravating ones, the Courts may impose a punishment one or two grades lower than the one prescribed by law, in whatever degree they consider reasonable in view of the number and importance of such mitigating circumstances.

6. Regardless of the number and importance of aggravating circumstances, Courts shall not impose a punishment higher than the one prescribed by law in its maximum degree, unless the aggravating circumstance described in number 15, Article 10 is present, in which case a punishment one or two grades higher shall be imposed, starting with the second conviction for the same offense, to the extent they consider reasonable.

7. Within the limits of each degree, the Courts in determining punishment shall consider the number and importance of aggravating or mitigating circumstances and the greater or less harm produced by the offense.

Article 62

If the punishment prescribed by law does not consist of three degrees, the Courts shall apply the rules set forth in the preceding article, and shall divide the term of each punishment in three equal parts, each constituting a degree.

Article 63

Courts may impose fines as widely as allowed by law, determining the amount not only on the basis of the mitigating or aggravating circumstances present in the deed, but especially on the basis of the financial status or capabilities of the perpetrator.

Appendix B

EXAMPLES OF GENERAL GUIDELINES FOR SENTENCING

1. Provisions which express a preference for several theories of punishment: Section 81, Danish Criminal Code:[1]

"In determining the penalty, account shall be taken, not only of the gravity and dangerousness of the offense, but also of the previous record of the offender, of his age and of his general conduct before and after the deed, of the persistence of his criminal tendencies and of the motives underlying the act."

Article 79, Greek Penal Code:[2]

"JUDICIAL CALCULATION OF THE PUNISHMENT

"1. In the calculation of the punishment within the defined limits of the statute, the court shall consider on the one hand, the quality of the act committed, and, on the other hand, the personality of the offender.

"2. In order to determine the gravity of the offense the court shall consider: (a) the damage resulting from the offense, or the threatened danger; (b) the nature, the kind and the purpose of the offense, as well as all factors accompanying its preparation or commission, circumstances of time, place, means and manner; (c) the intensity of the intention, or the grade of the negligence of the perpetrator.

"3. In the evaluation of the personality of the offender the court weighs particularly the degree of the criminal propensity of the perpetrator, as evidenced by the act, and for a more precise determination thereof: (a) the reasons which prompted him to commit the offense, the origin and the purpose which he sought; (b) his character, and the grade of his development; (c) the individual and social circumstances and his prior life; (d) his conduct during and after the act; especially his remorse and his willingness to compensate for the harm he has inflicted.

"4. The judgment shall state the reasons explaining the decision of the court for the imposition of the sentence."

Articles 132, 133 Italian Penal Codes[3]

"DISCRETIONARY POWERS OF THE JUDGE IN IMPOSING THE PUNISHMENT: LIMITS

"Within the limits established by law, the judge shall apply the punishment in his discretion; he must state the grounds which justify the use of such discretionary power.

"In increasing or reducing the punishment, the limits established for each kind of punishment may not be exceeded, except in the cases expressly established by the law."

"GRAVITY OF THE CRIME: VALUATION FOR THE PURPOSES OF PUNISHMENT

"In the exercise of the discretionary powers specified in the preceding Article, the judge must take into account the gravity of the crime as inferred from:

"(1) The nature, character, means, object, time, place and any other circumstances of the act.

"(2) The gravity of the harm or the danger caused to the person injured by the crime.

"(3) The intensity of criminal intent or the degree of culpable negligence.

"The judge must also take into account the perpetrator's propensity for delinquency, as inferred from:

"(1) The motives to commit delinquency and the character of the offender.

"(2) The criminal and judicial precedents and, in general, the conduct and life of the offender prior to the crime.

"(3) The conduct contemporary with or subsequent to the crime.

"(4) The individual, domestic and social conditions of life of the offender."

Article 54, Polish Penal Code:[4]

"The court shall impose penalty according to its discretion having regard primarily for the motives and the manner of acting of the offender, and his

relation to the person injured, to the degree of mental development and the character of the offender, to his past life, and to his behavior after committing the offense."

Article 37, USSR Criminal Code: [5]

"GENERAL PRINCIPLES FOR ASSIGNMENT OF PUNISHMENT

"The court shall assign punishment within the limits established by the articles of the Special Part of the preesnt Code which provide for responsibility for a committed crime, in strict accordance with the provisions of the Fundamental Principles of Criminal Legislation of the USSR and Union Republics and of the General Part of the present Code. At the time of assigning punishment the court guided by socialist legal consciousness, shall take into consideration the character and degree of social danger of the committed crime, the personality of the guilty person, and circumstances of the case which mitigate or aggravate responsibility."

Article 38, Yugoslav Criminal Code: [6]

"For a particular criminal offense the Court shall fix the degree of punishment within the limits provided by law for that offense, with due consideration for all the circumstances influencing the punishment to be severer or milder (aggravating and extenuating circumstances), and especially, the degree of criminal liability, the motives from which the offense was committed, the intensity of the danger or wrong to the protected object, the circumstances under which the offence was committed, the earlier life, the personal circum-offence."

2. Provision which consider *retribution* as the primary goal of punishment:

Section 60, German Draft Penal Code: [7]

"(1) The basis for fixing a punishment shall be the guilt of the perpetrator.

"(2) In fixing a punishment the court shall weight against each other such circumstances, other than definitional elements, as speak for and against the perpetrator.

"Especially there shall be considered:

"The motives and aims of the perpetrator,

"The state of mind which the act bespeaks and the exercise of volition involved,

"The extent of breach of duty,

"The manner of perpetration and the wrongful effects of the act,

"The prior life of the perpetrator, his personal and economic circumstances, as well as his conduct after the act, especially his endeavor to make restitution."

Article 63 Swiss Criminal Code: [8]

"Sec. 1. General Rules. ART. 63. The court shall mete out penalties in accordance with the guilt of the offender, considering the motives, previous conduct and the personal situation of the convicted person."

3. Provisions which consider *correction* (*rehabilitation*) as the primary goal of punishment:

Section 7, Swedish Penal Code: [9]

"In the choice of sanctions, the court, with an eye to what is required to maintain general law obedience, shall keep particularly in mind that the sanction shall serve to foster the sentenced offender's adaptation to society."

Appendix C—Examples of Provisions Solely Stating the Various Goals of Punishment

Section 17. Czechoslovakian Criminal Code: [10]

"1. The goal of punishment is:

"(a) to make the enemy of the working people harmless;

"(b) to prevent the offender from committing other offenses and to educate him towards respecting the rules of socialist society;

"(c) to contribute to the education of other members of society.

"2. The execution of the punishment shall not lower human dignity."

Article 20. USSR Criminal Code: [11]

"Purposes of punishment. Punishment not only constitutes a chastisement for a committed crime, but also has the purpose of correcting and re-educating

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convicted persons in the spirit of an honorable attitude toward labor, of strict compliance with the laws, and of respect toward socialist communal life; it also has the purpose of preventing the commission of new crimes both by convicted persons and others.

"Punishment does not have the purpose of causing physical suffering or the lowering of human dignity."

FOOTNOTES

*The provision refers to the complicated schemes and charts ruling the grades and degrees of punishment which are contained in art. 68–79 of the Penal Code.

[1] Giersing (transl.), The Danish Criminal Code 49 (1958).

[2] Lolis (transl.), The Greek Penal Code (mimeo. ed. 1962).

[3] Translated by the Comparative Criminal Law Project, per J. M. Canals.

[4] Lemkin & McDermott (transl.), The Polish Penal Code of 1932 (1939).

[5] Berman & Spindler (transl.), Soviet Criminal Law & Procedure (1966).

[6] 10 The New Yugoslav Law (3–4) 17 (1950).

[7] Ross (transl.), The German Draft Penal Code (1965).

[8] Friedlander & Goldberg (transl.), The Swiss Federal Criminal Code, in supplement to, 30 J. Crim. L.C. & P.S. (1939).

[9] Sellin (transl.), The Penal Code of Sweden (1965).

[10] Translated from Schmidt, *supra* note 13, at 216.

[11] Berman & Spindler, *supra* note 5A, at 151.

Appendix D—Extracts From Decisions of the Supreme Court of Norway Concerning Sentence Review

(The decisions were kindly made available to the authors by Prof. Johs. Andenaes, a former Justice of the Supreme Court of Norway, and a member of the International Advisory Board of the Comparative Criminal Law Project of New York University.)

December 18, 1951 (Norsk Retstidende 1166 et seq.)

The defendant had been convicted of attempted homicide and sentenced to a term of imprisonment of one year and six months, less 154 days already spent in custody, as well as deprivation of the right to hold office. He appealed on the ground that the sentence was too severe.

From the opinion of the leading judge:

"I believe the appeal should be granted.

"The crime considered here is a very serious one, but in view of the fact that the Jury found that the act was committed under especially mitigating circumstances and during a strong reduction of the level of consciousness, c.f., the Penal Code, Section 56, No. 1b, I consider a punishment of 1 year's imprisonment suitable. I also attach importance to the fact that Johansen immediately after the act repented it, helped his victim to bed, "stanched" the bleeding, lay down beside her and was lying crying when people arrived. He attempted afterwards to commit suicide. The Court has been informed that after hospitalization for about 14 days, the woman he stabbed was discharged with a clean bill of health and has suffered no permanent injury. She has not put in any request for prosecution.

'The expert witnesses have found Johansen to be a person with inadequately developed mental faculties, but the Jury has given a negative answer to the question whether there is any danger that he may again commit an act as specified in Section 399 point 2 of the Penal Code. The Court has been informed that after being released from custody he has again moved into the said woman's home and that it is his and the woman's intention to marry as soon as the latter has obtained her divorce.

"Under these circumstances and in view of the fact that Johansen is an able workman, who work for the said woman and her children, whose home he has taken part in rebuilding, I find compelling reasons for not sentencing him to serve a long term of imprisonment. I find special grounds in the case for presuming that the execution of the sentence is not necessary in order to keep Johansen from committing new offenses . . ."

Execution of the sentence was suspended.

September 8, 1959 (Norsk Retstidende 799 et seq.)

The defendant has been convicted of attempted rape and had been sentenced to a term of imprisonment of 3 years subject to deduction of one day for custody sustained. He had appealed from the judgment on the ground that the sentence should have been suspended.

From the opinion of the leading majority judge:

"I have found the case extremely doubtful, but have come to the conclusion that it is justifiable to apply a suspended sentence . . . Among the special reasons to which I attach importance, I mention that Appellant, who is married and has two children under age, has according to our information lived a normal married life, that he has no previous convictions whatsoever, and that in general nothing discreditable is known about him. These circumstances support the assumption, which also seems to be upheld by the medical certificate produced in the Court: that the offense was committed on the spur of the moment, that it was an act of emotional excitement caused by excessive alcohol consumption and committed during a consequent reduction of his powers of judgment and ability to reason."

The execution of the sentence was suspended for a trial period of 2 years.

From the dissenting opinion:

"In my opinion, considerations of general deterrence must weigh heavily in determining the punishment for a crime of this nature. In addition, it is only permissible, in this case where the Code's minimum penalty is imprisonment for 3 years, to hand down a suspended sentence when special reasons so indicate, of the Penal Code Section 52, No. 2, second paragraph. Although Appellant has no previous convictions, I cannot find any such special reasons in the present case. Appellant is a married man of mature age. As pointed out by the Court of Appeal, he showed considerable brutality during the attempt at rape, and he did not abandon his attempt until his victim obtained assistance. True, the execution of the sentence will have very serious consequences for his family—wife and 2 boys, but I cannot find that these detrimental effects are greater than must normally be expected from the serving of a prison sentence of such long duration. Nor do I find it decisive that the punishment imposed is far higher than that which I would have voted for under the general principles governing the determination of sentences, if I had not been bound by the minimum penalty provided by the Code. In my opinion, this should not lead to the conclusion that the entire sentence be suspended.

"From the conference I know that a majority of the Court are for allowing the appeal, whereby the sentence will be suspended. If the appeal had been dismissed, I would have recommended—as is the case quoted in Rt. 1959, pp. 43 et seq.—that the punishment imposed be considerably reduced or in part suspended by reprieve."

March 2, 1963 (Norsk Retstidende 231 et seq.)

Defendants had been convicted of bank robbery and sentenced to a term of imprisonment of one year and three months, subject to deduction of 71 days of sustained custody for each of them, as well as to pay compensation to the victim.

On the appeal of the Public Prosecutor, the sentence was converted to imprisonment for two years and three months less 155 days of sustained custody.

From the majority opinion:

"I come to the conclusion that the appeal ought to be allowed. It is true that the prisoners are very young. However, this is a case of a carefully premeditated crime, which has been planned and discussed by the prisoners for some time, and had been carried out cynically and in cold blood according to the plan. The amount robbed was considerable, as the offenders assumed it would be. The planning and execution of the offense were particularly likely to attract attention notably among adventurous young people: for that reason as well as the crime must be regarded as particularly dangerous to the community. In these circumstances considerations of general deterrence weigh heavily. The prisoners, both of whose intellectual qualifications and social environment should have given them every reason to behave properly, have flagrantly failed to live up to expectations."

April 6, 1963 (Norsk Retstidende 365 et seq.)

Defendant had been convicted of driving when under influence of alcohol and sentenced to imprisonment for 21 days to be suspended subject to a trial period of two years without probation, as well as a fine of Kr. 300.—or, if the fine was not paid, to imprisonment for nine days. The local Chief of Police appealed against the sentence on the ground that it should not have been suspended. The appeal was dismissed.

From the majority opinion:

"Further, I attach importance to A's young age—as mentioned in the statement of appeal he was 19 years and 4 months old at the time when the driving took place—although this age is not so low that this fact alone would have been sufficient to justify a suspension of the sentence. I also attach importance to the fact that A is at present doing his military service which he commenced on January 10, 1963. If the prison sentence is made non-suspended the effect will be either that he must leave his military services in order to serve his sentence—with the result that his military service would be extended accordingly—or that he would have to serve his sentence after the military service has been completed in July, 1964."

May 15, 1957 (Norsk Retstidende 541 et seq.)

Defendant had been convicted of grand larcencies and sentenced to a term of imprisonment of 120 days, subject to deduction of 31 days for sustained custody. Defendant appealed, on the ground that the sentence should have been suspended. The Supreme Court decided to suspend the remaining punishment with a probation period to two years.

From the majority opinion:

"In considering the appeal, I have melt serious doubts, especially in view of the fact that Appellant has on several previous occasions been guilty of similar offenses, that he has a previous conviction for robbery (Penal Code Section 267) and that the conditions are now satisfied for applying a heavier punishment for repeated crimes pursuant to the Penal Code Section 263, first paragraph. Nonetheless, I have come to the conclusion that in view of the special circumstances in the case, it is justifiable to let the execution of the prison sentence be suspended in accordance with the Penal Code Sections 52 et seq. I have attached importance to the fact that the thefts concerned very modest values, that most of the stolen objects have been returned to their owner and that the offenses are partly of a casual nature. Appellant's previous convictions are not to my mind of decisive importance in view of the comparatively long period of time—almost 6 years—that has passed since his last offense. Appellant has been unemployed for some time when the offenses were committed; he has not obtained more permanent employment and one may suppose that the execution of the sentence, by depriving him of his employment, would have a particularly serious effect on himself, his wife and unsupported children. According to the information in the case, there is reason to believe that Appellant has received a strong warning and that he will now make a serious effort to mend his ways and not again come into conflict with the criminal law. I find it reasonable that, under these circumstances, he be given a last chance and I add that the Mayor of his home town has recommended this in a letter to the Supreme Court dated March 12, 1957."

Appendix

In one of our district courts a sentence of 52 years without parole was imposed on a first offender for the sale and possession of narcotics. There was no indication that this was an aggravated case and, when appealed, the Court of Appeals for the 10th Circuit agreed that the sentence was excessive but held that it was powerless to reduce the sentence imposed.

In another case, a 25 year sentence was imposed on an individual for the theft from the mail, forgery and cashing of a Treasury check in the sum of $380.51. The defendant's only prior convictions had occurred 20 and 7 years respectively prior to the theft of the check. On appeal, the Court of Appeals for the 5th Circuit also held that it had no power to reduce a legally permissible sentence; however, it reversed the conviction for legal error.

A 12 year term of imprisonment was imposed on a bank clerk for embezzlement of approximately $70,000, much of which he used for the benefit of harassed debtors of the bank. This defendant was not motivated by personal gain in most of the embezzlement, instead he manipulated the books of the bank to cover up the accounts of delinquent depositors. The judge was on assignment from another district and imposed the sentence without securing even a presentence report by the probation officer.

In 1961, two bank embezzlers were committed to the same Federal institution from the same district within the same week. Yet, sentenced by different

judges, one received a term of six months, to be followed by eighteen months probation, and the other received a term of 15 years.

The above are not isolated examples. In the fiscal year ended June 30, 1969, the average sentence for transportation etc. of stolen motor vehicles varied from 13.5 months in the District of Massachusetts to 48 months in the Southern District of Iowa and 50.5 months in the District of Minnesota. Terms for forgery ranged from an average of 12 months in the Southern District of Georgia to 70.3 months in the District of Kansas. In fact, the overall average of time imposed varied from 24.2 months in the Middle District of North Carolina and 23.1 months in the Western District of Wisconsin to 74.7 months in the District of Maryland and 75.3 months in the Northern District of Oklahoma.

[S. 2228, 92d Cong., first sess.]

A BILL To amend chapter 235 of title 18, United States Code, to provide for the appellate review of sentences imposed in criminal cases arising in the district courts of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 235 of Title 18, United States Code, is amended by inserting immediately after section 3741 thereof the following new section:

"§ 3742. Appeal from sentence

"(a) An application for leave to appeal from the district court to the court of appeals the sentence of imprisonment or death imposed may be filed by a defendant with the clerk of the district court in any felony case in the following instances:

"(i) after a finding of guilt by a judge or jury, whether following a trial or the acceptance of a plea;

"(ii) after the revocation or modification of an order suspending the imposition or execution of a sentence or placing the defendant on probation;

"(iii) after a resentence under any other applicable provision of law.

"(b) Upon granting leave to appeal, the court of appeals may review the merits of the sentence imposed to determine whether it is excessive. This power shall be in addition to all other powers of review presently existing or hereafter conferred by law. If the application for leave to appeal is denied by the court of appeals, the decision shall be final and not subject to further judicial review.

"(c) Upon consideration of the appeal, the court of appeals may dismiss the appeal, affirm, reduce, modify, vacate, or set aside the sentence imposed, remand the cause, and direct the entry of an appropriate sentence or order or direct such further proceedings to be had as may be required under the circumstances. If the sentence imposed is not affirmed or the appeal dismissed, the court of appeals shall state the reasons for its action. The defendant's sentence shall not be increased as a result of an appeal granted under this section.

"(d) The application for leave to appeal from sentence shall be regarded as a notice of appeal for all purposes, and the procedure for taking an appeal under this section shall follow the rules of procedure for an appeal to a court of appeals. A denial of the application for leave to appeal on the ground that the sentence imposed is excessive shall not prejudice any aspect of the appeal predicated on other grounds. If the application is granted all issues on appeal shall be heard together.

"(e) When an application for leave to appeal is filed, the clerk of the district court shall certify to the court of appeals such transcripts of the proceedings, records, reports, documents, and other information relating to the offense or offenses of the defendant and to the sentence imposed upon him as the court of appeals by rule or order may require. Any report or document contained in the record on appeal shall be available to the defendant only to the extent that it was in the district court. In each felony case in which sentence of imprisonment or death is imposed the judge shall state for the record his reasons for selecting that particular sentence.

"(f) When a judge has adopted the sentence procedure set forth in section 4208(b) of title 18, United States Code, an application for leave to appeal may only be filed after a judgment or order is entered by the judge following the completion of the study provided by such section.

"(g) The provisions of section 3568 of title 18, United States Code, shall be applicable to any defendant appealing under this section.

"(h) This section shall not be construed to confer or enlarge any right of a defendant to be released following his conviction pending a determination of his application for leave to appeal or pending an appeal under this section.

"(i) This section shall become effective six months after its approval and shall apply only to sentences imposed thereafter."

(b) The analysis of chapter 235 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"3742. Appeal from sentence."

FEDERAL TRADE COMMISSION,
New York, N.Y., March 27, 1972.

G. ROBERT BLAKEY, Esq.,
Senate Judiciary Committee, Subcommittee on Criminal Laws and Procedures, Washington, D.C.

DEAR MR. BLAKEY: On the occasion of my testimony before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee on March 22, Senator Roman L. Hruska, who presided, requested that I send to you my comments on S. 2228, 92d Cong., 1st Sess. (1971), which would amend Chapter 235 of Title 18, United States Code, to provide for appellate review of sentences.

In its report on the proposed New Federal Criminal Code, the New York County Lawyers Association's Committee on Federal Legislation recommended that appellate review of sentences be authorized with a "certiorari" type of procedure, so that neither the appellate court nor the government would have to engage in a full-dress litigation concerning the justifiability of each sentence unless the appellate court felt that this was necessary in a particular case. S. 2228 embodies this idea by requiring a defendant to file an application for leave to appeal before the sentence would be reviewed. In my opinion, the bill could effectuate this concept more fully if subsection (e) of the new 18 U.S.C. § 3742 as proposed by S. 2228 were amended to read as follows:

"*An application for leave to appeal from sentence shall set forth the sentence appealed from and distinctly set forth the grounds for seeking review. Such application shall be granted if it appears to the court of appeals from the sentence, as compared with the sentences authorized by statute and ordinarily imposed in like cases, or for other reasons, that the sentence may be unreasonable; otherwise such application for leave to appeal from sentence shall be denied. The attorney for the government shall not reply to an application for leave to appeal from sentence, but shall submit to the court of appeals such facts in its possession as are pertinent to the reasonableness of the sentence imposed if the application for leave to appeal is granted. No sentence shall be modified by a court of appeals under this section unless an application for leave to appeal therefrom has been granted by such court and the attorney for the government thereafter given a reasonable offer thereafter to submit relevant information.* When an application for leave to appeal is [filed] *granted* the clerk of the district court shall certify to the court of appeals such transcripts of the proceedings, records, reports, documents, and other information relating to the offense or offenses of the defendant and to the sentence imposed upon him as the court of appeals by rule or order may require. Any report or document contained in the record on appeal shall be available to the defendant only to the extent that it was in the district court. In each felony case in which sentence of imprisonment or death is imposed the judge shall state for the record his reasons for selecting that particular sentence." (Matter suggested to be added is underlined; matter suggested for deletion is in black brackets.)

This change in S. 2228 would avoid a situation that might arise otherwise, where the court of appeals would have to consider the entire record in order to decide whether to grant each application for leave to appeal, and where the government would have to answer each such application. This, if it materialized, would in my opinion impose an intolerable burden on both the United States Attorneys throughout the country and the Courts of Appeals. Requiring an application for leave to appeal from sentence before an actual appeal is heard would avoid this result only if the application was based on the

defendant's version of why such an appeal should be considered, and did not involve a full review of the record or an answer by the government prior to the application for a full appeal being decided.

During the hearings on March 22, 1972, Senator Hruska asked me whether I believed that permitting the defendant to appeal from a sentence should be balanced by providing a similar right to appeal from sentences to the prosecution. I replied on the record that rather than permitting the prosecution to appeal from sentences, which might raise concerns of double jeopardy, I believed the additional right granted to the defendant could best be balanced by allowing the government to appeal from adverse pre-verdict decisions (e.g. on exclusion of evidence).

At present, a defendant in a criminal case can obtain appellate review of any decision adverse to him by means of an appeal from any conviction. On the contrary, an adverse ruling prior to or during trial harmful to the *prosecution's* case (e.g. exclusion of crucial evidence) can never be reviewed. If it results in an erroneous acquittal, the government has no remedy.

Obviously, the government cannot be allowed to appeal from the erroneous acquittal without placing the defendant twice in jeopardy in violation of the Constitution.

On the other hand, the government *could* be allowed to appeal prior to verdict. This remedy should only be used in extraordinary cases. Indeed prompt completion of the trial is normally in the interest of the prosecution as well as the court. In order to assure that the right of appeal were not routinely invoked, express permission of the Attorney General on the basis of a certificate of public importance of the case and of the ruling could be required.

The New York County Lawyers Association's Committee on Federal Legislation recommended such a right of appeal in its report on "legislation to strengthen fairness and effectiveness in law enforcement", published in the "Hearings on Measures Relating to Organized Crime", Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, United States Senate, 91st Cong., 1st Sess. 219 (1969). At 227, the report stated:

"Title VII of the 'Safe Streets' Act permits appeals by the Government from decisions suppressing evidence. We believe this is sound, because the Government otherwise has no appellate review. There can obviously be no appeal after a defendant is found not guilty at a trial, since this would result in double jeopardy. The defendant's right to appellate review is fully protected because he can appeal if convicted and can raise all relevant claims at that time.

"In our view, rulings adverse to the Government of a serious character *prior to or during trial*, just as much as the suppression of evidence can, unless reviewed at the time, cut off the Government's right to any appellate review of the adverse decisions affecting its case. Accordingly, Government appeals from any serious adverse decisions before or during trial should be considered."

In its report on the proposed New Criminal Code, submitted by Vincent L. Broderick on March 21, 1972 at p. 29 the County Lawyers Committee proposed the following language to implement such a concept:

"The courts of appeals shall also have jurisdiction to review on appeal by the Government, any decision before or during trial in a criminal prosecution instituted by the United States, which the Attorney General certifies is likely to affect the outcome of the case and is of substantial interest to the public. Such appeal if during trial shall be heard immediately. Any decision on such appeal adverse to the defendant shall be reviewable by the Supreme Court of the United States on appeal or certiorari after any affirmance of any resulting judgment of conviction rather than by direct review of the judgment of the court of appeals entered pursuant to an appeal pursuant to this paragraph."

This language could be added as a further section of S. 2228.

These views are submitted in accordance with Senator Hruksa's request at the time of my testimony, and obviously do not necessarily represent the views of the Federal Trade Commission, which has taken no position on these questions.

If I can be of further assistance, please do not hesitate to call on me.

Respectfully,

RICHARD A. GIVENS,
Regional Director.

United States Court of Appeals for the Second Circuit

(No. 315—September Term, 1971, Argued December 1, 1971. Decided February 23, 1972, Docket No. 71-1862)

UNITED STATES OF AMERICA, APPELLEE,
v.
SHEPARD BONEPARTH *and* J. S. BONEPARTH & SONS, INC., DEFENDANTS-APPELLANTS.

Before: Lumbard, Waterman and Feinberg, Circuit Judges.

Appeal from judgment of conviction, entered in the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *J.*, and a jury, for violating 18 U.S.C. §712.

Judgment reversed and indictment dismissed.

Arthur Richenthal, New York, N.Y. (Richenthal, Abrams & Moss, on the brief, *for Defendant-Appellant Shepard Boneparth.*

Samuel N. Greenspoon, New York, N.Y. (Eaton, Van Winkle & Greenspoon, on the brief), *for Defendant-Appellant J. S. Boneparth & Sons, Inc.*

Patricia M. Hynes, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; John W. Nields, Jr., and Peter F. Rient, Assistant United States Attorneys, on the brief), *for Appellee.*

Feinberg, *Circuit Judge:*

J. S. Boneparth & Sons, Inc. and Shepard Boneparth, sole owner of the company's common stock and its president, appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, after a trial before Judge Lloyd F. MacMahon and a jury. The company and Shepard Boneparth were convicted of violating 18 U.S.C. § 712, which prohibits anyone "engaged in the business of collecting or aiding in the collection of private debts" from using the initials "U.S." or any name or emblem conveying "the false impression that such business is a department . . . or instrumentality of the United States." The trial judge fined the company and Shepard Boneparth $1,000 each and imposed a two week jail sentence on the latter. Appellants claim that they were denied a fair trial and that the trial judge committed errors in his charge. They further claim that 18 U.S.C. § 712 cannot fairly be read to apply to them, and that if the statute is so read, it is unconstitutionally vague. Because we conclude that the statute does not apply to these defendants, we reverse their conviction and order that the indictment be dismissed.

We reach this conclusion with a heavy heart because the record reeks from the unconscionable practices of appellants. The company operated a furniture and appliance store in Harlem. Most of the sales were made on credit, so that liquidation of accounts receivable was a constant problem. The company did not use a collection agency but collected its own bills. Collections were pursued with understandable persistence. But when all else seemed to fail the company chose to resort to sheer trickery. It is that deception which this case is all about.

Certain delinquent customers received a form from the company that bore some resemblance to a check. It arrived in a plain brown envelope bearing the return address "U.S. Funds Bureau, Headquarters Building," with a post office box number. The form bore the legent "U.S. Funds Bureau" suitably inscribed in impressive lettering. "U.S. Funds Bureau" was in turn surrounded by equally august curlicues and margins and by the information that the "Headquarters" was "Washington 6, D.C.," and that the form was sent by the "Location and Re-Disbursement Dept." In the center appeared the advice that: "The Amount of ______ Dollars is Disbursable." The amount filled in roughly corresponded to the sum owed by the particular recipient, whose name and address were also typed in. Directly above appeared an imposing, screaming eagle, under which was the titillating legend: "This form not good for more than $1,000.00." The attached stub instructed the recipient to detach and retain until the

amount there typed in (the same as on the main body of the form) "is disbursed in full." Both the stub and the form also prominently bore the real reason for their existence—the advice to answer all questions on the "reverse side of this form completely and accurately." Doing so, of course, gave the company up-to-date information as to the customer's home address, bank, employer, spouse, spouse's employer, etc., so that further collection action would be simplified. There were further embellishments on the implied promise that money would be disbursed to the customer if the form were completed and returned,[1] and the company's name nowhere appeared on either the form, stub or envelope. But further description is unnecessary. The company never disbursed any money to a customer who returned the form; its intentions were just the reverse. Moreover, the words "U.S.," "Location and Re-Disbursement Dept.," and "Headquarters, Washington 6, D.C.," and the picture of the eagle were obviously all intended to gull a recipient into believing that the promise was coming from a governmental entity. The deceptive nature of the form is obvious and appellants no longer attempt to defend it.[2] What they do say is that the statute under which they were indicted does not apply to them.

That statute was enacted in 1959, after two earlier attempts had failed. It reads in full as follows (18 U.S.C. § 712):

Misuse of names by collecting agencies or private detective agencies to indicate Federal agency

Whoever, being *engaged in the business of collecting or aiding in the collection of private debts or obligations*, or being engaged in furnishing private police, investigation, or other private detective services, uses as part of the firm name of such business, or employs in any communication, correspondence, notice, advertisement, or circular the words "national", "Federal", or "United States", the initials "U.S.", or any emblem, insignia, or name, for the purpose of conveying and in a manner reasonably calculated to convey the false impression that such business is a department, agency, bureau, or instrumentality of the United States or in any manner represents the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both. [Emphasis added.]

Appellants claim that the statute is aimed at collection agencies[3] and that only such firms are "engaged in the business of collecting or aiding in the collection of private debts." Otherwise, say appellants, "every business attempting to collect its own debts would be covered by the statute" and this was not the intention of Congress.

Appellants' argument is persuasive. Everything about the statute supports their interpretation. Its caption refers to "collecting agencies," a phrase that would not ordinarily suggest businesses merely collecting their own debts. And it strains common sense to say that retail businesses such as furniture and appliance stores, which collect their debts only as a necessary adjunct to their ordinary operations, are "in the business of collecting . . . debts."[4] If such corporations were deemed to be "in the business of collecting . . . debts," what business entity would not be? More important, there would then be no reason for Congress to have inserted that qualifying phrase into section 712. Other statutes directed at misuse of federal government names have no such limitation.[5] Moreover, there is nothing in the legislative history of section 712 to

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[1] E.g., an enclosed envelope for sending back the form contained the following: "Atten: Disbursements Clerk."

[2] At trial, counsel for the company lamely argued that since the post office box numbers of the "U.S. Funds Bureau" and the company were identical, when receiving the fraudulent forms and envelopes "Everyone knew that this was the Boneparth Company and no one else, and they just couldn't possibly not have known it."

[3] We put to one side the obvious additional coverage of "private police, investigation, or other private detective services."

[4] The Federal Trade Commission has consistently maintained, with court approval, that representations made in dunning notices by retailers that they are collecting agencies are false. See *Dejay Stores, Inc. v. F.T.C.*, 200 F.2d 865 (2d Cir. 1952) *(per curiam)*; *In re Wm. H. Wise Co.*, 53 F.T.C. 408 (1956), *aff'd*, 246 F.2d 702 (D.C. Cir.) *(per curiam)*, *cert. denied*, 355 U.S. 856 (1957).

[5] See 18 U.S.C. § 711 ("Whoever . . . uses the character 'Smokey Bear' . . . or the name . . . as a trade name . . ."); 18 U.S.C. §709 ("Whoever . . . uses the . . . initials F.B.I.' . . . in connection with any . . . publication . . . ") ; 18 U.S.C. § 709 ("Whoever uses as a firm or business name . . . the letters 'HUD', 'FHA', . . ."); 18 U.S.C. § 707 ("Whoever, whether an individual, partnership, corporation, or association . . . uses . . . the words '4-H Club' or '4-H Clubs' . . .").

But see 18 U.S.C. § 709 ("Whoever . . . uses the words 'national', 'Federal', 'United States', 'reserve', or 'Deposit Insurance' as part of the business or firm name of a person [or] corporation . . . engaged in the banking, loan . . . or trust business . . . .").

suggest that its sweep was broadly conceived. The statute was apparently enacted as a response to inquiries then plaquing the United States Government from people who had returned forms similar to those used in this case but had not received money.[6] The Treasury Department, which apparently received most of the inquiries, clearly say the problem as discussed on "the so-called skip-tracing firms."[7] Communications to both the Senate and the House Committees in charge of the bills from the Office of the Attorney-General and from the Federal Trade Commission similarly assumed that the bill covered only such firms and collection agencies.[8] Indeed, in the only reported case we have found involving a prosecution under section 712, the defendant was found to have "conducted a 'skip-tracing' service from an office in the District of Columbia." *Wacksman* v. *United States*, 175 A.2d 789, 790 (Mun.Ct. App. D.C. 1961).

We conclude, therefore, that the statute does not reach a merchant collecting his own debts. The odd thing about this case is that the court below apparently agreed with defendants on this point. After the Government had presented its case and defendants renewed motions for dismissal of the indictment, the following colloquy took place:

The COURT. Doesn't this mean that you must be in this business of collecting debts, not just an ordinary business selling furniture or selling automobiles?

Doesn't is mean that it must be a separate business, a separate——

Miss HYNES [for the Government]. Your Honor, I don't think the statute means this must be a separate business. The statute says anyone who is engaged in the business of collecting debts.

The COURT. No, the statute says whoever, being engaged in the business of collecting debts or aiding in the collection of debts.

Isn't that what it says?

Miss HYNES. That is correct, your Honor.

The COURT. How can you possibly stretch that to reach a furniture store?

Miss HYNES. Your Honor, the testimony of Mr. Boneparth, the president of the furniture store is quite clear.

The COURT. He says, "We collect debts." But doesn't every business collect debts?

Miss HYNES. That's correct, but to carry that argument would be that a collection agency is within the purview of the statute while this furniture store, using the same form is not within the purview of the statute.

* * * * * * *

[The COURT.] And here Congress says whoever—comma—being in the business of.

Doesn't that right on its face mean that you must be engaged in that business? Every business collects debts if it is going to stay in business.

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[6] See S. Rep. No. 107, 86th Cong., 1st Sess. 2 (1959) . . .

The committee has in its files examples of private collection agency use of printed matter incorporating emblems and the words "United States" in such a manner as to appear to be deliberately designed to convey the false impression that the agency is an instrumentality of the United States.

See also S. Rep. No. 2350, 84th Cong., 2d Sess. (1956).

[7] See H.R. Rep. No. 874, 86th Cong., 1st Sess. 3 (1959) (Letter of Acting Sec. of Treas. A. Gilmore Flues):

The records of the Department show that private firms engaged in the business of locating the whereabouts of delinquent debtors have been operating under names such as "Treasurer's Office", "Disbursements Office", and "Claims Office", coupled with a Washington, D.C. post office address. . . .

The Department is of the opinion that the above-described forms used by the so-called skip-tracing firms are conceived with the idea of giving the recipient the impression that they emanated from a Government agency and that there are funds due him from the Federal Government. This is particularly true with respect to the use of names such as "Treasurer's Office" and "Disbursements Office", which lead the recipients to believe that the forms were sent by the Office of the Treasurer of the United States or the Division of Disbursement of the Treasury Departmnt. This belief of the Department is borne out by the fact that we have received numerous letters from persons complaining that they had returned the forms, but had not received their money. For example, from December 1956 to December 1958, 2,400 letters of inquiry were received from persons who received these forms. The Department has no alternative but to advise the individuals that the forms were not issued by a Government agency and that no violation of the statutes enforced by this Department is involved.

See also S. Rep. No. 107, 86th Cong., 1st Sess. 4 (1959).

[8] See S. Rep. No. 107, 86th Cong., 1st Sess. (1959); H.R. Rep. No. 874, 86th Cong., 1st Sess. (1959).

At the close of defendants' case, similar motions were again made, and the following interchange took place:

[The COURT.] There is nothing in the legislative history to support your interpretation of this. There is nothing in the context of the statute.

There is nothing in the text of it.

There is nothing at all to support it.

The context which it takes in the chapter—your interpretation of it just doesn't stand up.

Maybe Congress wanted to do that but it certainly didn't.

Miss HYNES. I think that the purpose of the statute is quite clear and that the narrow interpretation should not be given to the statute.

The COURT. I am not giving it a narrow interpretation. I am giving it the interpretation it says.

Nevertheless, instead of entering a judgment of acquittal or dismissing the indictment, the court submitted the case to the jury on the novel theory that the jury could find that defendants used an agent called U.S. Funds Bureau to collect the company's debts and that although the company could not directly commit the crime charged, nonetheless defendants could do so by wilfully causing this alleged agent to do so. 18 U.S.C. §2(b). On this theory, the jury returned a verdict of guilty.

Defendants vehemently argue to us, as they did below, that there was no such entity as the "U.S. Funds Bureau," that the name was fictitious, and that no such "agent" ever existed or was ever "engaged in the business of collecting . . . debts." On appeal, the Government has dropped its earlier broad construction of the statute [9] and adheres to the theory upon which the judge submitted the case to the jury. The Government responds that since defendants created "U.S. Funds Bureau" to deceive purchasers, it cannot now avoid the purpose of the statute by disavowing the existence of its own instrumentality. We believe that defendants have the better of the argument. There never was a "separate fund collecting business labeled U.S. Funds Bureau," the hypothesis on which the judge constructed his charge. The indictment made no such charge, and the Government told the jury in its opening that no such entity existed. There was no evidence to the contrary. If U.S. Funds Bureau never existed, then there was no person or entity which defendants could have caused to do anything.

Nor is the situation changed by the Government's variation of the theme, which appears to be a theory of estoppel. The question of law for the court was whether the statute applied to an ordinary retail establishment collecting its own debts. If the correct answer to that question is no, then on these facts there was nothing to submit to the jury. The company did not employ a "fictitious debt collection agency." It did use "in any communication . . . the initials 'U.S.' . . . for the purpose of conveying . . . the false impression" that it was a government agency. If doing that rendered it criminally liable under the statute, then any business similarly "conveying . . . the false impression" that it was a government agency by using the initials "U.S." in a communication would also be so affected. That would amount to a construction of the statute that we, and the court below, have rejected. We understand why appellants' collection methods would cause the Government concern and lead to the attempt to hold them criminally liable. But the rewriting of statutes is for Congress not for the court, particularly when the definition of a crime is involved, see *United States* v. *Weitzel*, 246 U.S. 533, 542-43 (1918) (Brandeis, *J.*). We might wish devoutly that practices like those shown here were criminal even when used by a firm collecting its own debts. But under this statute they are not.

Accordingly, the judgment must be reversed and the indictment dismissed. On this view of the case, we need not deal with appellants' other arguments.

Senator HRUSKA. Our next witness is Mr. George Gordin, Jr., National Consumer Law Center, 38 Commonwealth Avenue, Chestnut Hill, Massachusetts.

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[9] The Government states in its brief, at p. 8:

Appellants' argument that the statute does not apply to sellers of merchandise who are also in the business of collecting their own debts has some support in the legislative history. Businesses engaged in the collection of their own accounts receivable were of no concern to Congress, and understandably so.

STATEMENT OF GEORGE GORDIN, JR., LEGISLATION COORDINATOR AND SENIOR ATTORNEY, NATIONAL CONSUMER LAW CENTER, INC., CHESTNUT HILL, MASS.

Senator HRUSKA. Mr. Gordin, you have filed a statement, have you not?

Mr. GORDIN. Yes, I have.

Senator HRUSKA. It will be placed in the record at this point, and you may proceed to testify in your own fashion.

(The prepared statement submitted by Mr. Gordin reads in full as follows:)

STATEMENT OF GEORGE GORDIN, JR.

Mr. Chairman, my name is George Gordin, Jr. I am the Legislation Coordinator and Senior Attorney of the National Consumer Law Center, and I am a Lecturer in Law at Northeastern University Law School. Prior to joining the Center I was a law professor at Drake University Law School, where I taught commercial transactions, constitutional law and legislation, among other courses. For several years I served as general counsel for the New York State Council of Retail Merchants, and I was for two years a sales manager for the Hecht Co., a large Washington, D.C. department store. In addition, I practiced law privately for a number of years, primarily corporation law.

The National Consumer Law Center is located at the Boston College Law School in Brighton, Massachusetts. It is funded by a grant from the Office of Legal Services of the Office of Economic Opportunity to assist the more than 2200 Legal Services attorneys in representing indigent consumers and to pursue reform in consumer law. I am testifying today on behalf of the Center with respect to those provisions of the proposed Federal Criminal Code that affects consumers.

The proposed Code undoubtedly contains many significant and useful reforms, not the least of which may be the restructuring of the Federal criminal statutes. The Center's expertise does not extend to the entire body of criminal law and justice, and I will confine my remarks only to those sections that may have substantial impact on consumers and consumer law.

It should perhaps be noted at the outset that administrative and judicial enforcement of state criminal statutes designed to protect consumers against fraud and deception has for various reasons been largely ineffective. Many factors have been responsible for this ineffectiveness. The fact that generally the nature of the offense does not lie in the implementation of a scheme to defraud, that there is a problem of proof because of the use of traditional common law criminal actions, and that the nature of both the activity and the actor are interstate have certainly been central to the problem.

It has nonetheless been possible to get at some of the worst offenders under the Federal mail fraud statute (18 U.S.C. sec. 1341). Under the mail fraud statute the existence or implementation of the scheme itself is the relevant issue. Consequently, issues that make prosecution so difficult under state law, such as actual loss suffered by particular victims, the amount of loss involved, and whether or not the scheme was complete or successful, do not stand in the way of successful prosecution under the mail fraud statute. The proposed Code would subsume the mail fraud statute under section 1732 (Theft of Property). Unfortunately, because of the nature of this section, it would change the focus of the federal law away from the scheme to defraud and replace it with the same focus that has proven so difficult of enforcement under state law.

In addition, a further handicap faces the prosecution of purveyors of fraudulent schemes in the definition of "deception" in section 1741(a). Eliminated from the definition of "deception" are "falsifications as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed." In the first instance, it is unclear what are "matters of no pecuniary consideration." What is the purpose of this exception? If it is intended that the falsification must be material, then perhaps this should be stated, but certainly a falsification can be as to a matter which, of itself, has no pecuniary significance but is nonetheless material to the deception.

Secondly, there is an exception for "puffing" that is unlikely to deceive ordinary persons in the group. Two serious problems are raised by this exception. Are the unsophisticated in the group addressed to be excluded from protection because some in the group would not be deceived? Or is it a statistical average or perhaps a majority that must be found to exclude the unsophisticated? Moreover, warranty law has shown over and over again the difficulty of determining the meaning of puffing. The definition given in section 1741(a) is not significantly different from the commercial definition. But what is relevant to a determination of warranty protection may be quite different in a criminal fraud case, where the effect of the exaggeration may well be the essence of the fraud. No evidence of the need for this exception has appeared and it should not be included unless the need for it is established. In fact, if a falsification or statement is within the detailed definition of deception, then it is deception. If it doesn't fit the definition, it isn't, and no exceptions are needed.

Because of the importance of attacking fraudulent schemes at the federal level, we recommend the approach of the New York County Lawyers' Association suggested in their report on the Code. This would be to "include a new comprehensive antifraud provision designed to cover consumer deception" which would be independent of both the Theft section in 1732 and the definitions in section 1741. Their suggestion is for a new section along the following lines:

"*Scheme to defraud within federal jurisdiction.*

A person who devises, intends to devise, or joins in a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises and who, for the purpose of executing such scheme or attempting so to do, commits or causes any act bringing about circumstances upon which federal jurisdiction may be based under section 201 (a), (c), (d), (e), (f), (g), (h), (i) or (j) of this Code is guilty of a class C felony. This section shall not be limited directly or indirectly by anything contained in section 1741."

A new federal crime which in essence consists of interference with security interests is created by section 1738. Whereas the basic intent needed for conviction under the theft section (1732) is intent to deprive someone of his property, here the intent required is simply to prevent collection of a debt. Theft is criminal theft, but this crime appears to be civil in nature, that is, preventing collection of a debt. Creditors have many civil remedies available in cases of interference with security interests and the drafters of the Code recognize in the comments that this does not have the same appearance of "criminality" as theft ("that resisting the collection of a debt is not to be classed at the same level with appropriation of property interests of another.") We recommend that section 1738 be eliminated from the Code as an inappropriate subject for federal criminal action. If the Committee feels that a problem exists sufficient enough in nature (and the evidence does not appear to support this) to require a criminal statute, then we suggest that the most appropriate method may be to require an intent to deprive another of his property, as in theft. In fact, the simplest way to achieve this, although it might perhaps raise other problems, is to amend the definition of "property" to include certain security interests.

The Criminal Coercion provisions, section 1617, present a troublesome problem as does the treatment of the definition of "threat" in section 1741(k), which will be discussed separately. First, it seems that the draftsmen were at something of a loss as to where to place certain provisions which became a part of criminal coercion. Chapter 16 deals with danger and injury to persons, obviously meaning natural persons. The Criminal Coercion section is included in a subcategory denominated as Assaults, Life Endangering Behavior, and Threats. It seems clear that the health, safety, and well being of a human being is the value sought to be protected by these provisions.

But the draftsman inserted provisions which are apparently designed to protect business and commercial interests by making criminal certain conduct potentially adverse to them. In particular, section 1617(1)(c) makes the threat to "expose a secret or publicize an asserted fact, whether true or false, tending to subject any person . . . to hatred, contempt or ridicule, or to impair another's credit or business repute" an offense. Insofar as these provisions might apply to threats made to a business enterprise they are inappropriate to a criminal code in the first place, and inappropriate to this Chapter in the second place. Under the provisions in question, certain conduct not unlawful acquires a taint of criminality when to threaten to carry on that conduct is made unlawful.

To the extent that the provisions might reach a consumer or a group of consumers who wish to take a case "to the public" through informational picketing, the provisions may well have a constitutionally prohibited chilling effect on First Amendment rights to free speech. As a practical matter, the consumer would be hard pressed to find a way to communicate his intention to exercise his First Amendment rights without being accused of violating the Criminal Coercion section. As a result, negotiations between consumers or consumer groups and merchants, will be devoid of any discussion of some of the serious consequences that could flow from a failure to reach an agreement. For these reasons we urge the committee to eliminate in its entirety section (1) (c) of section 1617.

Another course of action would be to delete any reference in the criminal law section to injury to business and commercial interests, leaving the latter area for the civil law and remedies available to injured parties by way of damage and injunctive actions. Therefore, if section 1617(1)(c) remains a part of the Criminal Coercion section at all, the language "or to impair another's credit or business repute" should be dropped. Further, the section can be further clarified by inserting the word "natural" prior to the word "person." The language relating to business repute is unnecessary and misleading in any event. It suggests a business protection purpose to the subsection which is inappropriate and potentially influential in interpreting the meaning and intention of the subsection in the future. To the extent that the Committee finds it necessary to permit the business protection goal in the secion, that is already achieved by the use of the word "person" as defined in section 109(ae) which definition includes corporations or organizations.

If the Committee decides to retain subsection (c) of section 1617(1), we strongly recommend elimination of the affirmative defense language from section 1617(2). It is difficult to see why a defendant should have to bear the burden of establishing those defenses by a preponderence of the evidence, section 103(3). It is a particularly onerous burden for the defendant since the language of the defenses is primarily language of intent, a concept which is not easily proven by "hard" evidence. The Government should be required to prove beyond a reasonable doubt that the defendant had no legitimate motive for his conduct and possessed the unlawful intention to force another to engage in or refrain from conduct.

Not inconsequentially, Chapter 16 which deals with serious threats to the person of a human being appears to have no definition of the word "threat" as used in relevant sections of the Chapter. It would serve a useful purpose if a definition section were added to cover sections 1614 through 1617.

Equally as troublesome as the language of section 1617(1)(c) is the fact that "threat" as used in the theft sections, sections 1732-33 carries the language from section 1741(k). The effect of the definition as it applies to heretofore lawful conduct is to prohibit a consumer or consumer group from seeking to compel a merchant to honor an obligation by means of informational picketing, section 1741 (k)(vi), (vii), (viii), (x) and (xii). Whereas section 1617(1)(c) made it unlawful to threaten to exercise free speech pursuant to the First Amendment, section 1741(k) defines "threat" in such a way as to make it a crime to successfully force another to honor an obligation the actor believes to be owed to him by means of consumer picketing or publication of a grievance. Equally important, Section 1741(k) does not even provide the defenses of section 1617.

Apart from the probable unconstitutionality of such an approach, it is unwise policy to insulate the merchant from the community he serves. There is precious left of the concept of consumer sovereignty; to deny the consumer the opportunity to discuss his grievances with other consumers for purposes of bringing community pressure on a merchant in an effort to change his practices would extinguish completely the only influence the consumer may enjoy over the merchant in his community to obtain redress.

While it is not clear exactly what is meant by the second phrase of section 1741(k)(ix), it seems that one who attempts to inspire the attorney general or district attorney to undertake an investigation of merchant practices in an effort to get restitution runs some risk of being prosecuted for threatening to deprive another of his property. It is not constitutionally permissible to cut off the citizen's right to petition his government for redress of grievances.

The subsections dealing with collective activity, section 1741(k)(x) and (xii) are particularly onerous to consumer groups and their individual members.

These groups usually rally around the complaint lodged by an individual consumer and focus on that grievance. Section 1741(k)(x) constitutes such collective action a threat which if successful could result in a conviction for theft under section 1732 or section 1733. In addition, section 1741(k)(xii) is so vague as to be potentially unconstitutional in that it makes some undefined and perhaps undefinable conduct a threat when it would not substantially benefit the individual or he group engaged in the collective action. The problems, apart from determining the substantiality of benefit, is that the language of subsection (k)(xii), to wit: "*calculated to harm another in a substantial manner with respect to his . . . business, . . . financial condition, reputation, or personal relationship,*" is not sufficiently clear to permit one to predict that his conduct will be lawful or unlawful. In addition to the sweeping language of the section, it relies on the definition of "harm" found in section 109(o)— "loss, disadvantage, or injury, *or anything so regarded by the person affected*, including loss, disadvantage, or injury, to any other person in whose welfare he is interested." [Emphasis Added]. Obviously, the merchant is free to determine what he considers to be harm even though he may be unable to show that there is any direct adverse effect on him by the conduct complained of. The section is patently defective and should be rewritten to avoid such sweeping and vague provisions.

It is suggested that if the draftsmen believe that there are valid interests to be protected by the criminal code language of Section 1741(k), the solution to the problem may be to redraft the section or to add a section making it clear that Section 1741(k) is not intended to reach the results spelled out above.

The effect of the previously cited definition of "harm" in Section 109(o) is also apparent in Sections 1756 (Bankruptcy Fraud) and 1753 (Deceptive Writings). Under Section 1756 a person is guilty of a felony if with intent to harm creditors of a bankrupt, he transfers or conceals, in contemplation of bankruptcy, his own property or the property of another. In addition to being extremely vague, when the definition of harm is read into the statute it becomes frightenly so. Harm is anything so regarded by the person affected, which permits the creditor to set the standard for the requisite intent. The comment to this section states that the language "with intent to deceive a court or its officers or to harm creditors" was substituted for the existing "intent to defeat" the purpose of the bankruptcy laws because "it does not seem appropriate or necessary to require that the actor know what the bankruptcy laws are and affirmatively intend to undercut them."

On the other hand, it does seems quite appropriate to require some such knowledge on the part of the actor. The language of deceiving the court or its officers probably does require an element of such knowledge. We urge the committee to retain the essential elements of the "intent to defeat" language in Section 1756.

The use of the word "harm" appears again in Section 1753(1) (Deceptive Writings). Here, however, it is more than merely the definition of "harm" that is vague, perhaps unconstitutionally so. The entire section, which apparently creates a wholly new federal offense, is vague and ambiguous and the comments are not really helpful. A person who merely has in his possession a contract which is deceptive and which some other person affected by it regards as harmful to himself could be guilty of this offense. What is the offense of uttering a deceptive writing? It includes issuing it, but what is issue? Under this section, is a merchant guilty of a felony if he uses a deceptive contract in the sale of a used car for more than $500? If a person fills out a false financial statement in seeking credit, or a false insurance application, has he issued a deceptive writing? Some of the ideas which the section seems to embody may well be useful in federal criminal law, but the section needs a thorough redrafting for the sake of clarity.

Sections 1006, 3006 and 1772 raise serious questions concerning the appropriate penalties for activity not covered by the Code but to which other statutes have heretofore applied criminal sanctions. Although the Center is not in a position to assess the effect of reducing these penalties, we request the Committee to undertake a study of the necessity and effect of such reduction before adopting these provisions. The drafters of the Code have not apparently given much study to these problems and such a wholesale change in our regulatory scheme deserves thorough airing prior to enactment. Two areas of considerable importance to consumers rise immediately to mind—the anti-trust laws and food and drug laws.

It may well be that study will show that the maximum prison sentences now on the books are an effective deterrent. On the other hand, the evidence may be that severe monetary penalties better accomplish the purpose. If the latter be the fact, section 3301 has some provisions that should be retained and strengthened. By permitting the maximum fines of non-Code offenses to remain in effect, a stronger deterrent seems assured. However, it would appear that the Congress should undertake a re-examination of what these maximums should be. As to all crimes that affect consumers, whether they be Code or non-Code, the goal of the penalties, in addition to deterrence of similar future activity, should be to recompense and make whole the victim and to make such offenses totally unprofitable to the perpetrator. The offender ought never to be able to retain his illicit gain, and the section should be amended to provide for this. Subsection (2) (Alternative Measure) does take a step in this direction but would not seem to go far enough. In addition, the section should make it mandatory for the perpetrator of the offense to make complete restitution to the victim whenever this is possible, and such payment should take priority over fines.

Section 3301 does contain one ambiguity of major import. In a scheme to defraud a number of people, as most mail fraud schemes, for instance, is it one offense for all of the people involved? In other words, is it one or 1500 violations to defraud 1500 people with one scheme? A $500, $1000 or even $5000 fine in such cases can be written off as a cost of doing a fraudulent business if that is the maximum that can be imposed for the entire scheme. Nor does section 703 really answer this question.

An additional means of protecting the public which is particularly appropriate in offenses against consumers is suggested by section 3007. Here an organization convicted of an offense could be required to warn past as well as potential future victims by giving notice of the conviction. The Center approves the concept of this section and urges the Committee to consider the bracketed alternatives to this section, which gives a court greater leeway in fashioning an appropriate remedy. Moreover, we are unable to determine why this provision should be limited to organizations. It appears to be equally appropriate to individual offenders even though it is recognized that there maybe greater difficulty of application in the case of some individuals.

Still another amendment to the bracketed alternative appears desirable. The court should be able to require publicity of either the conviction and/or the conduct giving rise to the conviction and the fact that such conduct is a violation of law. Although implicit in the section, it should be made clear that where appropriate the court may require this publicity over a period of time. This type of publicity is not "social ridicule" at all as the comment implies, but an additional protection to the public in the manner of the warnings now required on cigarette packages.

The liability of a corporation for offenses committed by an agent of the corporation as delimited by section 402(1)(a) seems to cut back on corporate liability for felonies as it has been developed by the courts. If an agent of the corporation who has been delegated authority commits a felony within the scope of his employment, the corporation should not be able to escape liability for his acts. What the agent does is for the corporation and to its benefit, and a corporation, after all, can only act through its agents. While the bracketed alternative to section 402(1)(a) is preferable to the proposed section, the language of both is still complicated and of uncertain effect. We recommend that felonies be treated in the same manner as misdemeanors, particularly since no prison terms are involved, and that corporate liability be predicated on any offense committed by an agent of the corporation within the scope of his employment. The liability of an agent of the corporation for offenses committed on behalf of the corporation is made absolute, and rightly so, under section 403. A different rule should not obtain in the other direction.

On the other hand, the Center has serious doubts concerning the social value of section 3502, at least as written, which would permit a court to disqualify a manager of a corporation or other organization from exercising similar functions for up to five years. The section as a whole seems to raise serious constitutional issues, and the danger of political or selective use is apparent. Given the nature, tendencies and present workings of our society and the judicial system, it is unlikely that this section will be predominantly applied against the most serious violators or against business corporations. Moreover, although

there are presumably some standards to guide the court, they are dangerously vague.

The statute of limitations provided by section 701 of the Code is basically five years for felonies and three years for misdemeanors. Most consumer offenses are misdemeanors under the Code, but the public policy violated remains a serious and important one. The present statutes of limitations for these offenses is generally five years, and no reason is apparent why the time should be shortened.

We strongly urge the Committee to give greater publicity to these far reaching proposals embodied in this Code, and to move slowly and cautiously before adopting a statute with so many departures from current practice. A criminal code designed for the state level is not necessarily the most appropriate vehicle for a revision of the Federal criminal laws. If the Committee does proceed with the Code substantially as the Commission has reported it, we respectfully request that you will give due consideration to our recommendations, suggestions and inquiries.

Mr. Gordin. Thank you, Senator.

May I first make a disclaimer, which I feel is proper for a consumer lawyer, that I am not an expert in criminal law, nor is the Center staff expert in criminal law, but we are concerned with some of the impacts of the proposed reforms of the Federal criminal law insofar as they do affect consumers.

And I would like to very briefly say that we agree to a large extent with the thrust of the remarks that Mr. Givens has just made, and with his prepared statement, as well as with the remarks of the New York County Lawyers Association expressed by Mr. Broderick.

I will not go into detail, Senator, other than to answer any questions that you may have as to the mail fraud statute. We have suggested the same as Mr. Givens and Mr. Broderick, that a provision be written into the code which would retain the central thrust of the present mail-fraud statute.

Our principal concern is that by putting the present mail-fraud statute under the concept of theft that prosecution will be more difficult, primarily because of the traditional problem of proof, as well as because of the different thrusts of the type of cases involved. In the case of the mail fraud, you are really concerned with the implementation of a scheme, whereas in the prosecution for theft you are more concerned with the problem of how has an individual been damaged, has property been stolen from him—something of that nature.

Of more immediate concern to us, Senator, is the definition of "deception" which is contained in section 1741(a). It is, as I understand the concept of the draftsman of the proposed code, that the entire scheme of defrauding people would be prosecuted under the definition of "deception," coupled with section 1732, the theft section. But the definition of "deception" itself is unusually broad. It goes far beyond the traditional concept of fraud, and I am concerned that by sweeping everything into this broad language, many, many, things we have not hitherto had as Federal crimes would now become Federal crimes.

For instance, it apparently makes it a Federal crime to make misleading statements on applications for credit, that is, for extension of credit or applications for insurance, and this would be so under both the theft statute, section 1732, and under the new deceptive-writings statute, section 1753.

The deceptive-writings statute, itself, Senator, is a rather peculiar approach from the standpoint of the consumer in any event. I think that in all of these statutes it cuts both ways; that is, they affect the consumer as a possible offender under the statute, and they affect the consumer as a possible victim. And this statute it seems to me particularly—that is, the deceptive-writings one—would be harmful to both the consumer and to the merchant, because the entire section, as I read it, appears rather vague, and the comments do not clear this up.

A person who merely has in his possession a contract that is deceptive, under the definition of "deceptive," and which some other person who is affected by that regards as harmful to himself could be guilty of the offense of possessing a deceptive writing. I do not know what means. Would it mean that a merchant who merely had in his possession a contract which contained some clauses that were deceptive to a consumer would then be guilty of the crime of possessing a deceptive writing?

It is a very broad section, and one that contains, it seems to me, some potentials for extreme harm.

It also makes it an offense to utter a deceptive writing, but the offense of uttering a deceptive writing is, again, not a clear one. Under the definition of "utter" one of the definitions is to "issue," and I do not know what issuing a deceptive writing is. Would a merchant be guilty of a felony under this section if he used a contract which contained some deceptive material?

And that would not be a difficult thing to establish, and many contracts may have deceptive material in them. If he sold a used car for a value above the $500 limit, this could be a possible result of this section. Again, the same thing would be true under the deceptive-writing provision, someone else filling out a statement which contains misleading remarks on a financial application, or an application for credit, or an application for insurance could again be guilty of a felony if the amounts involved were over $500.

Part of the ambiguity here results from the use of the word "harm" in the section, that is, that it is an offense to harm. Let me quote the exact language: "Guilty of an offense if there is an intent to harm another person."

Senator Hruska. Give us the page, will you?

Mr. Gordin. This is section 1753, and it is on page 226 of the Commission's report, page 379 of part 1 of the hearings. I am quoting now from the proposed section 1753, on page 226 of the Commission's report. The sense is: A person is guilty of an offense if, with intent to deceive or harm the Government or another person, or with knowledge that he is facilitating such a deception or harm by another person, he does one of two things; he either knowingly issues a writing without authority to issue it, or he knowingly utters or possesses a deceptive writing.

An additional ambiguity, as I say, is thrown into this because of the definition of "harm" itself. In section 109 (o) of the code it provides that anything that is so regarded by the person affected is "harm," which means in the case, for instance, of someone filing a statement which had misleading information in regard to an appli-

cation for credit, that the creditor could determine that he had been affected, that he regarded this as "harm," and it does not seem to be necessary that he would have to prove here he had actually been adversely affected or that any harm, as we traditionally know it, had existed.

I might add here, Senator, that the same problem arises with the definition of "harm," as far as other sections affecting consumers are concerned.

In the section called "Bankruptcy Fraud," which is section 1756, and in the section which concerns itself with defrauding secured creditors—And, if I may, I would like to address myself to those two sections at this point.

The section 1738 called "Defrauding Secured Creditors" is new in the Federal criminal law. There is, to the best of my knowledge, nothing at the present time that would encompass this offense. What this is really is a crime of interference with security interests of a creditor.

This section is diffierent from the theft section, and, apparently, deliberately so, in so far as the intent that is required for this section is a completely different intent than for the various theft sections, that is, 1732, 1733, and 1734. The intent here is to prevent collection of a debt, not to deprive another of his property, which is the intent required under section 1732, section 1733, and section 1734.

Now, that, is seems to me, is primarily civil in nature, that is, theft is criminal theft, depriving another of his property, but here the intent is to prevent collection of a debt. I believe that creditors have sufficient remedies in civil law in case of interference with secured interests, and, in fact, the comments on the code recognize this. They say that this new crime, this new offense, does not have the same appearance of criminality as does theft, and they then go on to say that resisting the collection of debt is not to be classed at the same level with appropriation of property interests of another.

The center is very concerned with this aspect of the proposed code, and we recommend that this section not be included in the code as being inappropriate to a Federal criminal law. It is primarily civil in its nature. If Congress finds—and I do not know where the evidence is to indicate the necessity for it, but——

Senator HRUSKA. Now ,which section are you referring to?

Mr. GORDIN. I am referring now to section 1738, defrauding secured creditors. I believe that is at page 213 of the report.

Senator HRUSKA. Section 1738, defrauding secured creditors?

Mr. GORDIN. Defrauding secured creditors.

If a criminal statute is necessary to protect secured creditors, the intent required should not differ from the same intent that is needed for theft of property; that is, it should be intent to deprive another of his property, not an intent to prevent collection of a debt, which is, really, civil in nature. Perhaps, if the Congress feels that the protection of this interest is necessary, the best way to take care of it would be to amend the definition of "property" to include those secured interests that do need this kind of protection.

Senator HRUSKA. What is your recommendation with reference to that, that it be eliminated in favor of civil treatment?

Mr. Gordin. Our recommendation is that this is a civil matter and it should be left as it presently is to the rather extensive remedies that creditors do have in the civil law, and that the section is unnecessary. But if the Congress does find a need for some protection of secured interests, in that case, the intent that should be required should be the intent to deprive another of his property rather than preventing collection of debt.

Senator Hruska. With reference to harm, to which you have referred as being existent in several of these sections——

Mr. Gordin. Yes?

Senator Hruska. Would it be capable of definition, and thereby avoid the vulnerability of vagueness?

Mr. Gordin. I would, on my own part, Senator, prefer to see it undefined because I believe that the genius of our entire legal system has been in the ability of the courts to define on a case-by-case basis such things as "harm," and "attempt." I go along, to a large extent, with the remarks that Mr. Givens made. I believe that the courts have done as well with concepts such as "harm" as they have with concept such as "extortion." I do not think that it is necessary to actually define in the code such terms.

Senator Hruska. It is defined in the code, you know; it is defined in the report.

Mr. Gordin. I know it is, but I am saying I would prefer to see it undefined because I believe that the courts would consider the word "harm" along with the way they have in the past considered the word "injury".

Senator Hruska. Well, now, of course, you cannot have it both ways. You cannot say that to use it without definition would be unconstitutional, and then say you would rather not have it defined, and thereby remove the vulnerability.

Mr. Gordin. I do not think that is the case, Senator, because the courts have over the years developed case-by-case definitions. For instance, the word "injury" certainly has been, which is very similar to the word "harm," has been defined in case after case over the years by the courts. These are words that have common definition, and to attempt to define it now in such a way as it is in section 109 (o) of the code would be to add, I believe, new elements that have never appeared before in this kind of definition.

Senator Hruska. Well, let the record at this point contain subsection (o) of section 109 which defines harm as follows, and I am quoting subparagraph (o):

"Harm means loss, disadvantage or injury, or anything so regarded by the person affected, including loss, disadvantage or injury to any other person in whose welfare he is interested."

By making it equivalent to injury, you see, it ties in very closely and definitely, does it not, with the judicial definition of injury?

Mr. Gordin. May I ask, Senator, what is the advantage of using the word "harm" rather than the word "injury" in it?

Senator Hruska. Well, I do not know. But, with the definition here, and with vagueness out of the picture, if we are going to use injury, and if it will please some people, I imagine then it would displease others, and they would say harm is better than injury, and

this way we have it both ways. It is nailed down. We felt it was nailed down. We welcome your suggestion but we felt that it was pretty well nailed down in the report.

Mr. GORDIN. I would say, Senator, there is a phrase included in the definition which in and of itself is vague and meaningless, and that is the phrase "or anything so regarded by the person affected". This is, as far as I know, a new concept, at least so far as the term "injury" is concerned.

Senator HRUSKA. Well, thank you for that suggestion and it will be noted and considered. Would you be happier if that part was left out?

Mr. GORDIN. Yes, indeed.

Senator HRUSKA. And the rest of it retained?

Mr. GORDIN. That is the part, I think, that gave us the most trouble because it appears that an individual could set the standard.

Senator HRUSKA. As you state in your statement?

Mr. GORDIN. Yes.

Senator HRUSKA. Fine.

Mr. GORDIN. We have the same problem with the section on bankruptcy fraud, Senator, and I will just mention that briefly. That is section 1756 of the proposed code which again uses the word "harm" and provides a person is guilty of a felony "if, with intent to deceive a court or its officers or to harm creditors of a bankrupt."

Again, the standard with that particular phrase in the definition could, to a certain extent, be left in the hands of a creditor, himself. The bankruptcy section itself, that is, the bankruptcy fraud section, 1756, has a certain vagueness about it, Senator, and as a result of the change from present law, the intent is now "to deceive a court or its officers, or to harm creditors of a bankrupt." The comment states that they have changed the existing language, which basically is an intent to defeat the purpose of the bankruptcy laws, and that they have done so because they do not feel it is appropriate or necessary to require that someone know what the bankruptcy laws are, and affirmatively intend to undercut them. I am not so certain that that is true. It may well be that it is appropriate to require before someone should be guilty of violating the bankruptcy laws that, indeed, he does have some knowledge or understanding of them.

I believe that the language "intend to deceive a court or its officers" does contain an element of the fact of knowledge of the bankruptcy laws, or at least some part of it. You cannot really have an intent to deceive a court or its officers unless you have some knowledge that the court has an interest in the matter; so that our suggestion is primarily that the intent to defeat the purposes of the bankruptcy law language either be retained or that some element of it be retained in the definition, and secondly, if the language "with intent to deceive a court or its officers" is retained in the proposal that the additional language "to harm creditors of a bankrupt" be omitted as unnecessary.

In other words, if the section did say "with intent to deceive a court or its officers or with intent to defeat the purposes of the bankruptcy law," that this would be sufficient for the purposes of protecting the bankruptcy laws of the country.

I think also there is some concern at this point with the fact that the entire structure of the bankruptcy laws is undergoing, I will not say revision, because it is not yet true, but it is undergoing study with a view to a revision or overhaul, and that perhaps any statutes which relate to bankruptcy fraud might well await the outcome of the proposed revision of the whole bankruptcy law structure.

Mr. BLAKEY. Well, when is that report due?

Mr. GORDIN. I believe that report is due in September, but I am not absolutely certain of that. And, of course, the date, even if it is due in September, may not be a firm one. But, I am fairly certain that that is the deadline.

Mr. BLAKEY. If the date is anything close to September, there is every likelihood that that will be completed before this bill, or a bill, based on this proposed code is reported out and passed.

Mr. GORDIN. If I may, Senator, I would like to talk for a few minutes about the concept of penalties in the proposed code.

In these oral remarks I am shifting the emphasis away from the emphasis in my prepared statement because I believe that the statement, itself, does cover the points of major concern to us quite fully, and I would like to comment on some other things at this point.

It seems to me that for crime which affects consumers there ought to be three goals involved, and I think, of course you should have a goal that you want to deter similar activity in the future.

I think that in addition to that, of course, and as a part of it, you want to prevent future victims.

Senator HRUSKA. Now, Mr. Gordin, that bell was not rung for the purpose of signaling the last 5 minutes of your time, but it happens to coincide with it.

Mr. GORDIN. All right. Thank you, Senator. I think second, Senator, that you need as a goal, or should have as a goal the object of making the victim whole; that is, the object of recompense and restitution, and I think this is particularly important in consumer crimes.

And third, I think another goal ought to be that you want to make the offense involved in these economic and consumer crimes totally unprofitable. I think that is very important, and that is where I go along with the concept expressed by Mr. Givens, and the concept which we suggest in our statement that was submitted to you, that the court should be able to impose penalties, if you will, which are different from the traditional penalties of jail sentences and simple fines.

It seems that first of all the court ought to be able to order restitution to the victim of the crime where this is possible; and second, if fines are imposed, restitution ought to be a matter of priority over such fines.

I think that making the offense unprofitable is far more important than sending the offender to jail in most of these economic crimes. If you require an accounting and a disgorging of the profits, you can make it, by law, possible to get at assets that have been transferred out of an organization, or out of a corporation.

There are, of course, all sorts of ways of hiding assets that have been gained illicitly, but I think that the Internal Revenue Service, among others, have over the years discovered many ways of getting at

these hidden assets, and I believe that the courts can take advantage of the procedures of the Internal Revenue Service of doing so in these matters.

Rather than disqualify a person, for instance, as is proposed in one of the sections of the code, from engaging in a similar business in the future, or similar functions in the future, it might be much better to say that when you engage in that business, or in any business perhaps, you have to make restitution to the victims of your previous business.

It seems to me this makes the punishment fit the crime a lot more, and more than a jail sentence would do or disqualifying him from perhaps the only kind of legitimate endeavor that he is capable of.

If restitution has been made, then I think the courts ought to have the power to perhaps require that anyone who has two or three times been convicted of the same or a similar offense should have to make some sort of report on a quarterly or annual basis, and then be subject to audit and investigation so that, in other words, anyone who is guilty of a course of conduct over a period of time which tends to show that he is engaged more than once, or just twice, perhaps, in consumer crimes, would be carefully watched.

But, I think the concept of sending him to jail is not necessarily one that is going to help the consumer.

Senator HRUSKA. Very well. Your time has expired, and the vote bell has rung. The acting chairman will excuse himself long enough to cast his vote and then return to hear the testimony of Professor Charles B. Blackmar, School of Law, St. Louis University.

(Short recess.)

Senator HRUSKA. The hearings will be reconvened, and, Professor Blackmar, we are grateful to you for your patience. I am sure you understand the circumstances.

STATEMENT OF PROF. CHARLES B. BLACKMAR, SCHOOL OF LAW, ST. LOUIS UNIVERSITY

Mr. BLACKMAR. I certainly do, Senator.

Senator HRUSKA. You filed a statement, did you not?

Mr. BLACKMAR. Yes, I did.

Senator HRUSKA. It will be incorporated into the record in its totality, and you may proceed in your own way, either to read it or to highlight it.

(The statement follows:)

STATEMENT OF CHARLES B. BLACKMAR, PROFESSOR OF LAW, SAINT LOUIS UNIVERSITY

My special interest is in the effect of the proposed revision of Title 18 on jury instructions.

In federal criminal cases, the trial judge has the responsibility for instructing the jury on the applicable law. The court's charge comes at the close of the case, and is usually delivered orally without providing the jury a copy for use during deliberations. Some cynical observers claim that juries don't pay any attention to instructions, or at least to the fine points in phraseology. Jurors should be asked about this; lawyers and judges don't know very much. Who would listen to even the most proficient angler, if a fish could talk! The litigants, however, are entitled to have the jury instructed on the law in correct language, and, if there are errors, reversals will follow.

The judge faces a dilemma in preparing his instructions. If he places too strict a burden on the government, then a defendant may secure an undeserved acquittal. But if the charge is deficient as to an essential element, the case may have to be tried again even though there was little dispute about the particular element. In any revision of criminal laws, then, there will have to be careful study of problems in instruction of juries.

It is generally desirable to be able to instruct juries in statutory language. If the judge departs too much from the statute then the legal correctness of his deviations is always up for consideration. Some statutes, however, are not appropriate for use in exact words in instructions. They may have too many phrases, conjunctives, disjunctives, and subordinate clauses to be comprehensible when presented orally. So those who frame new code provisions should try to express them in language which can be understood by jurors. The draftsmen of the proposed revision to Title 18 have accomplished this purpose, in most of their provisions.

It is especially important that the statute leave no doubt as to the essential elements of an offense. Otherwise different courts will reach different conclusions. There were cases on both sides of the question as to whether 18 USC Sec. 1202(a), forbidding possession of firearms by felons and other dangerous persons, required a showing that there was some relation to interstate commerce. The question was put at rest by *United States v. Bass*, 92 S. Ct. 515 (1971), holding that an interstate connection was required. This decision made many reversals necessary. Some of the cases reversed probably cannot be tried again because of lack of evidence of an interstate element, but in some the required showing could have been made and instructed upon if the statute had been completely clear in the first place. This example shows the importance of precision in criminal statutes, and especially in statutes which regulate areas not previously subject to federal control.

In the drafting of criminal statutes, the draftsman must always remember that at some stage a court will have to instruct a jury about the meaning of his handiwork. The satutes, then, should set out the essential elements of the offense clearly. Definitions should be framed in terms a jury can understand, so that the judge may use them without paraphrase.

I have reviewed the proposed revision of Title 18 with reference to instruction problems. I am not without opinions about other parts, but will confine myself to the area of my particular interest. My general feeling is that the draftsmen have done an outstanding job and that it should be of material assistance in avoiding reversals because of instruction problems. I have noted several areas of danger which appeared to me.

I will refer to the sections of the proposed revision just as though they had been enacted.

JURISDICTIONAL BASE

The provisions relating to "jurisdictional base" (Sec. 201-219), and the elimination of the "jurisdiction base" as an essential element of an offense, (Sec. 103(1), should be very helpful in eliminating instruction problems. As the annotations show, the general tendency is to hold that the government does not have to demonstrate an "anti-federal intent" in criminal statutes relating to federally protected areas, governing offenses which are "malum in se." Assault, for example, is bad in and of itself. The federal government has ample power to protect its agents against assault while they are in line of duty, and has done so through present 18 USC Sec. 111. There is no reason why this protection should not be extended to a federal official who is in the course of his official duties, even though the person committing an assault is not aware of his status. Most courts have reached this conclusion. See 1 Devitt and Blackmar, *Federal Jury Practice and Instructions*, Sec. 24.04. But the authorities are not unanimous, and there may be disagreement as to this and other statutes. If the penalty is more severe than that usually prevailing under state law for similar offenses, the courts may be inclined to hold that a specific anti-federal intent is required. There are other examples.

It is eminently desirable, therefore, to have a general statutory provision such as that found in Sec. 103(1). If there are particular cases in which Congress wants to provide that anti-federal intent is necessary, this may be done by specific language. In the absence of specifications, there would simply be no such requirement.

It appears from Sec. 103(1) that the trial judge must determine whether an appropriate "jurisdictional base" has been established. Under the recent deci-

sion in *Lego v. Twomey*, 40 USLW 4135 (Jan. 12, 1972), it would be proper to provide that this finding need only be based on "preponderance of the evidence," and that it need not be "beyond reasonable doubt" as provided by the present draft.

ESSENTIAL ELEMENTS

Sec. 103(1) performs a particularly valuable service in defining the "essential elements" of an offense, and thereby providing a check list for instruction in particular cases. The court has the responsibility of instructing the jury on the "essential elements", and failure to do so, or omission of an essential element, may be such plain error as to require reversal even in the absence of objection. See *Musgrave v. United States*, 444 F. 2d. 755 (5th Cir., 1971.) With the revision the judge should be able to determine the essential elements of an offense from the statute, without difficulty.

AFFIRMATIVE DEFENSES

Most courts hold that the present federal criminal law knows no "affirmative defense." See, e.g., United States v. Arnold, 445 F. 2d. 290 (10th Cir., 1971.)

The recent case of *United States v. Ramzy*, 446 F. 2d, 1184 (5th Cir., 1971), suggests the contrary, at least as to exceptions to a statutory scheme of prohibition. But there is a risk in any case in which a judge places any burden of proof at all upon a defendant.

We may confidently predict that the provisions of Sec. 103(3), recognizing the "affirmative defense" as a part of criminal practice, will be subject to constitutional challenge on the basis of *In re Winship*, 397 US 358 (1970.) *Winship* holds that due process of law requires that the essential elements of an offense be established by proof beyond reasonable doubt. The rule is a rule of constitutional standing and applies to both state and federal prosecutions. The annotations to the Report cite *Leland v. Oregon*, 343 US 790 (1952), holding that a state may provide that the defense of insanity must be established by the defendant beyond reasonable doubt. and that it need not place the burden on the state. *Leland* is a relatively old case and it arose in a state setting. We cannot be sure that the case will be followed as to federal cases.

Some of the "affirmative defenses" such as intoxication (Sec. 502(3), mistake of law (Sec. 609), and repudiation of conspiracy (Sec. 1005(3) arise infrequently. This is not so, however, as to "entrapment," which is made an affirmative defense by Sec. 702(2). There may be a substantial risk in placing the burden on a defendant to establish entrapment. I wonder whether the risk outweighs the expected gain.

"Entrapment" is a judicial creation. *Sorrells v. United States*, 287 U.S. 435 (1935); *Sherman v. United States*, 356 U.S. 369 (1958). It is said that a defendant lacks the necessary criminal intent if the idea of crime originates with law enforcement officials. There is also a suggestion that officials must be controlled so that they will not use improper pressures. The Supreme Court might hold that a conviction obtained through entrapment is in violation of the due process clause. If this is so, then a requirement that the defendant bear the burden of proving entrapment might be found to be contrary to *In re Winship*, 397 US 358 (1970.) There should be careful consideration of this problem. Is the defense of entrapment such a danger to effective prosecution that it is worth a substantial constitutional risk? I doubt that it is.

The definition of entrapment in Sec. 702(2) might provide for simplification. Entrapment instructions have presented problems for years. See 1 Devitt and Blackmar. *Federal Jury Practice and Instructions*, Sec. 13.13 and notes. The instruction in the text has been revised several times in response to judicial criticism. The resulting instruction is rather complicated. The only thing I would question about the proposal is its reference to the "normally law abiding person." The propensity of the defendant to commit offenses of the kind involved is highly material in determining questions of entrapment. But a person who is disposed to commit certain kinds of offenses may be entrapped into others. There is a risk in introducing a new element into the concept of entrapment.

As to "defenses" which come up frequently, such as entrapment or want of mental capacity, it is better to use the "defense" approach of Sec. 102(2) than the "affirmative defense" method of 102(3). The "defense" approach is in accord with existing law.

MENTAL CAPACITY

It is entirely desirable to have a uniform definition of the mental capacity required for criminal offenses. The test set out in Sec. 503 is the modified "*Durham*" rule, as approved by the American Law Institute. That part of the definition designed to exclude the "sociopath" has been disapproved in some recent cases. See extensive discussion in *Wade v. United States*, 426 F. 2d. 64 (9th Cir., 1970.) It might be preferable to follow the Wade case. Acquittals by reason of insanity are very rare, and are usually limited to "unwritten law" situations in state prosecutions. It is doubtful that the use of the *Wade* rule would appreciably increase the number of acquittals, and it seems to be the most generally approved recent holding.

The Eighth Circuit still declines to adopt a rule on the *Durham* model. See *Pope v. United States*, 372 F. 2d. 710 (8th Cir.. 1967) ; *United States v. Mills*, 434 F. 2d. 266 (8th Cir., 1971.) It is virtually alone in so doing. When circuits are in disagreement, the Supreme Court may be called upon to resolve the controversy and this may provide dislocations. It is better to meet the problem through legislation.

PRESUMPTIONS

There are substantial dangers if a jury is instructed about a "presumption" and is told, in accordance with Sec. 103(4)(b), that

"the law regards the facts giving rise to the presumption as strong evidence of the facts presumed."

Congress has made frequent use of the statutory "presumption." *United States v. Gainey*, 380 US 63 (1965), holds, in accordance with prior decisions, that a statutory presumption is proper only if there is a logical relationship between the fact giving rise to the presumption and the presumed fact. Otherwise, the recognition of a presumption constitutes an invalid invasion of the province of the jury.

Because of this holding, recently approved instructions tell the jury that "it may find" the presumed fact from evidence of the fact giving rise to the presumption, but is not required to do so. See, e.g. *Yates v. United States*, 407 F. 2d. 50 (1st Cir., 1970). Sometimes the term, "inference' is used in a submission of this kind. See *United States v. Matalon*, 425 F 2d. 70 (2d Cir., 1970) ; *United States v. Marshall*, 431 F. 2d. 944 (5th Cir.. 1970).

Reversable error was found in a recent homicide case because the court instructed the jury that "the law presumes" malice from the use of a deadly weapon. *United States v. Wharton*, 433 F. 2d. 451 (App. D.C. 1970). See also *Green v. United States*, 405 F. 2d. 1368 (App. D.C. 1968).

It is also error, under present procedure, to tell a jury that a presumption is binding on it. *Varela Cartagena v. United States*, 397 F. 2d. 278 (1st Cir., 1967).

Because of the foregoing holdings it might be prudent to eliminate the last sentence of Sec. 103 (4) (b). If the jury were told that "the law" gave special weight to a particular fact, then this might conflict with the proposition that the jury is the sole judge of the facts. The error might reach constitutional proportions, under *In re Winship*, 397 US 358 (1970), in interfering with the defendant's right to the finding of guilty beyond reasonable doubt. There is no particular value in telling the jury about how "the law" regards certain evidence, and the risk of doing so is not unsubstantial. Why borrow trouble?

I disagree with the statement on page 160, as to the consultant's recommendation. I am not persuaded that the legislature has the right to define the degree of proof necessary for submission of a case to a jury. The statutes set out the essential elements of an offense, and the case is one for the jury only if there is evidence of each of these elements. If the legislature feels that a jury case should be made out by proof of the facts giving rise to a presumption, then it should make these facts definitive of the offense, instead of proceeding through the presumption device. Any attempt to give a presumption force beyond its logical value would violate the rule of *United States v. Gainey, supra*.

On inferences and presumptions, See 1 Devitt and Blackmar, *Federal Jury Practice*, etc., Sec. 11.04.

KINDS OF CULPABILITY

The definition of such terms as "intentionally", "knowingly", and "recklessly", as set out in Secs. 302(1) (a), (b) and (c) is very desirable. The definitions, however, should be capable of presentation to a jury in statutory language. There is no reason for a translation or paraphrase by the trial judge.

The instruction in 1 Devitt and Blackmar, *Federal Jury Practice*, etc. Sec. 1607, reads as follows:

"An act is done 'knowingly' if done voluntarily and intentionally, and not because of mistake or accident or some other innocent reason".

This definition has been used in many cases and has been approved by appellate courts. It would not be appropriate for inclusion in a statute of the kind proposed, because it makes use of the term "intentionally" and the proposed code uses this term to define a higher degree of culpability. Perhaps, however, the last clause, excluding accident and mistake, would be of value.

There is a problem in specifying "willfully" as the standard of culpability in the absence of a specification of any other, when "willfully" is not defined except by reference to "intentionally", "knowingly", or "recklessly". (Sec. 302 (2). It would be very awkward to give the jury all three of these definitions, in defining a fourth term. There would be more logic in eleminating "willfully" entirely and in revising Sec. 302(2) to read substantially as follows:

". . . If a statute of regulation . . . does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, there may be a conviction if the defendant acted intentionally, knowingly or recklessly. . . ."

The alternative would be to include a definition of "willfully". I do not believe that it can be said that this term is one of plain meaning requiring no definition. (The case of *United States v. Couming*, 445 F. 2d. 555 (1st Cir., 1971). holds that no definition is required but I question this, especially if a definition is requested.) I Devitt and Blackmar, Sec. 16.13, sets forth a definition which has been approved in numerous cases as follows:

"An act is done 'wilfully' if it is done voluntarily and intentionally, and with the specific purpose to do something that the law forbids; that is to say, with bad purpose either to disobey or disregard the law".

The inclusion of the term "intentionally" presents a problem under the proposed revision, just as it does in the definition of "knowingly". If the term "wilfully" is to be used to define the general requirement of criminal intent, it should be defined, independent of other definitions.

I wholly endorse the provision that a statute which is intended to punish an act done without culpability should say so. (Sec. 302(2). This provision should prevent many arguments as to whether 'scienter' is required. Of course legislative draftsman should have the provision in mind when drafting new penal statutes.

MISCELLANEOUS-SPECIFIC OFFENSES

(a) It is very desirable to have an "attempt" provision such as is found in Sec. 1001, applying to all offenses alike. There is no such federal "attempt" provision at present.

(b) The "criminal facilitation" provisions of Sec. 1002 may not be definite and certain enough to serve as basis for criminal liability. Also, is the question of "ready lawful availability" one to be decided by the court. or by the jury?

(c) The last sentence of 1004(1) seems to state a rule of evidence in criminal cases, to the effect that conspiracy may be established by circumstantial evidence. I wonder whether it serves any useful purpose in the statute. Does it say anything that is not recognized anyway:

(d) On first reading Sec. 1603 I was startled by the proposition that a killing through ordinary negligence would constitute a criminal offense. I then realized that Sec. 1603 referred to the definition Sec. 302(1)(d). It is not very satisfactory, however, to try to give a special meaning in the criminal area to a term which has a well-recognized civil connotation. Would it not be better to redesignate the term "culpable negligence" or "criminal negligence". The adverb, "negligently", in Sec. 1603 might then be replaced by a phrase such as "with culpable negligence". When a word is transferred from one area of the law to another, there is a danger of confusion and misunderstanding.

(e) I doubt very much that the phrase "offensively coarse" as used in Sec. 1618(1)(b) is definite and precise enough to serve as the basis for criminal liability. I assume that one who has telephone service invites people to call him, and the right to express oneself is to some extent a right of freedom of speech. What is coarse to one person might be normal for another. Perhaps it would be better to punish the making of phone calls to a party who has requested that the caller desist.

PATTERN INSTRUCTIONS

If the proposed revision is adopted judges will have to prepare instructions to meet new situations. There will have to be some experimentation, and no doubt a few reversals will result. This cannot be avoided completely.

It might be helpful to appoint a committee to prepare and circulate suggested forms of instruction in advance of the effective date of the code. It is not possible to prepare detailed "pattern instructions" such as are used in some states, but suggested forms should be valuable. Judges should be cautioned that the forms are suggested only, that they may be adapted to the particular judge's form of charge and that they should not be used indiscriminately.

The committee also might invite judges who have used instructions under the new statutory provisions to transmit these to the committee for circulation to other judges. The checklist method should be valuable, and also should help to save time.

Respectfully submitted,

CHARLES B. BLACKMAR.

Mr. BLACKMAR. I am Charles B. Blackmar, and coincidentally, as we discussed before the hearing started, the B. stands for Blakey.

I am a member of the law faculty at St. Louis University and, the Senator spoke to our Law Day some years ago, for which we are grateful.

And, coincidentally, I am special assistant attorney general of the State of Missouri, although my appearance here has nothing to do with the attorney general, or whatever views he might have.

I will summerize what I have here.

Senator HRUSKA. Very well.

Mr. BLACKMAR. My particular interest is in the subject of jury instructions because I have worked with Judge Edward Devitt of the U.S. District Court in Minnesota, on a 2-volume book on jury instructions, which is an update that the late Judge Mathes of the Federal District Court in California worked on.

So, I have been studying the subject of jury instructions for several years, and the bulk of our book relates to criminal cases.

Now, quite obviously when there are to be substantial revisions in the criminal law, that will mean that there are problems of instructing juries and, of course, juries have to be instructed and they have to be instructed in the right way. And there are a great many reversals because of error in jury instructions, especially with the body of Federal law getting more complicated and more Federal crimes being defined.

So, although I have views on most of the subjects covered by the code, I will pretty much confine myself on the technical problems of instructing juries, and how they might be affected by the proposal.

I am, of course, of the opinion that any provision for simplifying the body of Federal criminal law, and eliminating duplication and overlapping would be helpful, because it would cut down on a number of things that juries have to be instructed about.

And in this connection, I am especially pleased with the proposed jurisdictional base, and the piggyback jurisdictional provisions which, in effect, as I understand them, allow the court to make a finding about the required Federal incidents and do not make this jurisdictional base an essential element of the offense which has to be submitted to the jury.

The present statutes leave substantial doubt, in some instances, as to whether there is a Federal element that has to be submitted to the jury as an essential element of the offense. One example would be the statute about assault on a Federal officer, and there has been a lot of litigation about whether the individual committing the assault has to know that the person he assaults is a Federal officer acting in the line of duty.

I believe that has been pretty well resolved. Most courts say now that assault is bad, and if you happen to assault a Federal officer, that gives the Federal Government a legitimate interest, and the assaulter of the victim had no particular right to be free from Federal prosecution just because he did not know who he was assaulting.

But, I think that the elements regarding Federal jurisdiction which do not go to the relative culpability of the offender are well provided for in the proposal, and I would endorse that part very, very strongly.

I am particularly pleased with the definition in section 103(1) of the essential elements of an offense because I believe that would be of great help as a check list in instructing a jury with regard to the particular elements that must be given to the jury as to what it must find.

One part I am doubtful about, Senator, not because there is anything inherently wrong with it, but because I think it is going to make problems, and it is going to leave a very substantial legal question present, and that is the provision for affirmative defenses, which to my knowledge is the first time that this has been provided as a part of the Federal Criminal Law.

In our work on jury instructions, we have done everything we can to get judges out of the habit of saying something like "the law presumes," because very often that will be a ground for reversal, and the appellate court says that you are taking a decision away from the jury by telling them that the "law presumes."

Now, the approved formula is to say that you may draw an inference but you are not compelled to.

Now, I would wonder that whether the provision that certain matters are to be—or for offenses might in the end be in conflict with the Supreme Court of the United States in the *Winship* case, 397 US 358 which holds that the rule of proof beyond a reasonable doubt is a rule of constitutional significance

Mr. Blakey. That only applies to the elements of the offense, does it not?

Mr. Blackmar. That applies to the essential elements of the offense.

Mr. Blakey. And these affirmative defenses are not conceptualized in the code as an element of defense, that is, to be negated, but rather as some extraordinary grounds for exculpation?

Mr. Blackmar. That is true. The only thing, of course, is that some defense counsel is going to claim that even though they are devoted as affirmative defenses, still they are essential elements of the offense, and that the Government has to prove them beyond a reasonable doubt.

Of course, that case will go to the Supreme Court, and then it will be settled there. I would wonder whether there is enough to be

gained by it. I would wonder, and in my experience juries are very, very reluctant to turn their independence loose because of such a defense as insanity, or entrapment. I do not believe it happens very often. I am just saying there is a risk, and there is a problem, and I just wonder whether it is worth it. I just submit that to you. I do not believe it is necessarily underisable to say if one who claims entrapment must prove it by a preponderance of the evidence, but I just raise the question.

Most of the affirmative defenses do not occur very often. This entrapment claim is very, very often made particularly in narcotics cases, or in cases of that kind. There has been a lot of trouble, and there have been a lot of reversals of convictions because of errors in the entrapment instructions, and for some reason that is sensitive, and it seems to be hard for judges to phrase.

I doubt if there are very many acquittals because the jury convinced of an entrapment defense. I doubt that acquittals on that ground are a substantial danger.

So, that is just one thing. If the code is enacted in the present form, I think there is a risk, and I would suggest the committee weigh that because I do not believe by eliminating the affirmative defense concept you would lose many meritorious convictions, and I just wonder whether it is worth the risk.

I am particularly concerned with the provision in section 1034(b) in which it might be proper to tell a jury that the law regards the facts giving rise to the presumption as strong evidence of the facts presumed.

Now, there have been many reversals for language like that. Of course, not in situations expressly sanctioned by statute. If I were a judge, unless the statute simply commanded me, I have a feeling that I would not tell the jury anything like that—that the law regards certain things as strong evidence of certain facts, because I would tell them that it is up to you to determine the facts.

Mr. Blakey. Professor Blackmar, this is a difficult problem in a trial of cases, and I wondered if you would comment on it as raised in these terms: How do you bring to a nonspecialized jury, how do you bring to their attention what the law or the legal experience has been with certain kinds of fact, except by instructing them that these kinds of facts normally have these kinds of inferences?

Mr. Blackmar. I think that is all very, very practical in cases in the Federal courts where the judge has a very broad discretion to comment on the evidence, and his action in doing that will normally be sustained, unless his comments are too prejudicial, and so long as he tells the jury that this is my opinion, and it is not binding on you, and it is up to you to find the facts.

I do not believe there is very much problem about that.

Mr. Blakey. Isn't that the functional equivalent of the Congress having, after legislative hearings, determine that there is a rational relationship between certain fact patterns and other ultimate conclusions, and then passing a law to that effect, and thus permitting the prosecutors to argue to jurors in these terms, and it serves as a predicate for a prosecutor asking for an instruction to that effect?

Mr. BLACKMAR. Congress has quite often, as you point out, established certain so-called statutory presumptions, but you had better not call it that when you are talking to a jury. It says that certain facts support an inference of the existence of other facts.

Now, occasionally congress has been slapped down on that. Some years ago, as I recall it, the Federal estate tax law had a provision that a gift within 2 years of death, was conclusively presumed to have been made in contemplation of death, and that was invalidated.

And another one a few years ago, well, we have had the ones about possession of cocaine and marijuana as supporting the inference that the substance was unlawfully imported, and those so-called presumptions were struck down.

And then there was one that an individual in the vicinity of a still was assumed to be engaged in the business of the still. So, when Congress has done that, the courts say that there has to be a rational connection between the facts that Congress sets out and the facts, and the inference that can be drawn, and many of them have been the subject of some litigation.

And once again I think this, Mr. Blakey, is a question of risk. It is a question, I would think, that it would be desirable when you come forward with a thorough revision of the criminal code, to have as few points requiring excessive appellate litigation as possible, so I am suggesting to the committee the desirability of being conservative with regard to things like that.

I question also, I think, in general, the approach of the degrees of culpability when you define intentionally, knowingly, recklessly, and willfully. These are not definitions that can be read to a jury. I would like to have definitions in this that could be read to a jury, and you notice that I also raise the question about the basic test in an offense for which nothing else is specified; that is, willful, and even willfully is applied only in terms of being either intentionally, knowingly or recklessly, and I wonder if there is not an extra step in there that might operate to confuse juries.

I have a few minor comments in my statement, things that did not seem clear to me. They are not fundamental. I hope that my comments might be of assistance to people who are studying this, and unless there are any questions, this completes my presentation.

Mr. BLAKEY. Professor, there is the last suggestion that you make in your statement dealing with the patterned instructions. I wondered if you would comment on this suggestion that has been made in the hearings:

The suggestion has been made that the committee ought to consider the possibility of creating a law reform commission that would have as its duty the careful supervision of performance of the code, and the ability to recommend to the Supreme Court, or to the Congress either specific statutory provisions, or say, rules of evidence, or rules of procedure to the Supreme Court for its adoption and promulgation.

I wonder if the committee were to consider establishing that kind of commission, might it not be proper to entrust it with the duty of preparing uniform, patterned jury instructions that could be used

by Federal courts throughout the Nation in the basic situations that they see each day in the trial of cases?

Mr. BLACKMAR. If this code is adopted, or I would say when it is adopted, there is going to be a tremendous job for Federal judges in preparing instructions to fit these new situations, and only good could come out of an attempt to provide them with forms that they could use. I would wonder, myself, whether at the beginning there should be an adoption—I would certainly question having patterned instructions in the statute.

I do not know how many times the legislature is going to have to say what it means. I would suggest that it would be desirable to have a committee to work on preliminary drafts of instructions.

Well, of course, you do not know the details until you see what the statute is going to say finally, but well, say, have a committee that would prepare drafts, and circulate them to the judges.

You have a year's leadtime which should give them the time to do a good job, and circulate them to the judges, perhaps as not being officially adopted, but as being suggested for the judges' use and, of course, subject to the right of counsel to contend that the patterned instructions do not directly reflect the law that the legislature has passed. I would think that would be desirable.

Mr. BLAKEY. If they were officially adopted, might not that tend to limit the litigation that would naturally occur over the introduction of new instructions?

Mr. BLACKMAR. I have a hard time if I am defending a client with the idea that I am to be foreclosed, not by something that Congress has passed, but by something that a committee, without my client being represented before it, has suggested. I think that the thought and the effort might prevent a number of challenges, and I would certainly hope that it would not be intimated that the court has already approved these and, therefore, counsel will not be heard in an actual litigated case on a claim that the instructions still do not directly reflect the statute.

Mr. BLAKEY. I suppose it would be necessary to make them flexible, and optional, but if you were going to have a committee to do it, it would seem to me that the basic work of them would be the fact that they were promulgated by the Supreme Court, and presumed to be correct, and most judges in most situations could rely on them.

But, I suppose you would also have to have flexibility for multiplicities of fact situations that would actually appear to tailor them under the circumstances.

Mr. BLACKMAR. Well, a great many States have experimented with patterned instructions. In some States, in my own State of Missouri, the Supreme Court has actually promulgated forms of instructions for civil cases, not for criminal cases, and these are the approved forms for the cases they cover, and they must be used.

Mr. BLAKEY. Have they worked well?

Mr. BLACKMAR. I think they have worked well, especially in view of the chaotic situation, and I think most lawyers are satisfied with them.

Other States have promulgated suggested forms of instructions, not mandatory and not officially adopted, but nevertheless available

as suggestions to lawyers and judges. I do think that you would have to take the courts and the people who practice criminal law in the Federal courts, I would think, and get their opinions on the idea of promulgated instructions and that would be most valuable.

Mr. HAWK. Your Missouri suggested instructions are mandatory but they do not cover every possible situation?

Mr. BLACKMAR. No, and that is a good point, sir; that in general they are confined to cases that are heard frequently enough so that there is source material.

And I have found in the work of preparing this book of instructions that it is very hard to compose an instruction from scratch in a hypothetical case. We try to work, whenever possible, with instructions that have been given in actual cases, and in which the cases have been affirmed by appellate courts.

We have, whenever possible, tried to work from the forms, and we have a few that are not, but that really is quite a job, and I do not believe most states have even tried that.

Mr. BLAKEY. If there were officially promulgated instructions, do you think this would facilitate the trial of indigent cases, or counsel coming in on a relatively fresh basis to the Federal court system?

Mr. BLACKMAR. Oh, yes, especially if a particular court is in the habit of appointing lawyers with relatively little experience in handling these cases, which happens in some places. I think either in legislation, in court rules like some customary instructions, the so-called Allen charge, the Hammer charge, and something like that, might be set out officially.

Mr. BLAKEY. Thank you, Professor.

Senator HRUSKA. There are many instances and many situations where formal instructions can be pretty much beyond any need for flexibility, are there not?

Mr. Blackmar. I believe that is true.

Senator HRUSKA. I would think, for example, in automobile negligence cases, the last clear chance rule, the assured clear distance ahead, the contributory negligence rule in those States where that applies, and proximate cause.

Now, those are just some examples.

Mr. BLACKMAR. Those are right.

Senator HRUSKA. And it is a happy circumstance when we can reduce that to sufficient certainty which will prevent by some inadvertence or maybe a laxness in dictating a resersable error from occurring. Are there not stock situations where that could be done?

Mr. BLACKMAR. There are. There are, Senator, an increasing number of Federal appellate cases where a particular court of appeals will say this instruction on identification of the defendant will be given in all future cases in this circuit. And I think that there are a good many situations like that.

Senator HRUSKA. Well, it would remove some of the indefiniteness and uncertainty.

Mr. BLACKMAR. It would.

Senator HRUSKA. Well, thank you very much.

Mr. BLACKMAR. Thank you, gentlemen.

Senator HRUSKA. And when you return to St. Louis University, give my special, personal greetings to Father Paul Reinert.

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Mr. BLACKMAR. You know, Father Reinert went skiing for the first time at the age of 60 and acquired a fractured ankle.

Senator HRUSKA. Tell him we are looking after Father Carl Reinert, his brother, in Omaha, very, very well.

The committee will stand in adjournment until 10 o'clock in the morning in this same room.

(Thereupon, at 12:30 p. m. the hearing was recessed, to reconvene tomorrow, Thursday, March 23, 1972, at 10 a. m.)

REFORM OF FEDERAL CRIMINAL LAWS

THURSDAY, MARCH 23, 1972

U.S. SENATE
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2228, New Senate Office Building, Senator Roman L. Hruska presiding.

Present: Senator Hruska (presiding).

Also present: G. Robert Blakey, chief counsel; Malcolm D. Hawk, minority counsel; Robert H. Joost, and Kenneth A. Lazarus, assistant counsels, and Mabel A. Downey, clerk.

Senator HRUSKA. The subcommittee will come to order.

This morning we will continue with the sixth day of hearings into policy questions presented by the proposed Federal criminal code drafted by the National Commission on Reform of Federal Criminal Laws.

Speaking for myself, I should like to comment that these hearings into the policy choices offered for the proposed code have been very valuable. Along with the distinguished chairman of the subcommittee, who is not able to be here this morning because of the press of official business, I was also a member of the National Commission which produced the draft that is being considered here. Our fine colleague, Senator Ervin of North Carolina, was the third Senate member.

But the testimony before this subcommittee has already indicated the work of the Commission, monumental as it was, did not fully expose or grapple with many of the important problems it embraces.

I should also like to record at this point the statement, as acting chairman, of my gratitude to all of the witnesses at these policy hearings and to all who have submitted written statements, for the time and the patience and the expertise that they have so generously and capably contributed towards the making of a Federal criminal code.

The Senate is in session. It started at 9:30. Later in the day we will have a series of rollcall votes. Should that occur during these sessions, it will be necessary to recess briefly to allow this Senator to record his vote on any of the issues arising. For this reason, it will be necessary to continue the practice of limiting the time of any witness to 30 minutes, with a 5-minute warning given him, as is done in professional football on TV, and in that way he can summarize and get his statement finished in better shape.

In each instance where written statements have been submitted, the statement will be included in the record in its entirety so that

each witness may proceed to testify in his own fashion, either by highlighting the statement or by such other remarks on the subject as he may wish to make.

The first witness this morning is Mr. Charles S. Maddock, representing the section on corporation, banking and business law of the American Bar Association.

We welcome you, Mr. Maddock.

STATEMENT OF CHARLES S. MADDOCK, SECTION ON CORPORATION, BANKING AND BUSINESS LAW, AMERICAN BAR ASSOCIATION

Mr. Maddock. Thank you, Mr. Chairman.

(The prepared statement submitted by Mr. Maddock reads in full as follows:)

Statement of Charles S. Maddock, Section of Corporation, Banking and Business Law of the American Bar Association

I am very pleased to have this opportunity to appear here today and testify on behalf of the Section of Corporation, Banking and Business Law of the American Bar Association with respect to the Final Report of the National Commission on Reform of Federal Criminal Laws.

The Report is the product of a great deal of effort by many individuals working in the public interest. As members of the professional bar of the United States, we feel a special debt of gratitude for the work that has been done, particularly in the traditional areas of criminal law. Far and away the largest part of the Report deals with matters that are beyond our field of expertise and we, therefore, leave these areas for comment by others who are more qualified than we.

Our concern is solely with those sections of the Report which relate to new criminal restraints which are placed on business and upon men and women in their economic activity.

These are the Sections of the Report which relate to matters that are of direct and continuing concern to us as lawyers advising business. We recognize that business and businessmen have no special claim to privilege under either the civil or the criminal law. They are, however, entitled to the same consideration and even-handed treatment available under our system of law to all segments and individuals in our society.

We approach our consideration of the Report with the conviction that in the United States our criminal laws are intended to prevent anti-social behavior—they are not and should not be strictly punitive measures. We believe also that the criminal law as a preventive device should be employed only in those areas and situations where there is a clear showing of real and serious danger to the public and where measures other than the criminal law are clearly inadequate to prevent the objectionable conduct. In short, that resort to the criminal law as a device for protecting the public should be employed with caution and only in those situations where other measures of social control are not effective.

In those Sections of the Report with which we are concerned, particularly where new restraints are proposed, we question seriously whether this criteria has been satisfied.

Professor Sanford Kadish of the University of Michigan Law School in an article "Some Observations on the use of Criminal Sanctions in Enforcing Economic Regulations" published in the University of Chicago Law Review in the spring of 1963 considers with care the problems associated with the use of the criminal law to enforce economic regulation. One quote from this article is particularly relevant in considering the proposed enlargement of criminal responsibility in the economic area:

". . . there is an important difference between the traditional and expanded property offenses and the newer economic regulatory offenses—a difference reflecting the shift from an economic order that rested on maximum freedom for the private entrepreneur to one committed to restraints upon that freedom. The traditional property offenses protect private property interests against the acquisitive behavior of others in free private decision. The newer offenses on

the other hand, seek to protect the economic order of the community against harmful use by the individual of his property interest. The central purpose, therefore, is to control private choice, rather than to free it . . . Private economic self-determination has not been abandoned in favor of a wholly state regulated economy. Indeed, the ideal of free enterprise is maintained, the imposed regulations being regarded as necessary to prevent that ideal from consuming itself. Whether the criminal sanction may safely and effectively be used in the service of implementing the large scale economic policies underlying regulatory legislation of this kind raises fundamental questions."

* * * * * * *

". . . implicit in the legislative scheme is the conception of the criminal sanction as a last resort to be used selectively and discriminatingly when other sanctions fail."

The normal procedure in enacting new criminal legislation would be for the Congress to hold hearings in order to determine on the basis of factual presentations whether or not there were dangers to society because of carefully particularized business activity and whether or not these dangers could be avoided only by the adoption of laws that clearly defined the specified activities as crimes. This is not what has been done in the preparation of the Report. In creating new principles of criminal liability in the economic area, the Report contains no demonstration of that degree of danger to the public which requires the imposition of the severe sanctions of the criminal law in connection with any of the suggested changes with which we are concerned. This, we believe, is a fundamental fault in the Report insofar as it recommends new or modified restraints in the area of business or economic activity. In fairness, it should be noted that the Commission concerned with this Study was not in a position to make the detailed and studied investigation normally utilized by the Congress in a consideration of whether or not new criminal law should be adopted.

A second difficulty in several of the sections with which we are concerned results from the generality of the language chosen to describe the activity which is now to become criminal. Criminal laws under our system are intended to *prevent* conduct deemed to be antisocial. They are not intended as a trap for the unwary or as devices that can be used by government in power as a tool for controlling dissident groups or individuals. In drafting criminal legislation, therefore, it is essential that the rules be completely clear and specific. The Report in several of the Sections relating to economic activity does not do this.

Finally, we question the propriety of the device utilized in some Sections of the Report of incorporating other statutes by reference rather than spelling out in the Section itself the conduct that is made criminal.

The specific Sections with which we are concerned are:

1. § 402—Corporate Criminal Liability.
2. § 403—Individual Accountability for Conduct on Behalf of Organizations.
3. § 409—General Provisions for Chapter 4.
4. § 1006—Regulatory Offenses.
5. § 1551—Strikebreaking.
6. § 3007—Special Sanction for Organizations.
7. § 3502—Disqualification from Exercising Organization Functions.

SECTION 402 CORPORATE CRIMINAL LIABILITY

Subsections 402(1)(a), (b), and (c) as proposed by a majority of the Commission are not unreasonable and follow traditional guidelines, although the probably inadvertent provision in 402(1)(a)(iii) basing corporate liability on the activity of "any person, whether or not an officer of the corporation, who controls the corporation or is responsibly involved in forming its policy" raises some serious questions. What is meant by control? Is it legal control of a majority of the stock or is it control of some smaller or larger percentage. "Control," it may be pointed out, is a concept with which the Securities and Exchange Commission has been dealing for years with as yet no clear cut definition. We believe it would be unwise to subject a person to criminal liability under a Criminal Code that failed to define "control." This point should be clarified if the concept is adopted.

The alternative suggestion by some members of the Commission to subsection 402(1)(a) which appears in brackets should be rejected—as it was when the Report was finalized. This subsection lists certain categories of people in (i), (ii), (iii) and (iv) for whose offenses the corporation will be criminally

responsible. By eliminating the necessity for the conduct of (i-iv) persons to be within the scope of their authority to act, the proposal substantially broadens present concepts of criminal liability.

Liability attaches under the subsection when the offense is sanctioned by a (i-iv) person in any of the following ways: (a) authorized; (b) requested; (c) commanded; (d) ratified; or (e) recklessly tolerated in violation of a duty to maintain effective supervision of corporate affairs. Authorized, requested, commanded, and ratified are not troublesome concepts and may be a proper basis for corporate criminal liability *if* the (i-iv) person had the authority to give the sanction. The troublesome concept is "reckless toleration." This would make the corporation liable for an offense committed outside the scope of the agent's authority which might have been stopped by a (i-iv) person had he known about it. This goes too far. This is particularly true when the duty which has been breached is a duty of "effective supervision." Can supervision ever be "effective" if the subordinate acts improperly? The combination of "reckless toleration" and "effective supervision" imposes an impossible burden on the conscientious supervisor.

Section 402(1)(d) provides that

"A corporation may be convicted of:

(d) any offense for which an individual may be convicted without proof of culpability, committed by an agent of the corporation within the scope of his employment."

The concept above is not novel. *Fletcher* states,

"Congress may, in certain areas, in the so-called public welfare crimes as drugs and narcotics, impose criminal liability on a corporation for the mere doing of the proscribed act wholly unrelated to knowledge, actual or constructive." [1]

In view of the limitations described by Fletcher, and the fact that proof of culpability is not required, it would seem that this type of criminal activity should be carefully circumscribed by reference to particular conduct in a specific statute rather than left to a generalized charge in a general "codification." Accordingly, if subparagraph (d) remains, we suggest that the generalized language presently appearing be replaced by language that carefully describes those kinds of activity which the Congress believes are of such serious import as to not require a finding of culpability.

In precluding a defense for the corporation, Section 402(2) provides that:

"It is no defense that an individual upon whose conduct liability of the corporation for an offense is based has been acquitted, has not been prosecuted or convicted or has been convicted of a different offense, or is immune from prosecution, or is otherwise not subject to justice."

This subsection does not change the law except perhaps where the sole agent through whom the corporation acted was acquitted. *Fletcher* states,

"It is immaterial that the corporate officers and agents are themselves severally liable to indictment for the crime with which the corporation is charged. And the corporation may be found guilty notwithstanding the innocence of its agents, although the contrary has been held where the sole agent through whom the corporation acted was acquitted." [2]

Fletcher supports his position in part by citation to federal cases. We believe that the "sole agent" concept described by Fletcher should be included as an exception to the provisions of 402(2).

Even in this relatively clear area, however, we suggest that perhaps the best way to obtain compliance with law is to insist on strict observance by those *individuals* with whom the law is concerned. Corporations act only by individuals with and if strict attention is paid to them and responsibility is carefully enforced on them, the corporation will take care of itself. By "burying" the crime in some fictitious creature of the law we can easily lose sight of or avoid the prosecution of the real criminal—the individual.

In summary: we find no objection to 402(1)(a)(b) and (c) as proposed by the majority of the Commission. We would limit 402(1)(d) to those activities where the danger of public harm is sufficiently great to justify the lack of culpability. We suggest the elimination of 402(2) or, if it is included, an amendment to except corporate liability if the sole agent through whom the corporation acted was acquitted.

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[1] 10 Fletcher Cyc Corp Section 4944 (Perm ed 1970).
[2] *Id.* at Section 4942.

SECTION 403 INDIVIDUAL ACCOUNTABILITY FOR CONDUCT ON BEHALF OF ORGANIZATIONS

Although we take no exception to the provisions of 403(1) and (3), we suggest that 403(2) and (4) are unreasonable and should be discarded.

Section 403(2) dealing with individual responsibility in the field of business activity contains a far reaching and we believe unwarranted extension of the criminal law. This Section provides that whenever a duty to act is imposed upon an organization by a statute or regulation, any agent of the organization having primary responsibility for the subject matter of the duty is legally accountable for an omission to perform the required act to the same extent as if the duty were imposed directly upon himself.

By failing to define "primary responsibility" or give any guidelines as to the application of the words in practical operation this Section places an impossible burden on the whole concept of delegated authority and responsibility. Is primary responsibility shared by all in the line of authority, or if not where does it rest—with the line supervisor, with the Board of Directors,—or at what point in between?

"Primary responsibility" appears to be reasonably straight-forward when viewed in the abstract. However, when viewed against the reality of the administration of a business or other organization, the problem of interpretation is very serious.

The Board of Directors of a corporation is "primarily responsible" for the operation of the Company. Some part of this authority is delegated to officers, who, in turn, delegate to the division or department managers, who, in turn, delegate to other managers and supervisors on down through the whole structure of the organization. Delegation is meaningless unless authority and responsibility go hand in hand and one of the outstanding features of American economic activity is the freedom to act implicit in our system of delegation. The system permits the greatest possible use of individual talent throughout the whole structure of the organization by leaving intelligent men and women free to make their own decisions and take the responsibility for them within sometimes clear but often very hazy limits. In the course of this delegation, some may think that primary responsibility remains with the Board—others may believe it rests at a different level—the Report gives us no help in answering the question. But assume it rests at the top, what then? If the Board of Directors, the President or others at the top of the pyramid are criminally liable for the acts of subordinates because they are "primarily responsible" the whole system is in jeopardy for who will make an effective delegation if he is responsible criminally for conduct taken pursuant to that delegation. Those preparing the Report probably did not intend this result, but where does "primary responsibility" lie in view of the language chosen? The answer may be easy in a particular stated fact situation, but in the great majority of cases the line will be extremely hazy. And this will be especially true when planning action rather than in an after the fact evaluation of conduct. Businessmen have troubles enough today with the simple problems of economic responsibility in their posture with the Company. The addition of criminal liability would produce a very serious limitation on the incentive to delegate and thus do grave damage to the opportunity for maximum use of individual talent.

Even if the aforementioned objections did not exist, adoption of this subsection would subject the federal criminal law to a problem analogous to the one created by Article 92 of the Uniform Code of Military Justice. Article 92 imposes criminal liability upon a soldier who "violates or fails to obey any lawful general order or regulation." For this military offense, knowledge of the regulation is not required. The serious problem involved the authority to promulgate a "general order or regulation." The *Manual for Courts Martial* solves the problem and protects the soldier from criminal liability for violation of regulations of which he has no knowledge promulgated by persons far down the chain of command by limiting the authority to promulgate general regulations to the President, Secretaries of Defense and Transportation or of a military department, or regulations issued by an officer having general court martial jurisdiction. Subsection 403(2) misses this problem and makes an individual corporate agent having "primary responsibility" liable for violation of *any* federal regulation. Who promulgates the regulations referred to in the subsection? The President? The Secretary of Health, Education and Welfare? The Director of OEO? An OEO staff attorney? A GS-3 clerk? The Report is silent on this point.

Section 403(4) is a further example of the unreasonableness of the Report provisions relating to individual responsibility. This subsection provides:

A person responsible for supervising relevant activities of an organization is guilty of an offense if he manifests his assent to the commission of an offense for which the organization may be convicted by his willful default in supervision within the range of that responsibility which contributes to the occurrence of that offense.

The mischief in this subsection derives from the fact that "willful" does not mean simply willful but includes "recklessly," a particularly difficult concept when combined with reference to a failure of supervision in the undefined "range of responsibility" that covers all levels of supervision and finally the fact that liability can attach merely to an omission "which contributes to the occurrence of the offense."

The apparently merciful attitude of the subsection in reducing the penalty from a felony to a Class A misdemeanor under certain circumstances should be examined more closely. Sections 3201 and 3301 show that a person convicted of a Class A misdemeanor could be imprisoned for one year and fined $1,000. Pursuant to Section 3003 a persistent misdemeanant who has been convicted of three Class A misdemeanors within the past five years can be sentenced as a Class C felon. The maximum sentence here is seven years imprisonment and a fine of $5,000. (Sections 3201 and 3301)

We oppose the very broad expansion of the scope of individual criminal liability represented in Sections 403(2) and 403(4), particularly when the concept is to be applied to a broad limitless range of undefined economic or industrial activities.

The basic concept may be proper in a specific defined area because of demonstrated problems that can be solved only in this way. As a general concept applying in all cases, however, it runs completely contrary to our established concepts of basic fairness.

Sections 403(2) and (4) could very easily make criminals of a broad segment of executives and administrators throughout the United States simply because they delegate authority; and this result could follow even though the executives and administrators had no intention of violating the law, no criminal purpose and, in fact, no knowledge of the facts giving rise to their liability as criminals. And all of this without even the suggestion of any facts to support the need for this drastic result.

Although it may be relatively easy to second guess the meaning of words in the context of occurrences that have already taken place, how can lawyers properly advise their business clients in advance of those occurrences as to what may or may not be negligent supervision? Realistically, if a wrongful act is committed by a subordinate, it will be almost impossible after the fact to prove competent supervision: this means in practical effect that it would be impossible for a lawyer to give his business client any meaningful advice regarding a safe course of conduct.

Any advantage that might accrue to the enforcement of economic policy by the inclusion of this concept in our criminal law would be more than offset by the damage that would be done to the efficiency in handling our economic activities and to the opportunities for accomplishment presently enjoyed by those working in our business organizations.

If there are specific areas of business activity where the public interest requires the absolute theory of criminal liability implicit in this Section, those areas should be defined explicitly for all to see clearly: then individuals can determine for themselves with a full appreciation of the consequences whether or not they wish to assume the criminal liability risk involved in delegation in those areas. Where, however, delegation in and of itself and without regard to specific fields of responsibility makes men criminals, we have, I submit, gone much farther than any concept of public interest requires—in fact, we have done a grave disservice to public interest.

SECTION 409 GENERAL PROVISIONS FOR CHAPTER 4

Section 409(1)(a) defines organizations that are subject to the provisions of Chapter 4 and embodies an interesting philosophical concept that we believe should be rejected.

This subsection, by excluding Government from the definition of organizations covered by the new and expanded concepts relating to criminal activity by organizations, is particularly unfair and discriminatory. As a matter of basic

morality, a government official who fails to properly carry forward his responsibilities or to properly supervise his subordinates should be just as culpable as a corporate official who fails to supervise his subordinates. Because of the nature of the public trust involved, it would seem that there is greater reason for including public officials than for covering those who are involved in basically private activities.

The comment to the subsection contains the implicit suggestion that only the federal government can be relied upon to properly run our society. The following is a portion of the comment and it requires no amplification.

Governments are excluded from the definition of "organization" and hence from liability for offenses under this Chapter. Even if states are exempted, there are considerations which may call for changing the definition, in the opinion of some Commissioners, to make municipalities and state administrative agencies amenable to federal prosecution, particularly in areas such as environmental pollution and civil rights.

SECTION 1006 REGULATORY OFFENSES

Although the concept of equating regulated activity with criminal activity runs generally through the Sections of the Report dealing with business or economic activity, the mischief of this concept is most clearly demonstrated in Section 1006.

This Section makes the violation of a "penal regulation" a criminal offense. Penal regulation is defined as "any requirement of a statute, regulation, rule or order" which carries a civil or criminal penalty. There is *no* limitation in the quoted language. When one considers the tens of thousands of Federal *regulations* alone and the very broad areas of business and economic activity covered by them, the mischief in this concept is apparent—but Federal regulations are only one part of what is involved in "penal regulation" and a small part—we are also concerned with "rules" and "orders"; and violation of a penal regulation is punishable by fine and imprisonment.

We reject the concept that any activity that is or may be regulated by government is of such serious import to the public interest that a failure to abide by any regulation, rule or order issued by anyone in authority in any of these areas should be punished as a crime.

If, however, serious consideration is given to equating regulation with criminal punishment, then action implementing this concept should be taken deliberately by the Congress after hearings directed to the specific question and with full knowledge of all of the implications of such action. It should not be done by a Commission as part of a general codification of the criminal law or on the basis of a standardization of penalties.

In those cases where no new criminal law is intended, the existing statutes standing as they do on their own feet and being complete within themselves, point clearly to the proscribed conduct. Confusion rather than clarity is introduced by the effort in Section 1006 to draw an assortment of completely unrelated and undefined activity into a common basket even when this is done ostensibly for the purpose of standardizing punishment. If such standardization is desirable then those who propose it should codify by listing the specific statutes, regulations, rules and orders that are in effect in the Code of Federal Regulations or elsewhere that are to be combined together. In this way, it would be possible to see exactly what conduct is to now be labeled criminal and give the Congress an opportunity to evaluate the need for a criminal penalty in each case and also determine on a proper basis the nature of the penalty best fitted to assure compliance in those cases where a criminal penalty should apply. This is a burdn that should not be left to the ordinary citizen nor for that matter to the individual members of the Congress.

As indicated earlier, the mischief in Section 1006 lies in equating regulation with criminal law. There are certain economic activities that are regulated where violations are sufficiently serious that they should be punished as crimes; but this is certainly not true of all economic activity. The line between the two areas should be drawn by the Congress *deliberately* and where particular activity is to be considered criminal the penalty should be carefully tailored to meet the need of assuring compliance. We defeat the fundamental purpose of our criminal law if we legislate in this area on any basis other than with great care for not only the specific conduct that is to be proscribed but also with respect to the penalties to be imposed. In addition, ordinary considerations of fairness require that a person who may be charged as a criminal have not only

full and exact knowledge of the activity that is proscribed but also of the penalty that will be imposed if he engages in that activity.

If the following language at the beginning of Section 1006:

"This Section shall govern the use of sanctions to enforce a penal regulation whenever and to the extent that another statute so provides"

is intended to limit the application of the Section to only the "statute, regulation, rule or order" which specifically incorporates the provisions of the section, the intent is not made clear by the language chosen. The full implementation of this section as written probably would require no more than the passage of a single omnibus statute incorporating Section 1006 into all outstanding and to be issued statutes, regulations, rules and orders.

Although this problem could be corrected by changing the language to read:

"This Section shall govern the use of sanctions to enforce a penal regulation only when and to the extent that the specific statute, regulation, rule or order specifically incorporates this Section 1006 by reference."

the basic question still remains—why legislate in the criminal area in this way? Why shouldn't penalties be considered at the same time specific criminal activity is defined so that the penalty carefully fits the crime? And why should all regulatory offenses be criminal? It is of greatest importance in the criminal area where the stigma of conviction carries (or should carry) such serious consequences that we legislate with care and not on a "catch all" basis.

The same problems created by the "broad brush" definition of crimes in this section are also carried over into its subsections dealing with punishment.

In Section 1006(2)(a) a wholly inadvertent, unintentional even unknowing violation of one of the tens of thousands of regulations, rules or orders which are lumped together in the basket of "penal regulations" can carry a fine of $500 and probation for a period of one year (Sections 3301 and 3102). The proposal would not only make criminals of truly innocent actors but subject them to substantial penalties far in excess of what is involved in "overtime parking" violations in other areas of the criminal law.

We are here involved with making criminals of hourly paid workers, foremen and supervisors, not just top management employees—for the rules, regulations and orders presently in effect cover the broadest conceivable aspects of industrial activity.

Where is the need for this action—what are the problems that give rise to the desirability of such harsh punishment for unnamed offenses? The Report gives no clue to help us.

When we move from unknowing violations to "intentional" violations the problems of the Report become more serious.

A willful violation of a penal regulation is punishable as a Class B misdemeanor and carries a possible penalty of a fine of five hundred dollars, imprisonment for thirty days, and probation for two years. But note that the Report in Section 302(1)(e) provides that "willful" means much more than one would normally suppose—and this definition applies throughout the Report not just to the area of economic or business offenses. Under this Section a person engages in conduct "intentionally, knowingly *or* recklessly . . ."

Here again, when one considers the broad sweep of even the existing "regulations, rules and orders" it is readily apparent that a large net has been set for a large number of innocent people who after the fact appear to have acted "recklessly." Here again note that "penal regulation" is drawn so as to cover thousands of unnamed, unidentified, regulations.

The Report removed most of the inequity that appeared in the Study Draft in Section 1006. However, we believe that the evil was not so much in the language as in the philosophical concept embodied in this Section. There may be areas of activity where government regulation is considered desirable but we reject out of hand the idea that *all* regulation must be supported by the force of the criminal law. The result of Section 1006 as we see it was probably not intended by those who framed this Section and may come simply by the effort to abbreviate, to standardize or to codify. But the result does follow, intended or not.

We suggest further that in this area of regulation of business or other economic activity, no useful purpose is served by the attempt to standardize penalties and the added new concepts of criminal law found in Section 1006. We believe that it is far better to follow the pattern that is traditional in the

United States: If the regulation or suppression of a particular type of activity is desirable let the Congress make the determination at the time the need for regulation or suppression of the particular activity is considered and in the course of hearings on the question and at that same time tailor the remedy to fit the evil sought to be avoided. In some cases this may suggest the need for a criminal penalty but this will certainly not be true in all situations.

In this way, the need for using the vehicle of the criminal law as well as the extent to which it should be used will be based upon hard facts related to a specific problem with all persons afforded an opportunity to be heard upon all the details of the proposal. The relationship of proposed penalties to the penalties imposed in other situations could also be considered at that same time. This is a far better approach than that followed in the Report where literally thousands of regulations, rules and orders—all unnamed—are lumped together under a broad meaningless designation of penal regulation— and where there is no opportunity whatsoever in the Congressional hearings to even identify the particular areas of regulation let alone consider or evaluate the specific conduct that is to be made criminal. The effort in the "implementing" language of subsection (1) of this Section to accomplish what we suggest would, as a practical matter, be wholly inadequate protection for the reasons suggested earlier. In addition, this method of legislating runs completely contrary to fundamental principles relating to both the legislative process and more important the protection of individual rights.

We urge the elimination of Section 1006 from consideration in any final legislation.

SECTION 1551 STRIKEBREAKING

This Section although unobjectionable as far as it goes, covers only one side of the labor problem. The Section provides:

"A person is guilty of a Class A misdemeanor if he intentionally, by force or threat of force, obstructs or interferes with:

(a) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor; or

(b) the exercise by employees of any of the rights of self-organization or collective bargaining."

The sanctions in this Section apply in the area of labor relations only to acts of employers or their agents. If the federal government is to punish employers or their agents who interfere with legitimate labor activities the same power should exist to punish employees or their agents who interfere with legitimate management activities. We suggest that if this proposal is to be considered, the title "Strikebreaking" be changed to "Protection of Legitimate Labor and Management Activities;" and that the following be inserted as a part of Section 1551(1):

"(c) the exercise of any employer's right to maintain free and open access to his plant or other business establishment."

The last paragraph of the comment to this Section appears to invite the change we suggest.

SECTION 3007 SPECIAL SANCTIONS FOR ORGANIZATIONS

SECTION 3502 DISQUALIFICATION FROM EXERCISING ORGANIZATION FUNCTIONS

These Sections introduce new and retrogressive concepts into our system of penalties.

The Special Sanctions provided by Section 3007—either alternative—appear to be wholly unnecessary, unduly punitive, and suggest a tendency toward derogation of organizations and their officials by the option of publicity as part of the sentence when an organization has been convicted of an offense. In this enlightened age, this sanction seems out of step. The stocks and whipping post in the public square are relics of an earlier age. Even if it were a good idea, it is unnecssary. The mass communications media's legitimate concern with ecology, pollution of the environment, prices, rights of consumers, and the general subject of public policy, insures unfavorable publicity for organizations which violate, or may be accused of violating, the laws. In fact, the media seem to be far more interested in the accusations than in final judgments. To add the notification or other publicity features to other punishment presently provided, without making provision for the assurance of publicity in the event of

a decision favorable to the organization seems to violate fundamental principles of fair play if not justice.

This same "singling out for special punishment" feature is also carried over into Section 3502.

No court should have the power to prohibit an offender who is on probation from seeking work with a corporation. The offender might have been convicted of murder, rape, arson, desertion from the armed forces, or other extremely serious crime. These offenders on probation can currently work in a managerial capacity in organizations provided that they can convince the organizations that they have been rehabilitated. To deny a person this same right because he has committed an economic offense would appear to be a distortion of social values.

To support the Report position, the comment to Section 3502 points out "There is precedent for this section in existing provisions disqualifying persons convicted of certain offenses from holding positions in banks insured by the F.D.I.C. (12 U.S.C. Section 1829)." The scope of 12 U.S.C. Section 1829 is limited to employees of the closely regulated F.D.I.C. insured banks. We could find no case wherein 12 U.S.C. 1829 has even been litigated. In any event, even if this special type of punishment should be available in special cases, those cases should be selected with care, and specifically provided for by statute with reference to the specific crime.

CONCLUSION

The purpose of our testimony has not been to suggest that business organizations and their employees should receive specially favorable treatment under the Federal criminal law. They should not. But they should receive "equal" treatment under the law. If there are special areas where new laws are required we should pinpoint those areas and legislate. But no one will benefit, least of all our national interest, by adding new criminal concepts in the field of economic crimes simply as part of a codification procedure when as noted by the Commission staff there already is a vast proliferation of minutely specified rules and regulations for the conduct of government, business, unions and indeed of private life.

To the extent that the Report simply codifies existing law, we find no fault, although we seriously question the procedure followed in some sections of adopting criminal law by incorporating other statutes by reference.

Where new criminal concepts are proposed, however, we suggest that they are drawn in language so imprecise as to make them completely unreasonable if not unconstitutional. An even more basic objection arises because of the complete absence in the Report of any showing of either the need or the desirability of extending the reach of the criminal law beyond presently existing limits in the economic area. The Report contains no factual or other support for the proposition that an expansion of the use of the restraints of the criminal law are necessary, relating to the enforcement of Federal economic policy—yet the assumption of the absolute truth of this proposition is implicit in those sections of the Report which broaden criminal liability in the economic area.

Professor Kadish in the article previously referred to lists the issues that should be considered in evaluating legislation in this area:

". . . There are many imponderables with respect to its effectiveness both as a preventive and as a means of reducing the costs of an indiscriminate use of the criminal sanction. On the side of preventive effectiveness, is the reprobative association of a genuine criminal conviction a needed weapon of enforcement? Would the semi-criminal category of offense convey enough of a sense of wrongness to perform its tasks? Can these laws be enforced efficiently enough without such associations? Is the loss of the power to imprison a substantial loss? Does what is left of the criminal process still provide efficiencies not available in the pure civil remedy? Will the regulatory offense prove politically acceptable to legislators and administrators as an alternative to outright criminalization? On the side of reducing costs, how much will it help that a new label has been created so long as the criminal process is used, or that imprisonment is not available as a sanction, when in fact it is rarely used anyway? And finally, is whatever is lost in effectiveness worth what is gained in other respects? One cannot be dogmatic in answering these questions. But one can, I think, insist that these are the kinds of questions which must be asked about this alternative as well as others if we are to escape the limited options inherited from different days in the use of the criminal sanction."

The questions raised by Professor Kadish are neither asked nor considered in the Report. In fairness, it should be noted that the Commission had neither the time nor the resources to consider them. Yet, the assumption is made that somehow in some way we will have more effective enforcement of Government regulations in the economic area simply by adding the criminal sanction to those other sanctions presently in force. We respectfully suggest that the Congress, before accepting this concept should give full attention to the concept itself rather than permitting that concept to be lost because it is so small a part of the very large, useful and constructive material that is represented by the Report.

What we are concerned with in the Sections we have discussed is not codification—nor is it merely the adoption of new criminal law. The breadth of the proposals in the economic area of the Report represent a major change in legislative and economic policy in the United States. Before making that change we suggest the need for a recognition that this is in fact what is proposed and an acceptance of the concept that such a change should not be made as part of a large-scale codification of Federal Criminal Law far and away the largest part of which has no bearing whatsoever on the economic area.

We respectfully suggest that the Report in the sections analyzed fills no demonstrated inadequacy in the regulation of economic activity, the administration of justice or in the coverage of the United States Criminal Law and if adopted could do serious damage to both the legal and economic systems of the United States.

The principal concerns that we have voiced in this statement are

1. The lack to date of a factual showing of any necessity for the implicit creation of new economic crimes as a result of Sections 402, 403 and 1006 of the proposed Code.

2. The imprecise language used in defining these new crimes and the serious dangers inherent in placing the threat of criminal penalty on the delegation of authority in Section 403(2).

3. The unusual and retrogressive sanctions contained in Sections 3007 and 3502.

4. The "broad brush" treatment of economic crimes in Section 1006 and the concept implicit in this Section that all regulation must be supported by the force of the criminal law.

For these reasons we urge the Congress to seriously consider the specific suggestions for changes in the Report that are contained in this testimony.

We are deeply appreciative of this opportunity to present our views. We hope sincerely that the thoughts expressed will be of help in your consideration of the Report and assure you of our desire to give the Congress all of the assistance within our competence in your consideration of this proposed legislation.

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BIOGRAPHICAL SKETCH OF CHARLES S. MADDOCK

Mr. Maddock is appearing as a witness for the American Bar Association Section on Corporation, Banking and Business Law.

Mr. Maddock was born in Utica, New York in 1911; educated in the public schools of Denver, Colorado; graduated with a BA degree from the University of Colorado in 1932 and from the Harvard Law School with an LL.B. degree in 1935.

From 1935 to 1943 he was associated in the practice of law in Boston, Massachusetts, with the firm of Gaston, Snow, Saltonstall & Hunt (now, Gaston, Snow, Motley & Holt). In 1943 Mr. Maddock became Assistant General Counsel of

Hercules Powder Company (now Hercules Incorporated) in Wilmington, Delaware, and since 1955 has been General Counsel of Hercules Incorporated.

Mr. Maddock is admitted to practice before the Supreme Court of the United States, in the Commonwealth of Massachusetts, and the State of Delaware.

Mr. MADDOCK. I am very pleased to have this opportunity to testify on behalf of the section of corporation, banking and business law of the American Bar Association with respect to the final report of the National Commission on Reform of the Federal Criminal Laws.

The report is the product of a great deal of effort by many individuals working in the public interest. As members of the professional bar of the United States, we feel a special debt of gratitude for the work that has been done, particularly in the traditional areas of criminal law. Far and away the largest part of the report deals with matters that are beyond our field of expertise and we, therefore, leave these areas for comment by others who are more qualified than we.

Our concern is solely with those sections of the report which relate to new criminal restraints which are placed on business and upon men and women in their economic activity.

These are the sections of the report which relate to matters that are of direct and continuing concern to us as lawyers advising business.

We approach our consideration of the report with the conviction that in the United States our criminal laws are intended to prevent antisocial behavior—they are not and should not be strictly punitive measures. We believe also that the criminal law as a preventive device should be employed only in those areas and situations where there is a clear showing of real and serious danger to the public and where measures other than the criminal law are clearly inadequate to prevent the objectionable conduct. In short, that resort to the criminal law as a device for protecting the public should be employed with caution and only in those situations where other measures of social control are not effective.

In those sections of the report with which we are concerned, particularly where new restraints are proposed, we question seriously whether this criteria has been satisfied.

The specific sections with which we are concerned are:

1. Section 402—Corporate Criminal Liability;
2. Section 403—Individual Accountability for Conduct on Behalf of Organizations;
3. Section 409—General Provisions for Chapter 4;
4. Section 1006—Regulatory Offenses;
5. Section 1551—Strikebreaking;
6. Section 3007—Special Sanction for Organizations, and
7. Section 3502—Disqualification from Exercising Organization Functions.

Section 402—Corporate Criminal Liability:

In Section 402 as proposed by a majority of the Commission we suggest changes in 402(1)(d) and 402(2) and clarification of the word "control" and the words "responsibly involved" in 402(1)(a)(iii).

Section 402(1)(d) provides that:

> A corporation may be convicted of:
> (d) Any offense for which an individual may be convicted without proof of culpability, committed by an agent of the corporation within the scope of his employment.

This concept is not novel.

Fletcher in his treatise on corporations states:

> Congress may, in certain areas, in the so-called public welfare crimes as drugs and narcotics, impose criminal liability on a corporation for the mere doing of the proscribed act wholly unrelated to knowledge, actual or constructive.

In view of the limitations as to public welfare crimes described by Fletcher, and the fact that the proof of culpability is not required, it would seem that this type of criminal activity should be carefully circumscribed by reference to particular conduct in a specific statute rather than left to a generalized charge in a general codification. Accordingly, if subparagraph (d) remains, we suggest that the generalized language presently appearing be replaced by language that carefully describes those kinds of activity which the Congress believes are of such serious import as to not require a finding of culpability.

Section 402(2) provides that:

> It is no defense that an individual upon whose conduct liability of the corporation for an offense is based has been acquitted, has not been prosecuted or convicted or has been convicted of a different offense, or is immune from prosecution, or is otherwise not subject to justice.

This subsection does not change the law except perhaps where the sole agent through whom the corporation acted was acquitted.

Fletcher states:

"It is immaterial that the corporate officers and agents are themselves severally liable to indictment for the crime with which the corporation is charged. And the corporation may be found guilty notwithstanding the innocence of its agents, although the contrary has been held where the sole agent through whom the corporation acted was acquitted." Fletcher supports his position in part by citation to Federal cases. We believe that the "sole agent" concept described by Fletcher should be included as an exception to the provisions of 402(2).

Section 402(1)(a) lists the persons for whose conduct a corporation may be held criminally responsible. Included in this list in subsection (iii) is "any person, whether or not an officer of the corporation, who controls the corporation or is responsibly involved in forming its policy."

Nowhere in the section is there a definition of "control," and we, therefore, have no guide as to whether it means ownership of a majority of the voting stock or some other concept. "Control" is a concept with which the Securities and Exchange Commission has been dealing for years with as yet no clear-cut definition. We believe this point should be clarified if the concept is adopted. These same comments, we believe are also applicable to the words "responsibly involved in forming organization policy."

When we move to the alternative suggestion by some members of the commission to subsection 402(1)(a) which appears in brackets,

we believe that this suggestion should be rejected—as it was when the report was finalized. This subsection lists certain categories of people in (i), (ii), (iii), and (iv) for whose offenses the corporation will be criminally responsible. By eliminating the necessity for the conduct of (i–iv) persons to be within the scope of their authority to act, the proposal substantially broadens present concepts of criminal liability.

Liability attaches under the alternate subsection (a) when the offense is sanctioned by a (i–iv) person in any of the following ways: (a) authorized; (b) requested; (c) commanded; (d) ratified; or (e) recklessly tolerated in violation of a duty to maintain effective supervision of corporate affairs. Authorized, requested, commanded, and ratified are not troublesome concepts and may be a proper basis for corporate criminal liability if the (i–iv) person had the authority to give the sanction. The troublesome concept is "reckless toleration." This would make the corporation liable for an offense committed outside the scope of the agent's authority which might have been stopped by a (i–iv) person had he known about it. This goes too far. This is particularly true when the duty that has been breached is a duty of "effective supervision." Can supervision ever be "effective" if the subordinate acts improperly? The combination of "reckless toleration" and "effective supervision" imposes an impossible burden on the conscientious supervisor and the corporation.

In summary: We find no objection to 402(1)(a)(b) and (c) as proposed by the majority of the commission. We would clarify 402(1)(a) and would limit 402(1)(d) to those activities where the danger of public harm is sufficiently great to justify the lack of culpability. We suggest the elimination of 402(2) or, if it is included, an amendment to except corporate liability if the sole agent through whom the corporation acted was acquitted. Section 403 Individual Accountability for Conduct on Behalf of

Organization: We take no exception to the provisions of 403(1) and (3). We suggest, however, that 403(2) and (4) are unreasonable and should be discarded.

Section 403(2) dealing with individual responsibility in the field of business activity contains a far-reaching and we believe unwarranted extension of the criminal law. This section provides that whenever a duty to act is imposed upon an organization by a statute or regulation, any agent of the organization having primary responsibility for the subject matter of the duty is legally accountable for an omission to perform the required act to the same extent as if the duty were imposed directly upon himself.

By failing to define "primary responsibility" or give any guidelines as to the application of the words in practical operation, this section places an impossible burden on the whole concept of delegated authority and responsibility. Is primary responsibility shared by all in the line of authority, or if not where does it rest—with the line supervisor or foreman, with the board of directors—or at what point in between?

"Primary responsibility" appears to be reasonably straight-forward when considered in the abstract. However, when viewed against the reality of the administration of a business or other organization, the problem of interpretation is very serious.

The board of directors of a corporation is "primarily responsible" for the operation of the company. Some part of this authority is delegated to officers, who, in turn, delegate to the division or department managers, who, in turn, delegate to other managers and supervisors on down through the whole structure of the organization. Delegation is meaningless unless authority and responsibility go hand-in-hand and one of the outstanding features of American economic activity is the freedom to act implicit in our system of delegation. The system permits and encourages the greatest possible use of individual talent throughout the whole structure of the organization by leaving intelligent men and women free to make their own decisions and take the responsibility for them within sometimes clear but often very hazy limits. In the course of this delegation, some may think that primary responsibility remains with the board of directors—others may believe it rests at a different level—the Report gives us no help in answering the question. But assume it rests at the top, what then? If the board of directors, the president or others at the top of the pyramid are criminally liable for the acts of subordinates because they are "primarily responsible" the whole system is in jeopardy, for who will make an effective delegation if he is responsible criminally for conduct taken pursuant to that delegation. Those preparing the report probably did not intend this result, but where does "primary responsibility" lie in view of the language chosen? The answer may be easy in a particular after-the-fact situation, but in the great majority of cases the line will be extremely hazy. And this will be especially true when planning action rather than in an after-the-fact evaluation of conduct. Businessmen have troubles enough today with the simple problems of economic responsibility in their posture with the company. The addition of criminal liability would produce a very serious limitation on the incentive to delegate and thus do grave damage to the opportunity for maximum use of individual talent.

Section 403(4) is a further example of the unreasonableness of the report provisions relating to individual responsibility. This subsection provides:

"A person responsible for supervising relevant activities of an organization is guilty of an offense if he manifests his assent to the commission of an offense for which the organization may be convicted by his willful default in supervision within the range of that responsibility which contributes to the occurrence of that defense."

The mischief in this subsection derives from the fact that "willful" does not mean simply willful but includes "recklessly," a particularly difficult concept when combined with reference to a failure of supervision in the undefined "range of responsibility" that covers all levels of supervision and finally the fact that liability can attach merely to an omission "which contributes to the occurrence of the offense."

We oppose the very broad expansion of the scope of individual criminal liability represented in sections 403(2) and 403(4), particularly when the concept is to be applied to a broad limitless range of undefined economic or industrial activities.

The basic concept may be proper in a specific defined area because of demonstrated problems that can be solved only in this way. As

a general concept applying in all cases, however, it runs completely contrary to our established concepts of basic fairness.

Section 403(2) and section 403(4) could very easily make criminals of a broad segment of executives, administrators, and supervisors at all levels of an organization simply because they delegate authority; and this result could follow even though the individuals involved had no intention of violating the law, no criminal purpose and, in fact, no knowledge of the facts giving rise to their liability as criminals. And all of this without even the suggestion of any facts to support the need for this drastic result.

Although it may be relatively easy to second guess the meaning of words in the context of occurrences that have already taken place, how can lawyers properly advise their business clients in advance of those occurences as to what may or may not be negligent supervision? Realistically, if a wrongful act is committed by a subordinate, it will be almost impossible after the fact to prove competent supervision. This means in practical effect that it would be impossible for a lawyer to give his business client any meaningful advice regarding a safe course of conduct.

Section 409—General provisions for chapter 4: By excluding Government from the definition of organizations covered by the new and expanded concepts relating to criminal activity by organizations, section 409(1)(a) is particularly unfair and discriminatory. As a matter of basic morality, a Government official who fails to properly carry forward his responsibilities or to properly supervise his subordinates should be just as culpable as a corporate official who fails to supervise his subordinates. Because of the nature of the public trust involved, it would seem that there is greater reason for including public officials than for covering those who are involved in basically private activities.

Section 1006—Regulatory offenses: Although the concept of equating regulated activity with criminal activity runs generally through the sections of the report dealing with business or economic activity, the mischief of this concept is most clearly demonstrated in section 1006.

This section makes the violation of a "penal regulation" a criminal offense. Penal regulation is defined as "any requirement of a statute, regulation, rule or order" which carries a civil or criminal penalty. There is no limitation in the quoted language. When one considers the tens of thousands of Federal regulations alone and the very broad areas of business and economic activity covered by them, the mischief in this concept is apparent—but Federal regulations are only one part of what is involved in "penal regulation"—we are also concerned with "rules" and "orders"; and violation of a penal regulation is punishable by fine and imprisonment.

We reject the concept that any activity that is or may be regulated by Government is of such serious import to the public interest that a failure to abide by any regulation, rule or order issued by anyone in authority in any of these areas should be punished as a crime.

We are here involved with making criminals of hourly paid workers, foremen and supervisors, not just top management employees—for the rules, regulations and orders presently in effect cover the broadest conceivable aspects of industrial activity.

Where is the need for this section? What are the problems that give rise to the desirability of such harsh punishment for unnamed offenses? The report gives no clue to help us.

The report removed much of the inequity that appeared in the study draft in section 1006. However, we believe that the evil was not so much in the language as in the philosophical concept embodied in this section. There may be areas of activity where Government regulation is considered desirable but we reject out of hand the idea that all regulation must be supported by the force of the criminal law. The result of section 1006 as we see it was probably not intended by those who framed this section and may come simply by the effort to abbreviate, to standardize or to codify. But the result does follow, intended or not.

We suggest that in the regulation of business or other economic activity, no useful purpose is served by the attempt to standardize penalties or by the added new concepts of criminal law found in section 1006. We believe that it is far better to follow the pattern that is traditional in the United States: If the regulation or suppression of a particular type of economic activity is desirable let the Congress make the determination at the time the need for regulation is considered and in the course of hearings on the question and at that time tailor the remedy to fit the evil sought to be avoided. In some cases this may suggest the need for a criminal penalty but this will certainly not be true in all situations.

In this way, the need for using the vehicle of the criminal law as well as the extent to which it should be used will be based upon hard facts related to a specific problem with all persons afforded an opportunity to be heard upon all the details of the proposal. This is a far better approach than that followed in the report where literally thousands of regulations, rules and orders—all unnamed—are lumped together under a broad meaningless designation of penal regulation—and where there is no opportunity whatever in the congressional hearings to even identify the particular areas of regulation let alone consider or evaluate the specific conduct that is to be made criminal.

We urge the elimination of section 1006 from consideration in any final legislation.

Section 1551—Strikebreaking: This section, although unobjectionable as far as it goes, covers only one side of the labor problem. The section provides:

"A person is guilty of a class A misdemeanor if intentionally, by force or threat of force, obstructs or interferes with:

(a) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor; or

(b) the exercise by employees of any of the rights of self-organization or collective bargaining."

The sanctions in this section apply in the area of labor relations only to acts of employers or their agents. If the Federal Government is to punish employers or their agents who interfere with legitimate labor activities the same power should exist to punish employees or their agents who interfere with legitimate management activities. We suggest that if this proposal is to be considered, the title "Strikebreaking" be changed to "Protection of Legitimate Labor and Man-

agement Activities" and that the following be inserted as a part of section 1551(1):

"(c) the exercise of any employer's right to maintain free and open acess to his plant or other business establishment."

The last paragraph of the comment to this section appears to invite the change we suggest.

Section 3007—Special sanctions for organizations; Section 3502—Disqualification from exercising organization functions: These sections introduce new and retrogressive concepts into our system of penalties.

The special sanctions provided by section 3007—either alternative—appear to be wholly unnecessary, unduly punitive, and suggest a tendency toward derogation of organizations and their officials by the option of publicity as part of the sentence when an organization has been convicted of an offense. In this enlightened age, this sanction seems out of step. The stocks and whipping post in the public square are relics of an earlier age. Even if it were a good idea, it is unnecessary. The mass communications media's legitimate concern with ecology, prices, rights of consumers, and the general subject of public policy, insures unfavorable publicity for organizations which violate, or may be accused of violating, the laws. In fact, the media seem to be far more interested in the accusations than in final judgments. To add the notification or other publicity features to other punishment presently provided, without making provision for the assurance of publicity in the event of a decision favorable to the organization seems to violate fundamental principles of fair play if not justice.

The same "singling out for special punishment" features is also carried over into section 3502.

No court should have the power to prohibit an offender who is on probation from seeking work with a corporation. The offender might have been convicted of murder, rape, arson, desertion from the Armed Forces, or other serious crime. These offenders on probation can currently work in a managerial capacity in organizations provided that they can convince the organizations that they have been rehabilitated. To deny a person this same right because he has committed an economic offense would appear to be a distortion of social values.

CONCLUSION

The purpose of our testimony has not been to suggest that business organizations and their employees should receive specially favorable treatment under the Federal criminal law. They should not. But they should receive equal treatment under the law. If there are special areas where new laws are required we should pinpoint those areas and legislate. But no one will benefit, least of all our national interest, by adding new criminal concepts in the field of economic crimes simply as a part of a codification procedure.

To the extent that the report simply codifies existing law, we find no fault, although we seriously question the procedure followed in some sections of adopting criminal law by incorporating other civil statutes by reference.

Where new criminal concepts are proposed, however, we suggest that they are drawn in language so imprecise as to make them completely unreasonable if not unconstitutional. An even more basic objection arises because of the complete absence in the report of any showing of either the need or the desirability of extending the reach of the criminal law beyond presently existing limits in the economic area. The report contains no factual or other support for the proposition that an expansion of the use of the restraints of the criminal law are necessary to the enforcement of Federal economic policy, yet the assumption of the absolute truth of this proposition is implicit in those sections of the report which broaden criminal liability in the economic area.

Prof. Sanford Kadish of the University of Michigan Law School in an article "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" published in the University of Chicago Law Review in the spring of 1963 lists the issues that should be considered in evaluating the use of the criminal law as an implement for the enforcement of economic regulation. His comments are quoted in the formal paper which I have submitted.

The questions raised by Professor Kadish are neither asked nor considered in the report. In fairness, it should be noted that the Commission had neither the time nor the resources to consider them. Rather, the assumption is made that we will have more effective enforcement of Government regulations in the economic area simply by adding the criminal sanction to those other sanctions presently in force. We respectfully suggest that the Congress, before accepting this concept, should give full attention to the concept itself rather than permitting the introduction of that concept to be hidden because it so small a part of the very large, useful and constructive material that is represented by the report.

What we are concerned with in the sections we have discussed is not codification, nor is it merely the adoption of new criminal law. The breadth of the proposals in the economic area of the report represent a major change in legeslative and economic policy in the United States.

We respectfully suggest that the report in the sections analyzed fills no demonstrated inadequacy in the regulation of economic activity, the administration of justice or in the coverage of the U.S. criminal law and, if adopted, could do serious damage to both the legal and economic systems of the United States.

We are deeply appreciative of this opportunity to present our views. We hope sincerely that the thoughts expressed will be of help in your consideration of the report and assure you of our desire to give the Congress all of the assistance within our competence in your consideration of this proposed legislation.

Thank you.

Senator HRUSKA. Thank you very much, Mr. Maddock. That is a very thoughtful and complete paper, written in a way that it is going to be sort of a checklist on the sections that you have commented upon, so that we can consider them in the context of our views.

[The following letter in response to a written inquiry was received:]

March 23, 1972.

Mr. Charles S. Maddock,
Legal Department,
Hercules Incorporated,
Wilmington, Del.

Dear Mr. Hobson: Thank you for your excellent and thoughtful testimony before the Subcommittee on the provisions of the proposed Federal Criminal Code relating to corporate criminal liability.

During and after the hearing, you agreed to respond to two additional matters. In many foreign countries there is no criminal liability for corporations. See the discussion in Mueller, "*Mens Rea and Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability,*" 19 U. *Pitts L. Rev.* 21 (1957). In this context, would your committee reassess whether the new Federal Criminal Code should make corporations subject to criminal prosecution?

Next, would you comment further on the provisions of the proposed Code authorizing the sentencing judge to order disqualification of individuals in the light of provisions of the Landrum-Griffin Act. 29 U. S. C. § 504, and *United States v. Grinnel Corp.*, 384 U. S. 363. 597 (1966).

Thank you,

Sincerely yours,

G. Robert Blakey,
Chief Counsel.

March 28, 1972.

G. Robert Blakey, Eq.,
Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, U.S. Senate, Washington, D.C.

Dear Mr. Blakey: Thank you very much for your letter of March 23, 1972. I am setting out below the answers that I would give to the questions posed in your letter. I have sent copies of this reply to the Chairman of the Section on Corporation, Banking and Business Law and to the Chairman of the Corporation Law Department Committee of the Section with the request that if they have different of additional views that they be forwarded to you.

I hope that you will find my comments of help, but if you have any further questions, please don't hesitate to raise them.

1. Should the new Federal Criminal Code make corporations subject to criminal prosecution?

The American Bar Association position with respect to whether or not corporations should be convicted of criminal offenses is covered on page 9 of the paper submitted at the time of my testimony:

"Even in this relatively clear area, however, we suggest that perhaps the best way to obtain compliance with law is to insist on strict observance by those *individuals* with whom the law is concerned. Corporations act only by individuals and if strict attention is paid to them and responsibility is carefully enforced on them, the corporation will take care of itself. By 'burying' the crime in some fictitious creature of the law we can easily lose sight of or avoid the prosecution of the real criminal—the individual."

One very serious caution, however: there seems to be a growing misconception that if the directors or the officers of a corporation are made criminally liable for anything done by or in the name of the corporation regardless of the knowledge of such directors or officers, somehow or other the corporation will behave itself. Nothing could be farther from the truth. In addition, the comments on pages 10-15 of the paper submitted at the time of my testimony, with reference to sections 403 (2) and (4) of the Final Report point up the gross inequity of such a concept.

If, however, there is a belief that (1) it is not enough to punish corporate employees in the lower echelons of management for their failings or (2) that if the corporation as well as the individual is punished, there may be a greater incentive for the officers and directors to provide for preventive action against the reoccurrence of the offense, then there may be a reason to impose, under proper conditions, liability on the corporation.

It should be noted in this connection that all major corporations with which I am familiar have rather extensive educational programs for employees at all management levels regarding the nature of the obligations imposed upon them

not only by the criminal but the civil law. There may be smaller corporations that cannot afford the kind of legal advice that larger corporations are receiving through their legal departments, but the trend in all corporations has been toward a greater rather than a lesser awareness of not only the legal responsibility placed on their officials but an awareness of the necessity of carrying on operations in strict compliance with all legal requirements.

2. Should the proposed Code authorize the sentencing judge to authorize disqualification of individuals?

I do not believe that criminal legislation should contain provisions barring corporate officials or officials of other organizations from holding office in such organizations.

If, in the course of a particular civil controversy, because of the special facts involved, the trial court believes that a defendant should be restrained from holding office either in a corporation or a union, the court's equity jurisdiction will probably permit it to frame a decree adequate to fit the particular situation. Even though this relief was denied in the particular case, the United States Supreme Court in *United States* v. *Grinnel Corp.* 384 U.S. 563, 16 L.ed. 778 at 791 clearly suggests that the trial court has this power in a civil antitrust case. We believe that in any area where the public interest is as strong as it is in the field of antitrust, this equity power probably exists. On the criminal side, the powers of the court in framing provisions relating to probation probably also include the power to include a provision that the individual is not to hold office in a union or corporation as a part of the terms concerning probation. Although there has been no court challenge to the terms of the probation for James Hoffa, this restriction is clearly contained in his probation order.

We suggest that it is far better to leave to the court at the time it is framing a decree in a civil case or the probation provisions in a criminal case the power to design the relief necessary for the protection of the public on the basis of an actual factual showing in particular situations rather than trying through the legislative device to cover a myriad of situations prior to the actual happening of any particular event. Many errors of commission or omission can be made in framing legislation and areas that should be covered may easily be missed while at the same time appearances of, if not actual discrimination, can result from the attempt to cover the situation in legislation. In this connection, it is interesting to compare the legislative reasons in the Landrum-Griffin Act, 29 U.S.C. §504 for barring an individual from a union office with the provisions in Section 3502 of the final draft covering corporate officials, the provisions in Section 3501 covering government officials, and the provisions in 12 U.S.C. Section 829 relating to FDIC insured banks. Presumably, the desire is to prevent persons who have been guilty of an offense from having the opportunity to commit the same offense again in the same position of public trust but the specific provisions vary in a very wide dimension. If, as would appear to be the case, the power to accomplish the desired result exists independent of legislative authority, the public interest is better served and many problems are avoided by handling the matter without the aid of legislation. In addition, it could very well be argued that if disqualification from office is provided by specific legislative authority, the only basis for disqualification is that appearing in the specific legislation, thus losing the broader present authority which exists in our equity jurisprudence as well as in the probation procedure.

The suggestion in my prepared statement that "no court should have the power to prohibit a defendant who is on probation from seeking work with a corporation" (page 26) was intended to apply in the context of Section 3502 of the Final Report and not in the broader sense of the question that you have asked in your letter.

Yours very truly,

CHARLES S. MADDOCK.

Have you any questions, Mr. Blakey?

Mr. BLAKEY. No.

Senator HRUSKA. Mr. Hawk?

Mr. HAWK. None.

Senator HRUSKA. Thank you very much for coming.

Our next witness is Mr. Richard Hobson, chairman of the Corporate Law Committee of the Virginia Bar Association.

Your statement is already in hand, and you may proceed.

STATEMENT OF RICHARD R. G. HOBSON, CHAIRMAN, CORPORATE LAW COMMITTEE, VIRGINIA BAR ASSOCIATION

Mr. HOBSON. Thank you.

(The prepared statement submitted by Mr. Hobson reads in full as follows:)

BIOGRAPHY OF RICHARD R. G. HOBSON, CHAIRMAN, CORPORATE LAW COMMITTEE, VIRGINIA BAR ASSOCIATION

Occupation: Attorney, partner in the law firm of Boothe, Prichard & Dudley, Fairfax, Virginia.

Education: Princeton University—AB Degree, Magna Cum Laude, 1953; Harvard Law School—LLB, 1959.

Experience: *1953-56*—Officer U. S. Navy, served aboard destroyed in Atlantic Fleet and at U. S. Navy Bureau of Personnel, Washington, D. C.; *1959-62*—Attorney and Management Consultant, Arthur D. Little, Inc., Cambridge, Massachusetts; *1962-63*—Assistant to the legal counsel, CEIR, Inc., Washington, D. C.; *1963-present*—attorney in private practice in Fairfax, Virginia.

STATEMENT OF RICHARD R. G. HOBSON, VIRGINIA BAR ASSOCIATION

Mr. Chairman, the Virginia Bar Association wishes to comment with respect to certain specific provisions of the proposed Federal Criminal Code and in doing so to support the position taken by the American Bar Association with respect to these sections.

By way of introduction, I would like to describe briefly the Association which I represent before you today. The Virginia Bar Association met for the first time on July 5, 1888, having been formed by the leaders of the Virginia Bar. Its charter is dated 1890 and states that the Association is organized "for the purpose of cultivating and advancing the science of jurisprudence, promoting reform of the law and in judicial procedure, facilitating the administration of justice in the state, and upholding and elevating the standard of honor, integrity and courtesy in the legal profession."

At the present time the Association has approximately 2,900 members and some 27 committees. I am a practicing lawyer, partner in the firm of Boothe, Prichard and Dudley in Fairfax, Virginia, and am the Chairman of the Corporate Law Committee of the Association and I have been designated as the representative of the Association to present its views to this subcommittee.

I understand the Attorney General of Virginia has or will testify before you with respect to jurisdictional aspects of the proposed criminal code. My concern here today is more limited and relates only to a very few sections which we think would have direct impact on lawyers counseling business organizations and the officers and representatives of those organizations. I wish to acknowledge the fact that our attention to these sections was first attracted by the action taken by he American Bar Association and its section on Corporation, Banking and Business Law. I have seen a copy of the proposed statement by Mr. Charles S. Maddock on behalf of the American Bar Association. I will try not to duplicate the specifics of his statement with which we are in general agreement.

Our concern is with respect to proposed criminal code sections 402, 403, 409 (1)(a), 1006, 1551, 3007 and 3502. Indeed, a more precise description of our reaction when we read these provisions would be one of shock. We are of the opinion that these sections:

1. Create new crimes where none now exist and contain sweeping, inclusive treatment of economic or business crimes with the implicit concept that all economic regulation must be supported by the force of the criminal law.
2. Use imprecise language, thereby creating ambiguities and raising questions of basic fairness in the proposed use of the criminal sanction.
3. Impose upon organizations some unusual sanctions which run counter to accepted concepts of the function of criminal punishment.

I have set forth below some comments on these sections:

1. *Section 1006*—This section makes violation of a so-called penal regulation a criminal offense. Penal regulation is defined as "any requirement of a statute, regulation, rule or order which is enforceable by criminal sanctions, forfeiture or civil penalty." There is no limitation in this quoted language.

The scope of the word "regulation" is enough to frighten any lawyer who has dealt with government bureaucracy but the definition of the crime goes further to include both "rules" and "orders." There is no limitation with respect to the level of the official who can issue the "rule" or "order," the violation of which will constitute a violation of a penal regulation that is punishable by fine and imprisonment. It should be noted that the requirement that the defendant charged with the violation must act "willfully" can be met with a showing of mere recklessness. [§302(1)(e)]

2. *Section 402(1)(a)* [Alternative wording.]

This section would hold a corporation criminally liable for offenses "committed in furtherance of its affairs on the basis of conduct done, authorized, requested, commanded, ratified or recklessly tolerated in violation of a duty to maintain effective supervision of corporate affairs" by certain specified individuals. The major complaint with this provision is that it establishes criminal liability based on reckless toleration of prescribed conduct. One criticism of the alternative wording is that it makes the corporation liable for "reckless toleration" of too many of its employees. If deterrence is the purpose of imposing criminal liability on a corporation, there should exist some possibility for the corporation to be able to control the activity for which it is to be held criminally responsible.

The Model Penal Code makes a corporation liable for the commission of a criminal offense where the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

Although this provision preserves "reckless toleration" as a basis of liability, it does limit the persons who may cause criminal liability to attach to the corporation to directors or high managerial agents who also must be acting for the corporation and within the scope of their office or employment.

The Model Penal Code, Section 2.02 (2) (C), defines "reckless" as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

The use of "toleration" implies some knowledge of the criminal conduct on the part of the directors or high managerial agents. Basing corporate criminal liability on such grounds is in line with the common law and makes the corporation criminally responsible for the conduct of only those persons whose conduct it and the shareholders can regulate, as the Official Comments demonstrate.

The limitations on corporate liability impose in cases falling within paragraph c are generally consistent with the position of the English Courts and those of some American states. They are consequently supported by a substantial body of case authority.

[Citations omitted.]

Substantially the same distinction is drawn in the provisions of the Restatement of Torts Sec. 909 relating to the award of punitive damages against a corporate employer.

In practical effect, paragraph c would result in corporate liability for the conduct of the corporate president or general manager but not for the conduct of a foreman in a large plant or of an insignicant branch manager in the absence of participation at higher levels of corporate authority. Paragraph c thus works a substantial limitation on corporate responsibility in cases in which the deterrent effects of corporate fines are most dubious but preserves it in cases in which the shareholders are most likely to be in a position to bring pressures to bear to prevent corporation crime.

Model Penal Code, Tentative Draft No. 4 at 151.

If an approach such as outlined in the alternative wording of §402(1)(a) is to be used, the Model Penal Code's formulation is more definable and precise.

3. *Section 403(2)*—The extension of criminal liability for failure to perform a duty.

This section provides:

Except as otherwise expressly provided, whenever a duty to act is imposed upon an organization by a statute or regulation thereunder, any agent of the

organization having *primary responsibility* for the subject matter of the duty is legally accountable for an omission to perform the required act to the same extent as if the duty were imposed directly upon himself. [Emphasis added.]

By failure to define "primary responsibility" this section places an impossible burden on the whole concept of delegated authority and responsibility. The board of directors can be said to be "primarily responsible" for the operation of the corporation. They delegate substantial authority to officers who in turn delegate to other managers and supervisors down through the whole structure of the organization. As to a particular duty who is "primarily responsible?" Some may think this responsibility remains at the top. If the members of the board of directors or other top management are to be criminally responsible for the failure of a lower echelon subordinate to conform to a federal regulation, who would be willing to delegate authority. Even if the scope of "primary responsibility" is by interpretation limited to a direct supervisory authority, the problem is still present. Businessmen have troubles enough today with the simple problems of economic responsibility in their positions. The addition of criminal responsibility will seriously limit delegation of authority which is necessary for any effective organization.

4. *Sections 3007 and 3502*—In an age when the media is alert to voice their legitimate concern with ecology and pollution of the environment or rights of consumers, to name a few areas of both public and business concern, to provide for formal sanction of unfavorable publicity in addition to other already applicable sanctions seems to be singling out the organization for unfavorable treatment. The stocks and the whipping post in front of the gaol in Williamsburg seem to have been revitalized in this Section 3007. It allows the court to require an organization convicted of an offense to give notice or publicity of its conviction. There is no provision for publicity of an acquittal.

Similarly, Section 3502 goes beyond traditional concepts of criminal sanction in the case of representatives of an organization. It permits the sentencing court to disqualify an executive officer or manager from serving in such capacity for a period of five years if it finds danger in entrusting managerial responsibility to him. This singles the "economic or business offender out for punishment not given to the convicted murderer, arsonist or rapist. These traditional types of offenders can work on probation in any managerial capacity provided they can convince the organization that they have been rehabilitated. To deny a person this right because he has committed a business type of crime would seem to be twisting social objectives.

5. *Section 409(1)(a)*—This section excludes government agencies from the scope of organizational culpability. While we oppose the scope of such organizational culpability proposed by the code there seems to be unfairness in singling government officials out for protection.

CONCLUSION

The members of the Corporate Law Committee of the Virginia Bar Association recognize that business and businessmen have no special claim to privilege under the law. They are, however, entitled to the same consideration and even-handed treatment available under our system of laws to all segments in our society. We believe that the criminal sanction should be employed only when other measures are clearly inadequate and where there is a clear showing of real and serious danger to the public and other measures are clearly inadequate. In our opinion there is no such showing in the report which accompanies the proposed Federal Criminal Code and as lawyers who have some familiarity with the business sector in Virginia, we must protest this radical departure from existing law.

I appreciate this opportunity to present the Association's views to the subcommittee.

The Corporate Law Committee of the Virginia Bar Association: A. Hugo Blankingship, Jr., Fairfax; F. Elmore Butler, Richmond; Robert L. Burrus, Jr., Richmond; Richard H. Catlett, Jr., Richmond; Robert E. L. DeButts, Washington, D. C.; Charles D. Fox, III, Roanoke; Richard G. Joynt, Richmond; Herbert V. Kelly, Newport News; Talfourd H. Kemper, Roanoke; Frank Talbott, III, Danville; Richard R. G. Hobson, Chairman, Fairfax.

Mr. Hobson. I think, Senator, by way of introduction, I should say that the Virginia Bar Association was founded in 1888 and is an association of approximately 2,900 lawyers in the state of Virginia.

I am here on the authority of the association on behalf of its Corporate Law Committee, and we must pay deference to the American Bar Association and Mr. Maddock for calling our attention to the sections to which I address myself, the same sections to which he addressed himself.

We were provided with a copy of the American Bar Association report of the section on corporation, business and banking law. Our committee studied that, and our association approved our concurrence in Mr. Maddock's statement which he has just made to you.

I will try not to duplicate what he has said. We have a few comments in line therewith, but we are in general agreement. We are concerned with the same sections.

We believe that these sections would create new crimes where none now exist and contain sweeping, inconclusive treatment of economical business crimes and would seem to imply that all economic relations must be supported by the enforcement of criminal law. Some sections use precise language, thereby creating ambiguity and raising questions of basic fairness in the proposed use of criminal sanctions and some of them impose upon organizations some unusual sanctions which run counter to accepted concepts of the function of criminal punishment.

With respect to section 1006 that Mr. Maddock addressed himself to: This section makes violation of a so-called penal regulation a criminal offense.

Mr. BLAKEY. Mr. Hobson, may I ask you one question?

Mr. HOBSON. Yes.

Mr. BLAKEY. As a practical matter, when a fine is imposed on a corporation, how is it normally paid by the corporation?

Mr. HOBSON. I have to say, frankly, that none of my clients have been in that position, so I cannot give you any precise answer to that.

But I am sure it comes out of the general fund of the corporation, subject to shareholder permission, of course.

Mr. BLAKEY. So, what you are suggesting is that the impact of the fine lies either on the shareholders or——

Mr. HOBSON. In any event——

Mr. BLAKEY (continuing) on the public if the corporation is in a position to raise prices to cover it?

Mr. HOBSON. That is correct.

Mr. BLAKEY. Well, could it be fairly suggested then that the economic sanctions imposed, such as a fine, although imposed directly on the corporation falls, in fact, on either one of two innocent classes, the shareholders or the public?

Mr. HOBSON. It certainly falls on the corporation and hence on the stockholders and, to the extent that loss is passed on, the customers.

Mr. BLAKEY. Did the Bar Association give any consideration to questioning the fundamentally advisability of the notion that there should be criminal sanctions on the corporation itself?

Did they do that?

Mr. HOBSON. Other than the sanctions that are proposed in the Report——

Mr. BLAKEY. No. I am just asking whether the assumption in the Report that the present law should go forward, that there should

be sanctions on corporations as such was questioned. I am wondering whether the Bar Association gave any consideration to questioning that fundamental assumption?

Mr. HOBSON. No, it did not, Mr. Blakey. It accepted the present law concepts.

Mr. BLAKEY. Some of the materials made available to the committee by comparative law people indicate that foreign jurisdictions almost uniformly deny that there is any utility in corporate criminal liability. Do you think there would be any possibility that the Bar Association might give some consideration to that—

Mr. HOBSON. We certainly could do that.

Mr. BLAKEY (continuing) in the studying of the fundamental assumption of the report itself that there should be corporate criminal liability?

Mr. HOBSON. I think members of the committee would be willing to think about that and come back to you with our thoughts on it.

Mr. BLAKEY. I might suggest to you that Professor Mueller who appeared before the committee yesterday, in a study at the University of Pittsburgh Law Review, in 1957,[1] considered this in some detail, and if the association would be of a mind to, I think the subcommittee would appreciate its comments on that fundamental question.

Mr. HOBSON. All right, sir.

Get back to my point on the penal regulation: Any lawyer that has practiced before administrative agencies in administrative practice will be concerned, I think, with section 1006 which defines "penal regulation" as "any requirement of a statute, regulation, rule or order which is enforceable by criminal sanctions, forfeiture, or civil penalty." There is no limitation in that language. The scope of the word "regulation" is rather frightening, but it goes further and includes both "rules" and orders," and there is no limitation with respect to the level of the official who can issue the rule or order.

Mr. BLAKEY. May I ask you this question at this point, Mr. Hobson?

Am I correct in saying that the section to which you refer has no operational impact of itself?

Mr. HOBSON. That is right.

Mr. BLAKEY. Does it not contemplate that a specific statute would incorporate it by reference?

Mr. HOBSON. Well, 1006 makes the violation of the penal regulation a criminal offense.

Mr. BLAKEY. But is that not true only when the sanction is invoked by other statutes?

Mr. HOBSON. 1006 defines penal regulations, and, yes, by operation of the other provision of the code.

Mr. BLAKEY. So that we would have to assume that 1006 would have no operation at all unless another statute incorporate it by reference, and then it would have only the operation that that other statute gave it?

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1. *Mens Rea and the Corporation*, a study of the Model Penal Code Position on Corporate Criminal Liability, Gerhard O. W. Mueller, 19 Pitts L. Rev. 21 (1957) [see p. 1797].

Mr. HOBSON. Well, section 3 of 1006 says a person is guilty of a class A misdemeanor if he willfully violates a penal regulation and thereby, in fact, within it——

Mr. BLAKEY. But the introductory language of this secton says:

This section shall govern the use of sanctions to enforce the penal regulation whenever and to the extent that another statute so provides.

Mr. HOBSON. That is correct.

Mr. BLAKEY. So, I wonder why there is difficulty in the drafting of this specific concept? Would not the difficulty only come in its specific incorporation in another statute?

Mr. HOBSON. Well, I would say initially the difficulty comes in the definition of the penal regulation, in itself.

Mr. BLAKEY. But would that not be modified—would there not be an opportunity to modify that on a case-by-case basis?

Mr. HOBSON. I think we would say that the place to modify it, Mr. Blakey, is right here in the penal regulation.

This is where we urge the clarification should be, at this point.

Mr. BLAKEY. Well, the problem to which the statute was addressed was the existence in virtually all economic reguation type statutes of a catchall provision in the end saying, "Whoever violates any provision of this statute shall. . . ." The hope was that there might be some general principles that could be used to organize those penal regulations.

It is my understanding, at least, that there was no thought that there not be an attempt to tailor them. But there ought to be a general framework, and I wonder whether your objection is really to the general framework or rather to the thought that they may not be improperly tailored in a particular context?

Mr. HOBSON. I think I could respond at best, at least, by saying that presumably, when Congress enacted the specific sections and the various provisions of the law you referred to, there was attention paid to the specific problem and the specific order where the regulation or rule that was to be enacted and set forth to a person who is a lawyer who is dealing with that section of the law whether it is an administrative agency, he would be addressing himself to the area of business conduct in which his client is going to be involved, and he can look at that rule or that regulation, and tell his client in that area of business conduct, "You are subject to this criminal penalty, and this will be its application." Presumably the Congress, when it adopted the broad definition, or a broad criminal penalty for violation of a particular body of law or the agency that adopted the regulations, they knew they were imposing a criminal penalty at that time when they set the regulation——

Mr. BLAKEY. Would you not think——

Mr. HOBSON. But here is a general incorporation of the whole works.

Mr. BLAKEY. Would you not think there ought to be a general principle applicable to what agencies could do by way of regulation? Or should we leave it up to each individual agency to work it out on a case-by-case basis?

Mr. HOBSON. In the present law it is done by general law and by the agency within the scope of their powers and by the Administrative Procedures Act.

I think what we would say is that section 1006, with its broad definition of rules and orders and regulations and the combination of the fact that the defendant can be charged with a violation willfully and the fact that under 302(1)(e) it ["willfully"] includes recklessness, should be noted in viewing the scope of that punishment provision.

Within the alternative wording of 402(1)(a) that Mr. Maddock talked about, this section holds a corporation criminally liable for offenses committed in furtherance of its affairs on the basis of conduct done, authorized, requested, commanded, ratified, or recklessly tolerated in violation of a duty to maintain effective supervision of corporate affairs by certain specified individuals. The major complaint with this provision is that it establishes criminal liability based on reckless toleration of prescribed conduct and that the alternative wording makes the corporation liable for reckless toleration of too many of its employees. If deterrence is the purpose of imposing criminal liability on a corporation, there should exist some possibility for the corporation to be able to control the activity for which it is to be held criminally responsible.

There are alternatives to this in the model penal code which makes a corporation liable for commission of a criminal offense where the commission of an offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

Although this provision preserves reckless toleration as a basis of liability, it does limit the persons who may cause criminal liability to attach to the corporation to directors or high managerial agents who also must be acting for the corporation and within the scope of their office or employment.

In my statement, I set forth some other references from the model penal code, and, although we would agree with ABA's disapproval of the section, we would feel that the model penal code formulation is a preferable one if one is to be adopted.

In section 403(2), the extension of criminal liability for failure to perform a duty, it provides that:

> Whenever a duty to act is imposed upon an organization by a statute or regulation thereunder, any agent of the organization having primary responsibility for the subject matter of the duty is legally accountable for an omission to perform the required act to the same extent as if the duty were imposed directly upon himself.

By failure to define primary responsibility this section places an impossible burden on the whole concept of delegated authority and responsibility. The board of directors can be said to be primarily responsible for the operation of the corporation. They delegate substantial authority to officers who, in turn, delegate to other managers and supervisors down through the whole structure of the organization. As to a particular duty who is primarily responsible? Some may think this responsibility remains at the top. If the members of the board of directors or other top management are to be criminally responsible for the failure of a lower echelon subordinate to conform to a Federal regulation, who would be willing to delegate authority? Even if the scope of primary responsibility is by interpretation limited to a direct supervisory authority, the problem is still present.

Businessmen have troubles enough today with the simple problems of economic responsibility in their positions. The addition of criminal responsibility will seriously limit delegation of authority which is necessary for any effective organization.

With respect to section 3007 and 3502 which provide sanctions, in an age when the media is alert to voice their legitimate concern with ecology and pollution of the environment or rights of the consumers, to name a few areas of both public and business concern, to provide for formal sanction of unfavorable publicity in addition to other already applicable sanctions seems to be singling out the organization for unfavorable treatment. We still have stocks and whipping posts in front of the gaol in Williamsburg and these seem to have been revitalized in this section 3007.

Mr. Blakey. Mr. Hobson, may I ask you at this point if it is normal now when a person is convicted of embezzlement, an individual employee of a bank, to require that he make restitution to the bank as a condition of, perhaps, probation? If it is normal now, how would you distinguish that situation? Is that situation, applicable as in a case of individual liability, distinguishable from the situation envisioned by the black-letter draft of section 3007, which would effectuate a corporation's duty to make restitution to the identifiable class that it may have harmed?

That is really not publicity in the way of——

Mr. Hobson. The alternative of 3007 is publicity, I would say; the first alternative to 3007 is the idea of advertised notice.

Mr. Blakey. And do you object to both?

Mr. Hobson. No, I think notice as defined is a means of notifying those to whom restitution must be made, but I do not object to it; however, this whole section as a sanction seems to——

Mr. Blakey. The alternative section?

Mr. Hobson. Yes, 3007 alternative, where it talks about this, 3007, the black letter draft, as I think you referred to it, requires organizations to give notice of their conviction to the individuals harmed by mail or advertising.

Mr. Blakey. In a situation where you did not know to whom the letter should be mailed, how else could you do it except by advertising?

It is normal now, for example, where legal notices are given in newspapers——

Mr. Hobson. That is correct.

Mr. Blakey. To contact people that way where letters cannot be mailed. How would you distinguish that from this?

Mr. Hobson. I would distinguish this alternative as one that is publicity, and it is that one, I think, I am adressing myself to.

Mr. Blakey. And not the black letter?

Mr. Hobson. In the original draft?

Mr. Blakey. Yes.

Mr. Hobson. To the extent that it seems to single out organizations for separate treatment from private individuals, I think that would be the only other comment I would make about the first one.

Mr. Blakey. If it were made applicable to both individuals and organizations, would you have any objection to 3007 as it is written?

Mr. Hobson. I would have no objection as to unfair treatment. I am not sure that I would go so far as to say that I would approve the section generally anyway.

Mr. BLAKEY. Would you have any doubt that under current law the court could probably——

Mr. HOBSON. The courts have done so.

Mr. BLAKEY. Already do it?

Mr. HOBSON. To my knowledge, it has been done by the method of legal advertisement issues in a class action case.

In 3502, we think——

Mr. BLAKEY. On that one, let me ask you this question: Is it not true as a matter of general principle, in antitrust law today, that a person could be disqualified from continuing his business activities?

Mr. HOBSON. If the person, for instance—if the person convicted—if the type of activity were professional activity, a member of a bar, conviction of a felony would follow with removal of his status in the profession.

Mr. BLAKEY. Under the antitrust laws, is it not true that as matter of general antitrust principles that if a person has been guilty of particularly vicious predatory practice, he could be disqualified, or, as some part of an antitrust decree, from engaging in that kind of business activity in the future?

Mr. HOBSON. What examples? What kind of examples?

I know of none. You may be aware of some examples.

Mr. BLAKEY. I am thinking, I believe, of the *Grinnell* [1] case in the Supreme Court, where the judge, in fact, had ordered or prohibited the defendant from engaging in the future, and the Supreme Court held that the fact——

Mr. HOBSON. What was that activity?

Mr. BLAKEY. I do not remember the full details of the case at this point. Perhaps, if I were——

Mr. HOBSON. This would apply to a broad range of business activities, and I would think in a specific impugning of some sort of public function this may have been done. I know of none.

Mr. BLAKEY. Would you be willing to comment in a letter on that particular case?

Mr. HOBSON. Yes; if you will give the reference, we will certainly check that out.

Mr. BLAKEY. Thank you.

Mr. HOBSON. We feel section 3502 goes beyond traditional concepts of criminal sanction in the case of representatives of an organization. It permits the sentencing court to disqualify an executive officer or manager from serving in such capacity for a period of 5 years if it finds danger in entrusting managerial responsibility to him. We think this singles out the economic or business offender for punishment not given to offenders under the traditional types of crimes.

Mr. BLAKEY. Let me raise another illustration with you.

Are you familiar with section 504 of the Labor-Management Relations Act [2] which prohibits individuals from serving as labor representatives for a period, I think, of five years?

Mr. HOBSON. That came into effect with the Landrum-Griffin Act?

Mr. BLAKEY. Yes, where they have been convicted of certain felonies and are serving as a union official.

Mr. HOBSON. Yes, I know of such provisions existing.

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[1] *Grinnell* v. *United States*, 384 U.S. 563 (1966).
[2] 29 U.S.C. § 504 (73 Stat. 536).

Mr. Blakey. Would your objection to this provision which generalizes that concept go to that provision of present law?

Mr. Hobson. I think the Landrum-Griffin Act provision stems from—and I am speaking from a general recollection of this—I think that Congress's particular concern and the public concern in this area of labor-management relations, the concern that a union representative or official has something of a public trust, indeed—and if he is an elected official, indeed—or appointed by an elected official, I think there is a special concern of the public and of the Congress as to a responsibility.

Mr. Blakey. The question I am asking you relates to your statement that section 3502 goes beyond traditional concepts of criminal sanction in the case of representatives of an organization. I am just raising with you whether that statement is consistent with the law either in the antitrust area or in the labor area?

Senator Hruska. Will counsel yield?

Is there not further illustration in the banking laws where a bank official if found guilty of embezzlement or of fraud, fraudulent conduct, is disqualified thereafter from continuing as an officer?

I am not sure at this time, and we can check it, but I think the SEC has similar sanctions against brokers and investment bankers who transgress some of the laws of the land. So, that would indicate that there is some body, some points in the body of law, to serve as precedent.

Mr. Hobson. I think there is where the particular type of business activity is already licensed and where the Government is in a field of regulation, and I would see no problem with the requirement where we have certain qualifications to serve in a capacity.

If you have shown yourself—you know—morally incapable of serving in that capacity, where, in fact, the public puts their trust, then, this would disqualify you, and the banks are one area, and there are others, and the bar is another one.

Mr. Blakey. Would you have difficulty with the court making that kind of a decision on a case-by-case basis plus, I suppose, an appellate review?

Mr. Hobson. I think I would if it is as broadly as it is stated here where there are, in fact, many areas of business—and you will realize we are talking now from the smallest to the highest. There is, in fact, no regulations, no code of conduct specified for what this small businessman or small man is to do. The areas where there are some areas——

Mr. Blakey. You seem to be assuming the disqualification would follow automatically. I suppose there would have to be a aggravated factual showing in the particular criminal conduct and some relationship between it and the possible future disqualification.

Mr. Hobson. I would not give the judiciary that broad discretion, I think.

Mr. Blakey. Let me ask you this related question: Since the primary punishment for a convicted offender is imprisonment and that cannot be imposed on a corporation, how do you recommend that the code give equal treatment to corporations and individuals?

Should we not have to try to fashion some special sanctions for corporations if ultimately the subcommittee is to give equal treatment to corporations and individuals?

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Mr. HOBSON. Well, I do not think the proposition we start out with is that we want to give equal treatment to corporations, and in enacting criminal codes as they will apply to the business area, I do not think that is the first assumption we start out with.

Mr. BLAKEY. I am raising the question primarily in reference to your objection to publicity as a possible sanction for a corporation. We can only fine a corporation—or I suppose you could lift charters. Would you recognize as legitimate a possible sanction of the corporation such as that which would be the functional equivalent of capital punishment?

Mr. HOBSON. Of putting him out of business one way or another?

You are raising some interesting constitutional parallels.

Mr. BLAKEY. Now the law can only fine a corporation, and you have indicated that a fine falls primarily on the consumer or the stockholder. I wonder if you are not forced into finding some additional new sanctions such as publicity to make economic regulation effective? And if you object to the absence a similar sanction of publicity in the area of personal criminal responsibility, don't you ignore the need for special sanctions in the area of corporate criminal responsibility.

Mr. HOBSON. I think my general response to that would be: To absolutely have equality of treatment of an organization versus an individual is not the prime, initial goal that you set in drafting the code of conduct. But in our point here, it would be to the extent that proposals go beyond traditional types of sanctions, they are novel concepts and are subject to questions of fairness and equal treatment. One thing occurred to us, and this is perhaps a facetious response: There is no place in the provisions where the criminal, the business participant, is, indeed, found innocent of a charge. There is a lot of publicity that goes simply with the trying, the trial and accusation which, in the business field, is virtually death to business and many occupations and in many fields of business it is essentially death to the business enterprise merely to be charged. In many areas such as those in which the Federal Trade Commission operates, a consent order sometimes is death to a business. Publicity is a very, very serious and detrimental sanction to business enterprises, perhaps more so from the economic standpoint where it can be more so perhaps than to an individual because the business organization's, indeed, whole purpose in life is economic, to the extent we are talking about economic sanction.

I would add one more comment about section 409(1)(a).

That is the same as contained in the ABA report, and this is that it would seem we would question really whether or not it would be fair to single Government officials out for protection under that section, even by not including them into the definition of an organization.

In summary: The members of the Virginia Bar Association and those particularly engaged in representing business clients recognize that businessmen have no special claim to privilege under the law. They are, however, entitled to the same consideration and even-handed treatment available under our system of laws to all segments in our society. We believe that the criminal sanction should be employed only when other measures are clearly inadequate and where there is a clear showing of real and serious danger to the

public and other measures are clearly inadequate. In our opinion, there is no such showing in the report which accompanies the proposed Federal criminal code, and, as lawyers who have some familiarity with the business sector in Virginia, we must protect this radical departure from existing law.

We appreciate the opportunity, Senator, to come here and backup the American Bar Association, and I will try to respond and get the committee members to respond to any requests that Dr. Blakey may have.

Mr. BLAKEY. Would you also perhaps correlate your response with the American Bar Association, so the subcommittee will learn from them, too?

Mr. HOBSON. I will be happy to.

Senator HRUSKA. Thank you very much, Mr. Hobson, for coming here. We know that it is a part of your pro bono publico duties, I suppose, but that is part of the law business.

Mr. HOBSON. We find a lot of that, don't we, Senator?

Senator HRUSKA. Very well.

Our next witness is Professor Alan Miles Ruben of the Cleveland-Marshall College of Law. Is he here?

Mr. Ruben, your statement will be placed in the record in its entirety and you can proceed in your own way to highlight it or otherwise comment on it. Each witness is allotted 30 minutes, and you have that amount of time if you want to consume it.

STATEMENT OF PROF. ALAN MILES RUBEN, MEMBER OF THE FACULTY, CLEVELAND-MARSHALL COLLEGE OF LAW, CLEVELAND STATE UNIVERSITY, CLEVELAND, OHIO

Mr. RUBEN. Thank you, Senator.

Senator HRUSKA. Your prepared statement will appear at this point.

(The prepared statement submitted by Mr. Ruben reads in full as follows:)

STATEMENT OF PROF. ALAN MILES RUBEN

I am Alan Miles Ruben, a member of the faculty of The Cleveland-Marshall College of Law, Cleveland State University. I appear at the invitation of the Committee to comment on the provisions of the proposed Code dealing with the sentencing of corporate offenders. For the record, my principal academic responsibility lies in the area of corporate law. In addition, my experience includes the counseling and trial defense of corporate clients, both as a private practitioner and as house counsel, as well as the investigation of business organizations as Special Counsel for the Senate Subcommittee on the National Stockpile, and the prosecution of corporate malefactors, as Deputy Attorney General of Pennsylvania.

In reviewing notions of corporate criminal responsibility, the threshold question to be asked is: What purposes are served by convicting a corporation and imposing a particular sanction?

We can approach an answer, first, by noting that most corporate crime is committed to enhance income potential or minimize expected costs. Visiting criminal liability upon business organizations importantly functions therefor to "take the profit out of the crime" and thus deter others from being tempted to pursue impermissible paths to corporate gain.

In the second place, as organizations become larger and more complex, decisional responsibility is diffused and it becomes increasingly difficult to single out the individuals who have authorized the culpable acts. And, even when they

can be identified, we must observe that the conviction rate of corporate officers has been singularly unimpressive. Yet, the environment of the corporation may be such that eyes are closed to misconduct which contributes to profitability or the achievement of other organizational goals. Employees at the operational level of the hierarchy, even without direction or approval from their superiors, nevertheless manage to get the message as to what is required of them. They tend to be supervised not so much as to the means used to accomplish objectives as they are with respect to failure to produce desired results. In such cases, the only effective method of changing the corporate climate and deterring further violations may be the imposition of criminal liability upon the corporate entity, thereby encouraging management to adopt and rigorously enforce compliance policies.

Still, the application of economic sanctions against the corporation is likely to result in the sacrifice of other interests.

The impact of the penalties will be felt by consumers, as the firm attempts to pass on the cost, and by stockholders in the form of diminished dividends or share values. Employees' interests may also be affected.

Consider the effect of economic sanctions imposed upon a convicted corporation subject to the "time warp" phenomenon. Very often a considerable length of time elapses between the commission of an offense and the conviction for it. In the meantime, substantial changes may have taken place in the identities of the owners and managers of the entity. The result is, therefore, that the criminal penalty falls upon classes of persons who cannot be said in any realistic fashion to have had knowledge of the wrongdoing at the time they made their decisions to affiliate with the enterprise. The condition is well illustrated by the recent Shoup Voting Machine Company prosecution. Shoup was allowed to enter pleas of *nolo contendere* to indictments charging it with mail fraud and conspiracy in connection with promoting the sale of its machines to government agencies over the past several years by bribing public officials. The $45,000 fines were ultimately bourne by the Macrodyne-Chatillon Corporation, the parent company, which had innocently acquired the Shoup stock immediately prior to the advent of the prosecution.

To the extent that the use of criminal sanctions succeeds in controlling antisocial behavior in the corporation and fulfills the traditional functions of the criminal process—reform and rehabilitation of the offender and deterrence of potential offenders—the injury thereby occasioned to other interests should not be given primary consideration.

Three sanctions are provided as sentencing alternatives for the corporate defendant in the proposed code:

SPECIAL PUBLICITY SANCTION FOR ORGANIZATIONS

Section 3007 denominated "Special Sanction for Organizations" permits the sentencing court to require the corporation "to give notice of its conviction [but not that of individual employees, officers, and directors] to the persons ostensibly harmed by the offense by mail or by advertising. . . ." The sanction is thus designed to alert the putative victims of the offense so as to "facilitate restitution." A broader provision authorizing the court to insist that the corporation "give appropriate publicity to the sector of the public interested in the conviction. . . ." was rejected despite possible deterrent value because it was judged to come too close to approving a policy of "social ridicule as a sanction."

Yet the rejected alternative may be preferable.

The broader publicity sanction serves the purpose of making the conviction known to those, such as shareholders, customers, lending institutions, and creditors, who might be in a position to direct or at least influence change in corporate policy. Further, particularly when the conviction relates to violations of consumer protection legislation, the extensive publicity may have the effect of triggering public outrage and consequent consumer boycotting of the corporate products, thereby reinforcing any economic sanction imposed by the court, a fact which should be taken into account in framing the sentence.

However, the use of widespread publicity as a sanction has perhaps even greater significance because of its effect upon the defendant corporation's public image.

There is no gainsaying the fact that corporate managers place a premium upon a favorable organization image, and the loss of prestige consequent upon the publicizing of a conviction may have very profound deterrent value. The

corporation as an employer and as a lobbyist is undoubtedly handicapped by the resulting stigmatization. The educational lesson is not likely to be lost upon potential offenders.

FINES

The Commission has provided in Section 3301 for a maximum fine of $10,000 to be imposed upon a corporation which has been convicted of a Code defined offense, unless it has derived pecuniary gain or caused injury by reason of the offense, in which case the organization may be sentenced to a fine which does not exceed "twice the gain so derived or twice the loss caused to the victim."

For the large corporation a fine of $10,000 amounts to no more than a gnat bite.

On the other hand, the problems attendant to developing proof of gain or loss from the offense may render the alternative fine ineffective in many cases. When, for example, a corporation violates pollution control regulations and shifts the cost of waste disposal from itself to the community, there may be very significant obstacles in the path of calculating the community's loss or the corporation's profit.

The difficulty may be avoided by making clear that the "gain" or "loss" computations need not be precise and that what is required of the court is only that it supply its best estimate so that the risk of inaccuracy falls upon the wrongdoer.

For the purpose of making the estimation, the court should be authorized to employ, at the defendant's cost, special masters and appropriate professional assistance.

While the problem may also be answered by the creation of a "rebuttable" presumption that all loss or gain attributable to transactions related to the violations are the result of such violations, use of the ordinary adversary trial process to establish the "economics" of the violation seems comparatively inefficient.

A third fine alternative, useful when the offense does not give rise to gain or loss and the fixed dollar maximum penalty does not appear to be meaningful in light of the size of the defendant corporation, may be suggested. The fine can be established as a percentage of net income so that it packs proportionately the same wallop regardless of the scale of the enterprise. This kind of sanction is available in the case of certain violations of Common Market regulations governing competitive conduct. Fines of up to "10% of the turnover of the preceding business year" may be imposed upon firms whether their infringements are willful or negligent.

The superior flexibility offered by a percentage-based fine commends the adoption of this alternative.

PROBATION

We know very little about the corporate criminal. Aside from Sutherland's seminal work, "White Collar Crime," little has been done to quantify the extent of corporate criminal behavior or to relate such conduct to underlying factors. Neither the Department of Justice nor the Administrative Office of the United States Courts maintains records from which corporate criminals can be identified and their characteristics studied. It is likely, however, that the overwhelming number of offenses for which corporations might be prosecuted go undetected.

Sutherland's work suggests the presence of significant recidivist tendencies among the larger corporations. Judged from the number of corporations which have been indicted three or more times for violations of the Sherman Act during the period 1955-1965, his findings of recidivism appear to have support, at least in the area of antitrust offenses.

Our penal system has not done well as an institution for the reformation of the individual criminal. Ironically, perhaps there is greater hope for rehabilitation of the corporate offender, through expansion of the probation program.

The proposed Code provides that an organization convicted of an offense may be sentenced to probation for a maximum period of five years. The difficulty is, however, that the conditions of probation, spelled out in Section 3103(2), are not particularly appropriate for the corporate defendant.

I propose that as additional conditions for probation the corporation be required to (1) give notice of, and permit attendance by a probation officer at, all scheduled meetings of the board of directors, committees thereof, officers,

and other management employees making or substantially influencing corporate policy; (2) permit the probation officer access to corporate books and records including all records and memoranda prepared for or by individual officers and employees; and (3) admit the probation officer to the premises and all the facilities of the corporation and permit inspection of such premises, facilities, and the operations conducted in connection therewith.

The need to attend meetings, review records or inspect facilities would depend, of course, upon the nature of the offense and the potential for repetition of the criminal conduct.

As an officer of the court, the probation officer would be bound to respect the confidentiality of information obtained through his inspections and refrain from either disclosing data which would be of assistance to competitiors, or profiting from "insider" information.

The training of the probation officer useful in the case of the corporate offender would not necessarily be that of the social worker or psychologist who currently constitutes the bulk of the probation staff. Instead, depending upon the nature of the offense for which the defendant was convicted, the officer might be an engineer, accountant, economist, attorney, chemist, or other specialist. Indeed, more than one probation officer, each qualified in a different specialty, might be employed when the offense indicated that multiple-expertise was required to effectively supervise the corporation's activities during the probationary period. Such personnel might be "borrowed" from the governmental agencies associated with the prosecution, or otherwise transferred from the skilled pool of Federal career personnel for special assignment. Ultimately, a select number of such specialists might be added to permanent staff.

The cost of probationary supervision might well be charged to the defendant corporation and payment thereof made one of the conditions of probation.

Another important condition of corporate probation which should be required is the development and implementation by the corporation of an "affirmative compliance policy and program." Such a program would set forth guidelines and procedures for assuring adherence to the applicable prohibitions and duties imposed by law and prevent recurrence of criminal conduct. The program should be approved by the sentencing court and its operation supervised by the probation officers.

Admittedly, the foregoing suggestions for additional conditions of probation intrude extensively into the internal affairs of the corporation. They go far beyond the precedent of an Internal Revenue Service audit or a triennial state insurance department examination. And, certainly these proposals carry further than the procedures for third party investigation permitted under the corporate law of certain Commonwealth countries, Sweden and France, when mismanagement is alleged by shareholders.

Nonetheless, they do provide a viable framework for making probation an effective sentencing alternative for reforming the guilty corporation.

Beyond this they also convert probation into an effective deterrent device. Corporations, particularly large organizations, abhor outside intervention into their affairs. The secrecy of their board rooms may be as great as ever surrounded deliberations of a grand jury. Meetings of high corporate officials and directors are often carefully shielded from disclosure even within the organization. While the "Top Secret" stamp is not used, corporate records are usually maintained on a confidential basis; and, if a breach of security is feared, apparently there is little hesitancy in freely using the nearest available paper shredder.

The threat of an omni-present public probation officer viewing the most intimate details of corporate operations is calculated to deter even the most irresponsibly managed corporation from subjecting itself to the criminal process.

In closing, I invite the Committee's attention to a creative use of probation by the United States District Court for the Norhern District of Ohio last month in the *United States v. Cleveland Electric Illuminating Company*, No. CR 71-279.

There, the corporation was convicted of violation of the Navigable Waters Act of 1899 by dumping poisonous wastes into the Cuyahoga River. In sentencing the defendant to a six months term of probation, the court put the defendant's operations under the supervision of a qualified employee of the Environmental Protection Agency to oversee the requirement that the corporation dispose of its refuse in a manner which would not harm the environment. A copy of the order of probation is appended to my testimony.

Judgment and Order of Probation (Revised Dec. '66), Cr. Form No. 101

United States District Court for the ———

[No. CR 71-279]

UNITED STATES OF AMERICA
v.
CLEVELAND ELECTRIC ILLUMINATING COMPANY

On this 8th day of February, 1972, came the attorney for the government and the defendant appeared in person, and [1] by George I. Meisel, counsel.

It is adjudged that the defendant upon its plea of [2] nolo contendere, and a finding of guilty has been convicted of the offense of Discharging refuse into navigable waters of the United States, in violation of Title 33, Sections 407 and 411, United States Code as charged [3] in counts 4, 5, 13 and 16 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged [4] that the defendant is fined the sum of $2.500.00 as to count 4. $2,500.00 as to count 5, $2,500.00 as to count 13 and $2,500.00 as to count 16. Total Fine $10,000.00, execution of the Fine suspended and the defendant is placed on probation for a period of six (6) months.

It Is Further Ordered that, upon motion of the United States Attorney, counts 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 14, 15, 17, 18, 19 and 20 are hereby dismissed.

A True Copy of the Original, Filed: Feb. 8, 1972.

Attest: Dominic J. Cimino, Clerk.

By Richard R. Peters, Deputy Clerk.

It Is Further Ordered that during the period of probation the defendant shall conduct itself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

THOMAS D. LAMBROS,
United States District Judge.

Mr. RUBEN. Members of the staff—Mr. Chairman. I am delighted to be here this morning to comment on the sentencing alternatives available for corporate criminals.

Before making some additional suggestions, I want to record my admiration for the work of the National Commission and the very significant Federal Criminal Code they produced. The proposed code makes a major contribution to the development of thought with respect to criminal law in general and the imposition of criminal liability and sanctions upon corporations.

May I preface my remarks by stating that I am a firm believer in the idea that criminal liability can and should be visited upon

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[1] Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty, and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] If sentence is imposed but execution suspended, and probation ordered, enter here (1) sentence or sentences, specifying counts if any, (2) whether sentences are to run concurrently or consecutively, and if consecutively, when each term is to begin with reference to termination of preceding term or to any outstanding or unserved sentence, (3) whether defendant is to be further imprisoned until payment of fine or fines and costs, or until he is otherwise discharged provided by law. (4) the facts regarding the suspension of the sentence or sentences and (5) the period of probation.

If sentence is suspended and probation ordered, enter here the following: "The imposition of sentence is hereby suspended and the defendant is placed on probation for a period of years from this date."

corporations. I say this with the full knowledge that the impact of *economic* sanctions may very well be experienced in part by innocent shareholders, by consumers and by ordinary employees of the corporation. Nevertheless, I hold the opinion that the imposition of criminal penalties performs an important deterrent function; indeed, without them I should think we would be derelict in our duty to provide a pattern of regulation to minimize the future commission of white-collar crime.

I would emphasize to the committee and the staff that we know so very little about the corporate criminal. The Administrative Office of the U.S. Courts does not keep statistics on indictments or convictions of the corporate offender; neither does the U. S. Department of Justice. In fact, the only major study of the incidence of corporate crime and the characteristics of the corporate criminal, entitled "White-Collar Crime," was published in 1949 by the late professor E. H. Sutherland.

Interesting enough, tracing the derelictions of 70 of the largest mercantile, mining and manufacturing corporations, Sutherland finds that 60 percent of them had been convicted of crime and that on the average each of them had been convicted of a criminal offense four times.

Mr. BLAKEY. Sutherland's book was not limited to criminal offenses, was it?

Mr. RUBEN. No. However, I am referring specifically to criminal convictions. If one considers other kinds of quasi-criminal, regulatory violations, the multiple of recidivism increases and approaches 14 for each of the corporations on the list; Sutherland's inquiry into the characteristics of the corporate criminal, that is, what makes one corporation engage in criminal behavior while another does not, was not entirely successful. His conclusion at that time was that what he called its "position in the economic structure" was of major significance.

I would urge here at this time that it would be a very fruitful undertaking for this committee to encourage further research and the development and maintenance of statistical records by Government agencies of corporate criminal behavior.

I would like to address the balance of my remarks to some of the sentencing alternatives to which corporations may be subjected.

The obvious sanction, of course, is the fine. Here I must express some disagreement with the drafters of the proposed code with respect to the limitation of $10,000 as the maximum fine for code-defined offenses. This is simply a gnat bite on the hide of a major corporation.

Obviously, a $10,000 penalty might have a deterrent impact upon the small, closely held corporation. But for the large publicly held corporation, the so-called "endocratic" model, the sanction becomes no more than a small license fee.

Now, the code does provide an alternative double the precuniary gain, derived from or double the loss caused to the victim by the corporate offense. The difficulty here is with calculating the gains or losses. The code is silent on the subject and, experience in other areas suggests the computation of a gain or less may be difficult. It may be best amount to a speculation, and it may involve costly and time-consuming research.

The corporation is apt to defend on the ground that the commission of the offense, did not serve in fact to increase the profit it otherwise would have anticipated. It may also argue that there was no real loss occasioned to any victim. Particularly when the violation is by nature a noneconomic crime it is very difficult to apply the notion of gain or loss as a measure of the fine to be imposed.

There are two possibilities that I would especially urge the committee to consider by way of modification of proposed provisions.

The first is the creation of a "rebuttable presumption," that all gain and/or loss associated with transactions related to the offense is attributable to the offense, thereby placing on the corporation the burden of coming forward with evidence to show that such gain or loss did not stem from the violation.

There are some difficulties with this approach. Experience in antitrust cases indicates that it is cumbersome and inefficient to use the normal criminal trial adversary procedure to establish this kind of economic fact.

An alternative which I would recommend would be to permit the sentencing court to *estimate* the amount of gain or loss, making clear that precision is not required and that the burden of any inaccuracy in the calculation falls upon the wrongdoer. For this purpose, the court might be empowered to contract for the services of economists, accountants, and the like, and appoint special masters to make findings on the issue which it can review and adopt. The cost of this professional service might very well be imposed upon the convicted corporation.

The second area to which I would like to turn——

Mr. Blakey. Would you argue though that the cost is not going to fall ultimately either on the consumer or the shareholders?

I wonder if increasing the fines on the corporations will, in fact, deter the conduct of the people who are causing the corporation to commit the crime—to wit, the management level people?

Should there not be some focus in the operation of criminal sanction on people, the people, not the legal fictions, the people who are commiting the crimes, to wit, the corporate management?

Mr. Ruben. I quite agree. It is always better to place responsibility upon the individuals who engage in the illegal conduct, to disregard the fiction and get down to the human beings involved. But in the larger corporations, as you know, this is exceedingly difficult. In point of fact, our experience with indicting and convicting individual officers and employees of corporations has not been very satisfactory. Juries are not particularly prone to convict the individuals behind the corporate crimes.

Second, I think, indirectly, by placing the burden upon the entity itself, you are deterring corporate management. The management operates to make a profit. If you make it unprofitable for management to engage in criminal conduct then management will take steps to send the word throughout the hierarchy that the conduct is not to be engaged in. The difficulty is that there has been no real consistency in enforcement of criminal statutes, against the corporations. Fines have been picayune and violations often go undected. The 1961 electrical equipment antitrust cases disclosed that a conspiracy to fix prices and rig bids had been continuing in some product lines for more than 30 years.

Mr. Blakey. What you are describing is failures in administration as opposed to failures in the drafting of the law. How can we meet failures in administration—and by "we," I mean the subcommittee—by changing legal provisions?

Mr. Ruben. I think, in drafting the legislation, you take the system as a whole, and you work with it as it is likely to operate. You take into account the fact of prospective deficiencies in administration, the fact of what juries are likely to do, and you draft your law to try to meet these situations.

Mr. Blakey. Do you think there would be any problem in jury nullification where fines were set so high that the jury might feel that this would be an unfair imposition on either the shareholders or the consumers and thus not convict?

Mr. Ruben. No. First of all the imposition of sentences should be separated from the determination of guilt.

Mr. Blakey. Do not juries, in fact, normally know what happens to defendants?

Mr. Ruben. I would doubt very much that the average juror has heard about or is concerned with fines imposed on corporations. Indeed, the publicity given to corporate convictions is minimal. The greatest publicity outburst that occurred in modern times was in 1961 with the conviction of a number of major, well known companies, including General Electric and Westinghouse for violations of the antitrust laws. Yet, even here, the news media accounts were something less than overwhelming and the stories minimized the corporate fines while playing up the fact that two individuals were sent to jail. The conviction of some of the smaller corporations were not even mentioned in some newspapers.

So, to say that jurors know that corporations are convicted, and know the size of the fines they pay, I think perhaps is not realistic. I do not think they do.

Mr. Blakey. My suggestion was if we increased significantly the fines to be imposed on corporations, would this not become a matter of common knowledge in the community, and if it became a matter of common knowledge in the community, could this not serve the defeat the economic goal sought to be achieved, to wit: Convictions, meaningful convictions, and ultimately changing corporate behavior?

Mr. Ruben. Assuming for the moment that jurors do know of the imposition of the kind of fines that you are talking about, I still do not think so. I do not think that this knowledge would be used to defeat convictions at all. There is a lot to be said for the common sense of the juror who understands that the corporation has made an illicit profit as a result of its activities. I believe that he would feel that fines are a good way of removing the profitability from the offense and deterring future violations. As the public becomes more aware, particularly in the area of consumer protection, of the kinds of violations which corporations commit jurors are likely to feel that fines will deter or reduce the kind of violations that they are concerned about. I do not think that they would hesitate to convict for fear that the fines imposed may be unduly large. In point of fact, there is a method of relating the amount of the fine to the size of the corporation. The European Economic Community, provides

in regulations governing anticompetitive conduct for a sentencing commission to impose a fine based upon net income of up to 10 percent of the annual turnover of the guilty corporation. In this way, the fine is made proportionate to the scale of the enterprise.

A second kind of sanction imposed by the code enables the court to require the corporation to publicize its conviction to putative vicitims. I would recommend instead, adoption of the alternative proposal which would expand the scope of the publicity to notify all classes of persons interested in the conviction. Again, drawing on experience with the most publicized corporate convictions of modern times, the 1961 electrical equipment conspiracy cases, a survey of the coverage appearing in major newspapers found that, typically, none of the terms of the sentences imposed upon the defendants were included in the accounts and that not even a list of all of the corporations involved in the conspiracy was published. Convictions of and sentences imposed upon corporations frequently go unreported except in official documents which go unnoticed by the public. Newspapers tend to be quite selective in what they report. And, this selectivity is exercised without any individious intent. It is simply a question of space and reader interest. Therefore, the alternative sanction in allowing for widespread formal publicity seems to perform a significant function. Quite aside from any economic impact, as by inducing a consumer boycott, such publicity does have other side-effects. For one thing, corporations have prestige in the legislatures, not only in this Congress but in the State legislatures and in the councils of municipal governments, and there is no questions but what publicizing a conviction tends to lower the prestige of the corporation. It imposes a stigma which may severly hamper the effectiveness of its lobbying efforts.

Mr. Blakey. Would it not also be true that that same kind of publicity could have that same effect upon individual defendants?

Mr. Ruben. The code does not impose an individual publicity sanction:

Mr. Blakey. This committee could expand the sanction to fit individuals, too, could it not?

Mr. Ruben. Yes, it certainly could.

Mr. Blakey. Could you not require them to give publicity?

Mr. Ruben. Most certainly. There is no reason why not.

Mr. Blakey. Do you think there would be any constitutional problem with requiring a person to give that kind of publicity?

Mr. Ruben. Well, I do not think so. I do not think it is "cruel"——

Mr. Blakey. Would it be unusual punishment?

Mr. Ruben. Well, "unusual punishment" in the sense of cruel and harsh——

Mr. Blakey. No. just simply unusual.

Mr. Ruben. "Unusual" in the constitutional sense does not mean "novel." It does not fix the penalties as they were known in the 18th century for all time and prevent any new ones from being imposed.

Mr. Blakey. Do you think there would be any degree of cruelty involved in using social opprobrium directly as a means of controlling antisocial conduct?

Mr. Ruben. I do not think so, so long as it is done in the sound discretion of the sentencing judge when that the offense is willful

and publicity is imposed upon an individual who deliberately sets out to violate criminal laws and succeeds in doing so.

Mr. Blakey. Could we require a thief after the third conviction, to have tattooed across his forehead the phrase: "Thief," so all people who dealt with him in the future would know that he was a thief?

Mr. Ruben. As in so many areas, there is a matter of degree involved. I think the tattooing much like the branding iron involves physical injury and perhaps would be proscribed. The formal publicity sanction does not so offend. All we are doing is formalizing what the newspapers——

Mr. Blakey. What is the difference from requiring a human being to tattoo across his forehead, perhaps, or have a sign, perhaps, saying: "I am a thief," and requiring a corporation, as a part of its formal advertisement, to say, for example, "Progress may be our product, but we also fix prices?"

Mr. Ruben. Notions of personal privacy seem to me to have little application to a fictitious entity, the corporation. In the case of the individual required to carry a sign, this was done at common law and in the early days of this republic along with sentencing a person to the stocks.

Mr. Blakey. But we did away with it for humanitarian reasons. We eliminated the stocks, the branding and other forms of social opprobrium as the means of coercing human beings' conduct, did we not?

Mr. Ruben. Yes, we did.

Mr. Blakey. Are you not suggesting that this be reintroduced for at least those human beings who engage in corporate or other organizational activity?

Mr. Ruben. I am suggesting that a court may require publicity to be given to the conviction of an individual who commits a crime on behalf of a corporation, not as a means of stigmatizing the individual involved per se but rather as getting at the corporation on whose behalf the conduct was committed and, presumably, who tolerated this kind of behavior.

Mr. Blakey. Getting at them to do what?

Mr. Ruben. To take steps so that such kinds of conduct are not repeated, so that——

Mr. Blakey. Why would they not repeat the conduct if they had to give publicity?

Mr. Ruben. Because I think that adverse publicity in today's world whereby the illicit compact of a public corporation is brought to public attention is very effective as a penalty.

Mr. Blakey. It would lower the corporation's esteem in the public eye?

Mr. Ruben. It has many impacts. It would lower the esteem of the corporation in the public's eye——

Mr. Blakey. People's esteem be lowered. Is that not really a functional definition of social opprobrium?

Mr. Ruben. Of course, this is so. We ask whether a person has been convicted of a crime. If he has, surely his prestige is affected adversely. Indeed, we impose civil penalties at the present time upon those who are convicted of certain crimes. We subject them to a

variety of disabilities affecting their right to testify in court, to vote, etc. These are all forms of social opprobrium that we customarily use, and, in my judgment, are far more severe than publicity.

Mr. BLAKEY. But they are all indirect. They are not direct. A person cannot vote because we hope to avoid the possible adverse impact on elections of felons. But we do not necessarily expect him to carry a sign on his back saying "I am a convicted felon."

Mr. RUBEN. Well, take the case of criminal registration laws where criminals had been required to register and report their presence in particular localities in the State——

Mr. BLAKEY. Those laws were to give notice to the police, not to the people in general.

Mr. RUBEN. That is correct, but banks send out credit application forms asking about convictions, and insurance companies seek such information before issuing insurance policies. It is available in data banks at credit investigating agencies, so to say that information about a person having been convicted of a crime is not used publicized and in our society today is incorrect. In almost every aspect of a person's life the fact that he has been convicted of a crime will affect him, and this fact is called for and is kept on file, privately and publicly.

Mr. BLAKEY. And you do not see any privacy problems with that?

Mr. RUBEN. I think when a person goes out to deliberately commit a crime, I think he has forfeited his right to privacy when convicted; not forever and a day, of course, but publicity runs its temporary course. In point of fact, no formal publicity sanction is necessary in the case of an individual convicted of a crime of violence or a public official convicted of a breach of trust. If the crime is heinous enough it gets in the newspapers on page 1 anyway. The difficulty with "white collar" corporate crime is that it is not thought newsworthy enough to get on page 1. The regular "informal" private mechanism for providing a publicity sanction is simply not operative. The "formal" publicity sanction provided by the code, if extended to corporate officers, would thus supplement the normal channels of media communication and assure that notice of convictions of these individuals is given to the public at least to the same extent as in other cases.

Finally, if I may, I would like to turn to a third kind of sanction which may avoid some of the drawbacks of other sentencing alternatives, and that is a new concept in probation.

Now, the drafters of the code in establishing conditions of probation seemingly had only the individual offender in mind. Yet we have failed to do very much at all about the rehabilitation and reform of the individual criminal. I think the last Presidential Commission Report coined the term "warehousing" for confinement to correctional institutions. And, the recidivism rate suggests that the probation system is a failure.

Senator HRUSKA. Mr. Ruben, 5 minutes of your time now remains.

Mr. RUBEN. Thank you.

I think that we have a better chance of rehabilitation and reform of the corporate offender, paradoxically enough, under a probation system, than we seem to be having with individuals. I would urge, however, that appropriate conditions of probation for the corporate

violator be established. These conditions include the setting up of "affirmative action" or "compliance programs," policed by a monitor which require convicted corporations to formulate precise policies and guidelines as to how they will comply with all applicable laws and regulations to create a mechanism for assuring that its personnel are really informed of and adhere to those policies.

I would give supervision of such affirmative action program to a corporate probation officer or "monitor" appointed by the court. I would further set out in the conditions accompanying corporate probation requirements that the convicted corporation allow the monitor notice of and access to all meetings of its board of directors, the executive committee of the board, its officers and other high managerial personnel. I would also give him access to all corporate books and records including all records made by or for individual corporate officers. And, finally, I would give him access to and the right of inspection of all plant facilities and operations as he may choose.

The corporate monitor would be qualified for his appointment by training in the disciplines of law, accounting, engineering, chemistry and such allied professional fields as would enable him to perform his duties in light of the nature of the offense of which the corporation was found guilty.

Indeed, there may be reason to have two or more monitors in charge of the corporation's rehabilitation if the offense so warrants.

As for the present such corporate probation officers might be borrowed from agencies which were associated with the particular prosecution or from other Federal agencies on a temporary basis. In the future a permanent staff of such professionals might be developed in the probation service.

The introduction into the internal affairs of the corporation of these monitors would also have a very salutary deterrent except upon other potential corporate violators. If there is one thing that a corporation will not stand for, it is outsiders looking over the shoulders of its chief corporate managerial personnel and turning the light on in the hitherto secretive board room. To have such a corporate monitor assigned to the convicted corporation would send shivers up and down the spines of managerial personnel.

I would like to call to the committee's attention one such innovative use of the probation system already used by Judge Lambros in the northern district of Ohio.

Here, he found the Cleveland Electric Illuminating Co. guilty of violation of the 1899 Navigable Waters Act, and promptly put them on 6 months probation. To insure that they discontinued dumping their refuse into the Cuyahoga River, he had an employee of the Environmental Protection Agency assigned as probation officer to inspect and report on the company's compliance with the probationary conditions. We have not done much with the concept of corporate probation. Yet, this sanction offers great hope for deterring white collar crime and effectively reforming the corporate offender.

Senator Hruska. In that latter case, Professor Ruben, the court put the defendant's operation under the supervision of a qualified employee of the Environmental Protection Agency. Did he add anything by force of law?

Is not the inspector from the Environmental Agency required to make inspections and to police all plants, including this plant, under the terms of existing law?

Did he add anything except a little frosting to add to his reputation of being a strict judge? What do you think?

Mr. RUBEN. I think something was added, Senator, because, as much as I would like to see it otherwise, the staff of the Environmental Protection Agency is terribly limited. As we would like to see them make regular inspections as a matter of course, this is not the case. But for the court's order we could not be sure that within a given time the appropriate engineering changes would have been made in the plant to provide an effective and nonpolluting waste disposal system. As I say, this is a timely prototype of a probation system that can be developed in the future.

Senator HRUSKA. Fine. Thank you very much. You have added a good deal to the record, thanks to the questions asked by Mr. Blakey and your responses thereto.

Mr. RUBEN. My pleasure, Senator.

Senator HRUSKA. I would like to insert in the record at this point the prepared statement by the National Association of Manufacturers on corporate criminal liability,[1] and also an article on corporate criminal liability which appeared originally in the University of Pittsburgh Law Review by Professor Gerhard Mueller,[2] who testified before us on Tuesday on other matters relating to the proposed code.

Senator HRUSKA. The record will show that the next witness is Mr. Mac Asbill, Jr., of the section on Taxation, American Bar Association.

I see that you are flanked by some other distinguished legal experts. Will you introduce them for the record and for the benefit of the committee?

STATEMENT OF MAC ASBILL, JR., CHAIRMAN, SECTION OF TAXATION, AMERICAN BAR ASSOCIATION; ACCOMPANIED BY JULES RITHOLTZ AND LLOYD HALE OF NEW YORK CITY

Mr. ASBILL. I will be happy to, sir. On my left is Mr. Jules Ritholtz from New York and on my right Mr. Lloyd Hale also of New York. These gentlemen are members of our Section's Committee on Civil and Criminal Tax Penalties. We operate, in the section, primarily through committees, and it is this committee which has jurisdiction over the matters we are discussing today. The members, including these two gentlemen with me and others, have done a good deal of spade work for our section on this project, and I have asked Messrs Ritholtz and Hale to join me so they could assist in answering any questions you might have.

Senator HRUSKA. Your statement will be placed in the record in its entirety, and you may proceed, Mr. Asbill.

Mr. ASBILL. Thank you.

(The prepared statement submitted by Mr. Asbill reads in full as follows:)

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[1] See p. 1779.
[2] See p. 1797.

STATEMENT OF THE SECTION OF TAXATION
OF THE AMERICAN BAR ASSOCIATION
ON THE PROPOSED FEDERAL CRIMINAL
CODE AND ON THE REPORT OF THE
NATIONAL COMMISSION ON REFORM
OF FEDERAL CRIMINAL LAWS

Mr. Chairman and Members of the Subcommittee:

My name is Mac Asbill, Jr. I am an attorney practicing in Washington, D. C. and am presently Chairman of the Section of Taxation of the American Bar Association. That Section contains about 14,000 lawyers who are interested in the formulation and administration of our federal tax laws.

As you know, the House of Delegates of the American Bar Association has endorsed in principle proposals of the National Commission on Reform of Federal Criminal Laws regarding the restructuring of those laws and scope of Title 18. I has authorized the Association's Section of Criminal Law to offer its assistance in working with the executive branch and the Congress in developing specific proposed legislation to implement reform of the federal criminal laws, and to coordinate the similar assistance of other interested Sections of th Association. Pursuant to this authorization, I am pleased to have the opportunity to present to the Subcommittee on Crimin Laws and Procedures the views of the Section of Taxation, dev loped by its Committee on Civil and Criminal Penalties, and

approved by its Council, on certain major features of the proposed Federal Criminal Code (hereinafter pFCC) relating to tax crimes. American Bar Association support of any specific legislative proposals resulting from this joint effort will require further approval of such proposals by the House of Delegates or the Board of Governors of the Association.

I shall discuss briefly what appear to us, from the standpoint of tax lawyers, to be the major issues and problems resulting from the shift of many, but not all, tax crimes from Title 26 to Title 18; from changes in the elements of some of those crimes; and from the effort to apply to tax crimes certain concepts and approaches which the Commission proposes as generally applicable to all federal crimes. As my remarks will make clear, we believe that in some respects tax crimes may be *sui generis*, requiring rules which differ from those applied to other crimes.

I.

TRANSFER OF PENAL REVENUE SECTIONS FROM TITLE 26 TO pFCC

The introductory note to Chapter 14, Internal Revenue and Customs offenses, states that the chapter incorporates the principal tax offenses now located in Title 26 pursuant to the policy of integrating into the proposed Code all serious federal offenses. If one focused only on the tax laws, one might question the validity of this policy. The reasons for keeping

together, within a single title, all of the statutory provisions relating to a specific area of activity, such as the reporting, payment and collection of federal taxes, might be thought to be at least as compelling as the reasons in favor of including all serious federal crimes in one title, particularly in view of the fact that the crimes specified in Title 26 are rather carefully integrated with a number of civil penalties contained in that title.*/ However, similar arguments could presumably be advanced

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*/ See e.g. the following statement from Spies v. United States, 317 U.S. 492 at 496-7:

> "Sanctions to insure payment of the tax are even more varied to meet the variety of causes of default. It is the right as well as the interest of the taxpayer to limit his admission of liability to the amount he actually owes. But the law is complicated, accounting treatment of various items raises problems of great complexity, and innocent errors are numerous, as appear from the number who make overpayments. It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay. §§ 292 and 294 of the Revenue Act of 1936 and of the Internal Revenue Code, 26 U.S.C.A. Int. Rev. Code §§ 292, 294. If any part of the deficiency is due to negligence or intentional disregard of rules and regulations, but without intent to defraud, five per cent of such deficiency is added thereto; and if any part of any deficiency is due to fraud with intent to evade tax, the addition is 50 per cent thereof."

with respect to other areas of the law; and if numerous exceptions were made, the proposal to restructure the federal criminal laws would be doomed. Accordingly, we do not oppose the inclusion of tax crimes in the recodification; rather we hope to call attention to certain problems which must be solved in order to make the recodification a substantial improvement over existing law.

The enactment of the pFCC would create a situation where some tax crimes would be shifted to Title 18 while others would not. It is not clear what becomes of those provisions, or parts thereof, which are not shifted. What, for example, is the intention of the draftsmen as to that part of Section 7203 relating to willful failures to pay, keep records, or supply information; as to Section 7205, relating to fraudulent withholding of exemption certificate or failure to supply information; and as to Section 7209, relating to unauthorized use of stamps? Will these sections be repealed or will they continue as part of Title 26? If they continue in effect, will they be tied into the new Title 18 via Section 1006? The answers should be clearly stated. Until this is done, it will be impossible to determine whether the recodification results in gaps or in inconsistently overlapping provisions.

Moreover, where a provision of Title 26 is shifted to Title 18, and where it is clearly modified or embodied in a more generally applicable provision in the process, many questions arise. Thus, what happens to Paragraphs 7214(a)(4)-(6) in view of the Comment to pFCC Section 1004 (Criminal Conspiracy) which

states that under the pFCC there will be no crime of conspiracy to defraud the United States (as in present 18 U.S.C. Section 371) and no specific substantive offense of defrauding the United States? What is the effect of the omission in pFCC Section 1402(d) of the exception in Section 7215(b) to the criminal provisions relating to withholding? When Section 7210 (Failure To Obey Summons) is carried over and embodied in the broader pFCC Section 1342, is the substantial judicial gloss for this section[*/] eliminated or does it continue? Is the degree of protection afforded the public against unauthorized disclosure of tax return information by Section 7213 substantially diluted by the more general pFCC Section 1371, which grants protection from disclosure only to information made available to the government "under a governmental assurance of confidence?"

Paragraph 1401(1)(f) affords another illustration of the ambiguities which can result from lifting a provision from the Internal Revenue Code and incorporating it into another title, together with other provisions of general applicability. That paragraph makes a person guilty of tax evasion if "he otherwise attempts in any manner to evade or defeat any income, excise, estate or gift tax." This language is derived from the clause "attempts in any manner to evade or defeat any tax" now contained in IRC Section 7201. The United States Supreme Court in Spies

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*/ See e.g. Reisman v. Caplin, 375 U.S. 440 (1964), and the discussion under X, below.

v. United States, supra, has made it clear that the word "attempt" in IRC Section 7201 means something quite different from its meaning in the criminal law generally. The Court stated (317 U.S. at 498-9):

> "The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

Apparently it was the intention of the Commission to import this judicial gloss into the pFCC when it lifted language out of IRC Section 7201. However, other provisions of the pFCC, which are intended to be generally applicable throughout criminal law, cast doubt on this conclusion. Section 1001(1), located in Chapter 10, defines "criminal attempt" as conduct which "constitutes a substantial step toward commission of the crime," and Section 1005(2), in the same Chapter, states that

"whenever 'attempt' . . . is made an offense outside this Chapter [e.g., in Section 1401, which is under Chapter 14] it shall mean attempt . . . as defined in this Chapter." Obviously it is unclear from all these provisions whether "attempt" as used in Paragraph 1401(1)(f) has a special meaning which it has acquired in the tax area or whether it has the meaning which it has acquired in other areas of the criminal law.

The Commission has apparently proceeded on the assumption that the proposed Code substantially recodifies present law. The questions posed above, and the more fundamental matters discussed below, make it clear, we believe, that significant changes have been wrought, many of which may be unintended. They may well be desirable changes, but at least this Subcommittee and the Congress should be fully aware of their existence.

II.

THE REQUIREMENT OF A DEFICIENCY AS AN ELEMENT OF INCOME TAX EVASION

Under present case law, it is a requisite element of the crime of income tax evasion that there be a substantial deficiency due to fraud.*/ Generally speaking, a "deficiency" is defined to mean the excess of the tax due over the amount, if any, shown on the tax return. IRC Section 6211. Thus, the

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*/ See e.g. Tinkoff v. United States, 86 F.2d 868, 878 (7th Cir. 1937); United States v. Nunan, 236 F.2d 576, 585 (2d Cir. 1956).

requirement today is that there be a tax due and owing in excess of the amount shown to be due on the return regardless of whether or not the filing of the fraudulent return is the act claimed to constitute the evasion. Furthermore, this deficiency must be fraud-tainted, and the requirement would not ordinarily be satisfied by a technical adjustment in depreciation or the like. Chapter 14 of the pFCC apparently does not make the existence of a deficiency a necessary element of the crime of tax evasion. See Statement of Senator McClellan, p. 42 of February 10, 1972 Hearings.

We question the propriety of defining the crime of tax evasion in such a way that the requirement of a fraud-tainted deficiency, as an element of the crime, is eliminated. It seems doubtful, to say the least, that a person should be branded a tax evader if, in fact, he evaded no tax and reported the amount of tax actually due.

On the other hand, under IRC Subsection 7206(1), the willful making and subscribing, under the penalties of perjury, of a return which is known to be false as to a material matter, though it is not tax evasion, is now a felony even if there is no tax deficiency. Under pFCC Subsection 1401(1) that offense, absent a deficiency, would become a Class A misdemeanor, since there must be a deficiency for felony treatment under pFCC Subsection 1401(2). We question whether the downgrading of Subsection 7206(1) was intended.

It is not clear whether Paragraph 1401(1)(f) of the pFCC embodies the requirement of a substantial deficiency even if no deficiency is required under the other paragraphs of Section 1401. As indicated above, Paragraph 1401(1)(f) substantially but not completely, carries over the language of the present IRC Section 7201. If the judicial gloss on Section 7201, which now requires a substantial deficiency, is carried over with the statutory language into the pFCC, violation of Paragraph 1401 (1)(f) could seldom, if ever, constitute a misdemeanor, and might not constitute a Class C felony even though the deficiency exceeded $500. The small deficiency required by Paragraph 1401(2) (b) (any amount over $500) would not describe a "substantial" deficiency in most contexts. Since the requirement of substantiality superimposed on Section 7201 by judicial gloss would not be met, there might be no violation of paragraph (f) even though Paragraph 1401(2)(b) would lead to the conclusion that a Class C felony had been committed.

III.

SPECIAL PROBLEMS WITH GRADING IN CHAPTER 14

The attempt to extend the grading concept to tax offenses and to base grading on the amount of the "deficiency" creates other serious problems both of construction and of workability which are peculiar to the tax area.

It is only by means of the application of the grading

standard that an offense can be characterized as felony or misdemeanor. If the deficiency exceeds $500, the crime is a felony; if the deficiency is $500 or less, the crime is a misdemeanor. pFCC Subsection 1401(2).) But the amount of the deficiency in most cases cannot be known until the case is tried. This arrangement injects into the trial of tax crimes various procedural problems which do not now exist. These problems all stem from the fact that until the trial is complete and the amount of the deficiency is known, it may be impossible to determine whether the crime is a felony or a misdemeanor. How does the prosecutor decide whether to proceed by information or indictment? How can one determine the number of challenges to which each party is entitled in the course of jury selection? (Rule 24(b) Fed. R. Crim. P.) How could one know in advance the applicable statute of limitations since, under the pFCC, the limitation period is three years for a misdemeanor and five years for a felony? (Subsection 701(2).) The statute of limitations, now a plea in bar which vitiates the need for trial of stale and ancient claims, could, in many instances, not be effectively asserted until after the stale and ancient claim has been tried.

Much more serious than any procedural problems, however, is the anomaly of making the gravity of the crime of tax evasion depend upon a fact -- the size of the deficiency -- which may bear no logical relationship whatever to the criminal act. If a taxpayer fraudulently omits $2,000 of income, on

which the tax would be $400, should it matter, for criminal purposes, whether he also, mistakenly but in good faith, overstates his depreciation deductions by $6,000, thereby increasing the deficiency to an amount in excess of $500? We think not. If the deficiency is to control the magnitude of the offense, one should look only to that portion of the deficiency attributable to fraud. Indeed, the Section of Taxation, and the American Bar Association have recommended that even the 50% civil fraud penalty be applied, not to the entire deficiency, but only to that portion attributable to fraud. Section of Taxation Recommendation No. I submitted to and approved by the House of Delegates on February 7, 1972. (24 The Tax Lawyer 893 (Summer 1971).)

By grading the crime of tax evasion according to the size of the deficiency, the pFCC sets the stage for a civil trial within every criminal trial for tax evasion. It is likely that the issue of guilt or innocence will be obscured by preoccupation with the often totally unrelated issues of tax liability. Under present law, the size of the deficiency is almost never determined with any precision in a criminal case; having been instructed that there must be a "substantial" deficiency attributable to fraud in order to support a conviction, the jury merely returns a verdict of guilty or not guilty. Under the pFCC juries in criminal tax cases will be required to determine whether the deficiency exceeds the floor for each gradation of

the offense of tax evasion. This determination will frequently be based upon reasonably arguable technical matters of tax liability which have no place in a criminal trial.

The illogic of such a grading system becomes even more apparent when considered in connection with the newly defined offenses of criminal attempt and criminal facilitation (pFCC Sections 1001, 1002) as they apply to tax evasion. The grading of the crimes of attempt and facilitation depends upon the grading of the offenses attempted or facilitated. Since the grading of tax evasion depends on the amount of the deficiency of the evader, the alleged attemptor or facilitator may well be judged on the basis of acts which were not only innocent, but which were the acts of another person over which the attemptor or facilitator had no control.

Moreover, the existence of a deficiency (and _a fortiori_ the size of a deficiency) has no relationship whatever to the offenses specified in paragraphs (b), (c), and (d) of pFCC Subsection 1401(1). The crimes described in those paragraphs can and frequently do occur where there is a tax liability but no "deficiency." Consequently, the grading provisions of Subsection 1401(2) are simply inapplicable to those paragraphs. If grading is to apply to those paragraphs, it should be made clear what the criterion is. Should grading under pFCC Paragraph 1401(1)(b) be based upon the amount of the unpaid tax or the value of the asset removed or concealed? Presumably grading

under Paragraph 1401(1)(c) should be based upon the amount of taxes collected, withheld or received but not accounted for or paid over. It would seem that grading of the crime of destruction of government property under Paragraph 1401(1)(d) should depend upon the degree of the depredation (which might be quite difficult to measure), not upon the amount of unpaid tax, nor upon the usually irrelevant value of the property destroyed.*/

The Section of Taxation finds substantial merit in the present rule of IRC Section 7201 that makes all evasions felonies subject to the requirement of a substantial deficiency due to fraud. If, in defining the crime, further specificity is deemed necessary, substantiality could be defined in absolute or relative terms or both. Perhaps a similar combination of relative and absolute tests could be employed where, as under Paragraphs 1401(1)(b), (c) and (d), the amount of the tax liability or the value of property concealed or removed is the key to grading.

IV.

STANDARDS OF CULPABILITY

We find confusing, as applied to tax offenses, the statement of the requirements of culpability in Section 302 of the pFCC. Four culpable mental states are described by the adverbs "intentionally," "knowingly," "recklessly," and "negli-

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*/ It seems questionable whether pFCC Paragraph 1401(1)(d) is necessary at all in view of pFCC Sections 1356, 1705.

gently." "Willfully" is then defined to mean any _one_ of the first three of these kinds of culpability. Paragraph 302(3)(a) provides that "where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition of the offense, _except that where the required culpability is 'intentionally,' the culpability required as to an attendant circumstance is 'knowingly.'_" (Emphasis added.) We agree with the "substantial body of opinion in the Commission" which, according to the Comment following Section 302, "has serious reservations about the introduction into federal jurisprudence of the highly refined scheme of mental culpability here proposed."

The definition of willfulness in pFCC Paragraph 302(1)(e) represents a substantial reduction in the degree of culpability from the concept of "willfulness" required for tax crimes under present law. The _new_ definition provides that conduct is engaged in "willfully" if it is done "intentionally" _or_ "knowingly" _or_ "recklessly." Under present law neither recklessness nor mere scienter satisfies the requirement of willfulness specified as an element of tax crimes in various provisions of the Internal Revenue Code.*/ Willfulness under present law as

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*/ Indeed, it seems to us that "recklessness" is a particularly inappropriate standard of culpability to apply to the crime of tax evasion as it is an inappropriate standard, at least in most settings, by which to test corporate criminal liability resulting from the acts of corporate employees. See pFCC Paragraph 402(1)[a], alternate provision.

applied to tax crimes requires a bad purpose, an evil motive and a specific intent to accomplish what the law forbids. See, e.g., Spies v. United States, supra, at 499; United States v. Palermo, 259 F.2d 872, 877-882 (3d Cir. 1958); Haner v. United States, 315 F.2d 792, 794 (5th Cir. 1963); and Edwards v. United States, 321 F.2d 324, 325 (5th Cir. 1963). The parameters of the term are delineated by rather voluminous case law in the tax field. We believe it would be a mistake to discard years of learning expressed in carefully thought out judicial opinions clarifying and explaining the meaning of the term "willfully" with particular application to tax offenses. We have seen no rationale which would support the abandonment of this well-established standard in favor of lower standards in the federal tax area.*/

We are uncertain whether the newly defined standard of willfulness even applies under certain provisions of the

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*/ Indeed, use of the lower standards can produce strange and questionable results under certain subdivisions of pFCC Section 1401. Presumably a taxpayer could be guilty of a felony if, owing taxes to the United States and also being indebted to others, he preferred one or more of his other creditors. (Paragraph 1401(1)(b).) He could also be guilty of a crime, even absent the bad motive required by the current standard of willfulness, if he failed to pay over withheld taxes. (Paragraph 1401(1)(c).) Many have argued that IRC Section 7202, which makes it a crime willfully to fail to pay over withheld taxes, is unnecessary and inappropriate in the light of the 100% penalty provided by IRC Section 6672 for the failure of responsible officers to withhold and pay over as required by law. Their argument would, of course, be infinitely stronger if the standard of culpability for criminal failure to pay over was reduced to "intentionally" or "knowingly."

pFCC. Subsection 302(2) states that where culpability is not specified, the culpability required is "willfully." Paragraphs (a) -- (e) of Subsection 1401(1) do not contain any of the adverbs which are used in Section 302 to specify the kinds of culpability. Yet they all begin with the phrase "with intent to evade. . ." Does this language impose the "intentionally" standard?*/ If so, is the standard meant to be different from the requirement of "willfullness" imposed by current law? Professor Duke, Consultant on Protecting Federal Revenues, did explain as to one draft of Chapter 14 that was later changed in the Study Draft:

> "While not employing the word 'wilfully,' the Draft in requiring 'intent to evade' does not alter the mens rea of tax evasion. Under section 7201, the defendant must know, at the time he engages in the proscribed conduct (herein, execution, mailing, filing, or delivering his return [changed in Study Draft simply to 'file or causes the filing of a tax return or information return']) that his return is false, i.e., that it understates his tax obligations [also changed in Study Draft to 'which is false as to material matter'], and he must intend thereby to evade his obligations. That is what is meant by 'intent to evade' in the Draft." **/

If this concept survived in the pFCC it is nowhere spelled out or compelled, either in the Code itself or the commentary.

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*/ See pFCC Paragraph 109(t).

**/ Working Papers, pp. 748-749.

Finally, we note that the standard of culpability applying to pFCC Paragraph 1401(l)(f) is far from clear. That paragraph provides that a person is guilty of tax evasion if "he otherwise attempts in any manner to evade or defeat any . . . tax." In the Comment to Section 1401, paragraph (1)(f) is described as a substantial re-enactment of IRC Section 7201, and, as we have shown above, the statutory language of that paragraph, unlike that of paragraphs (l)(a) through (e), tracks that of the present statute. This suggests that the degree of culpability required under proposed paragraph (l)(f) is the same as that required under the present law. But such a result would be out of keeping with the vague and reduced standard of culpability apparently applicable to what the Commission regards as the principal means of evasion -- i.e., filing a false return. See pFCC Paragraph 1401(l)(a).*/

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*/ One of the most puzzling ambiguities resulting from the shift of the tax crimes to Chapter 14 and from the rewording of those crimes is that created by the use of the word "otherwise" in pFCC Paragraph 1401(l)(f). The preceding subdivisions of Subsection 1401(l) all begin with the phrase "with intent to evade." If the term "otherwise" in (f) means "other than with intent to evade," then (f) in effect provides that one can be guilty of the same crimes as those specified in paragraphs (a) through (e) even though his culpability (i.e., the new "willfully," which includes "knowingly") is considerably less than that required in the preceding paragraphs. This is so whether "with intent to evade" means "intentionally," or whether it is meant to import the present law's requirement of willfulness. If, on the other hand, the word "otherwise" in paragraph (f) means "by means other than those specified in the preceding paragraphs," i.e., by some means other than filing a false return or removing or concealing assets, etc., then why is paragraph (f) the only paragraph in Section 1401 which does not begin with the phrase "with intent to evade"?

Under pFCC Section 1402 the culpability required is "knowingly" -- the actor knows that he is engaging in the proscribed conduct. Particularly in a failure to file case that would be embraced by pFCC Section 1402 the proposed Code definition of knowingly, which expressly includes acts done without the purpose to do them, eliminates many defenses under present law and establishes a standard of culpability less than that required under present law for the 25% _civil_ penalty for failure to file where such failure is due to "willful neglect" and not due to reasonable cause. (IRC Section 6651 (a)(1).) Section 1402 would permit a conviction for late filing by a seriously injured person who was hospitalized on April 15th and consequently filed after that date. Such a taxpayer would "knowingly" fail to file on time, although it was not his purpose to be a delinquent taxpayer. Similarly, Section 1402 would permit the conviction of a taxpayer who had a reasonable belief, which turned out to be erroneous, that his accountant had applied for and obtained an extension of time to file. Under present law such a taxpayer would be protected by good faith reliance upon his accountant. See _United States_ v. _Platt_, 435 F.2d 789, 792-93 (2d Cir. 1970); _Haywood Lumber & Mining Co._ v. _Commissioner_, 178 F.2d 769, 771 (2d Cir. 1950).

V.

MISTAKE AND RELIANCE ON PROFESSIONAL ADVICE

Nowhere in the proposed Code is the defense of reli-

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ance on the advice or services of a professional person, such as an attorney or an accountant, specifically treated. The provision which most closely approaches the defense of reliance on professional advice is pFCC Section 609, which establishes mistake of law as an affirmative defense. But this Section requires reasonable reliance upon a formal legal pronouncement by Congress, a Court or an administrative agency. The comment to Section 609 suggests that a layman would not be reasonable even in relying upon such a pronouncement of law unless he consulted an attorney about it. Nowhere does the Section provide that reliance upon the attorney's advice is itself a defense.

In the tax area, reliance on the advice and/or services of attorneys, accountants and other competent people is commonplace and often necessary. It should be made clear that good faith reliance upon such professionals precludes a conviction for tax evasion. In the absence of such assurance, it should at least be made clear that existing law with respect to reliance is not being changed. See United States v. Platt, supra. A taxpayer should be protected by good faith reliance upon professional advice without any requirement that the taxpayer have personal knowledge of the specific provision of law involved.

Not only does the pFCC give no comfort with respect to reliance on professional advice; indeed it appears, by its conflicting provisions, affimatively to jeopardize this defense

and the related defense of mistake. Section 304 provides that no offense is committed if the person charged is ignorant or mistaken as to a matter of fact or law which would negate the kind of culpability required. Subsection 302(5), on the other hand, provides that culpability is not required as to the fact that the conduct is an offense. Yet pFCC Paragraph 1006(2)(b) provides that willfulness (which, by definition, includes knowledge) is required as to the existence of a penal regulation outside of the pFCC in order for a violation of such a regulation to be a misdemeanor. Further confusion is generated by pFCC Section 303 which states that a mistaken belief as to facts constituting an affirmative defense is not a defense.

The Section of Taxation also questions the propriety of treating mistake of fact or law or reliance upon the advice of others solely as an affirmative defense with the burden of proof on the accused. See pFCC Subsection 103(3). Rather, it should be the burden of the prosecution to prove beyond a reasonable doubt every element of the offense of tax evasion, including intent to evade and knowledge that taxes are being evaded, which means that the prosecution would have to disprove, beyond a reasonable doubt, good faith reliance if the issue of reliance were raised by the taxpayer. See *Sagansky* v. *United States*, 358 F.2d 195 (1st Cir. 1966).

VI.

SENTENCING

Under the pFCC, the penalties for the recodified tax

crimes differ greatly from those specified in the corresponding provisions of the Internal Revenue Code -- in some cases the pFCC penalties are more harsh, and in others they are more lenient. Insofar as we can ascertain, there is no demonstrated justification for these changes. The Section of Taxation questions the wisdom of such drastic changes absent some showing of the reasons therefor.

A few examples will illustrate the scope of the changes embodied in the pFCC. The maximum prison sentences applicable to tax evasion under Chapter 14 are substantially increased over those provided by present law. Thus, the maximum prison sentence today for each offense of income tax evasion is five years. IRC Section 7201. Under the proposed Code, each such offense carries a maximum prison sentence of fifteen years if graded as a Class B felony and seven years if graded as a Class C felony. pFCC Paragraphs3201(1)(b) and (c).*/ The Section of Taxation is aware of no justification for so increasing the maximum prison sentences for tax evasion. Indeed, recent thorough and authoritative studies of federal sentencing practices have concluded that all the *desiderata* of punishment, including deterrence and rehabilitation, would be achieved by imposing sentences far shorter than the present maximum for tax evasion offenses. See *ABA Project on Minimum Standards for Criminal Justice*, "Standards Relating

*/ In the "usual" tax evasion case pFCC Subsection 3202(1) would reduce the maximum sentence for a Class B felony to ten years and for a Class C felony to five years.

to Sentencing Alternatives and Procedures", Approved Draft 1968, Sections 2.1, 2.5(b) and 3.1(c), and commentary thereto; ALI Model Penal Code, Proposed Draft 1962, Article 7; Hon. Walter E. Craig, Sentencing in Federal Tax Fraud Cases, 49 FRD 97 (1969).

On the other hand, the maximum prison sentence specified in IRS Section 7206(1) for willfully making a false return, three years, is reduced by the pFCC to one year if there is no deficiency. See pFCC Subsection 1401(2). Again no reason is given for the change.

Present law sets the maximum fine for evasion and for willful failure to file at $10,000. Under the pFCC grading system discussed above, if tax evasion constitutes a Class B felony, the maximum fine remains at the present $10,000. (pFCC Paragraph 3301(1)(a).) If the tax evasion constitutes a Class C felony, the maximum fine is reduced to $5,000, and if the tax evasion is a Class A misdemeanor, the fine cannot exceed $1,000 (pFCC Paragraphs 3301(1)(b),(c)). It seems doubtful whether pFCC Subsection 3301(2), permitting higher fines in cases involving pecuniary gain, applies to tax evasion cases where, by hypothesis, the evasion has been discovered and the defendant usually realizes no pecuniary gain since he is required to pay not only the taxes due but also interest and a 50% civil fraud penalty. The Section of Taxation questions whether the maximum fines specified by the pFCC provide courts with a sufficient range of financial penalties for what is basically a financially motivated offense.

Moreover, the Introductory Note to Chapter 14 of the pFCC indicates that the offenses now described in the Internal Revenue Code which are not carried over to the pFCC are of a "regulatory character," presumably not as serious as the crimes which are imported into Chapter 14. Yet, unless special provision is made to make pFCC Section 1006, and the penalty provisions of the pFCC, applicable to those "regulatory" offenses, they may carry penalties which are much more substantial than some of the penalties provided for tax evasion or knowing disregard of tax obligations under the pFCC. For example, without such special provisions the offenses left in IRC Section 7203 would carry a potential fine of $10,000, whereas Class A misdemeanors under pFCC Section 1401 or 1402 would carry a maximum fine of $1,000. If the three offenses to be left in IRC Section 7203, now carrying the same penalty as failure to file, are subject to the provisions of pFCC Paragraph 1006(2)(b), the maximum prison term would be 30 days (pFCC Paragraph 3201(1)(e)) and the maximum fine $500 (pFCC Paragraph 3301(1)(d)), substantially less than at present and substantially less than would be provided for failure to file under pFCC Section 1402.

VII.

STATUTES OF LIMITATION

Under present law, the period of limitations within which criminal prosecution must be commenced for the felony of

evasion and for the misdemeanor of willful failure to file is six years. (IRC Section 6531.) However, pFCC Paragraph 701(2)(d) would reduce the statute of limitations from six to five years for felonies, and pFCC Paragraph 701(2)(c) would reduce the statute of limitations from six to three years for misdemeanors.*/

While the shortening of statutes of limitation is generally thought of as salutary, the Section of Taxation suggests that the shortening of the statute to three years in the case of the misdemeanors might place an unreasonable burden on the Internal Revenue Service and the Department of Justice. The Section of Taxation would not oppose these changes, however, if they are acceptable to the Internal Revenue Service and the Department of Justice.

VIII.

DECLARATIONS OF ESTIMATED TAX

Apparently it is the intention of the draftsmen to continue present law to the effect that the filing of a false

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*/ It should also be noted that the statute of limitations would probably be altered in the case of prosecutions under present 18 U.S.C. Section 1001 which is the false statement statute now frequently applied in income tax cases. Under 18 U.S.C. Section 3282, the statute of limitations for this offense is five years. The false statement offense probably becomes a Class A misdemeanor under pFCC Section 1352, and the statute of limitations would accordingly be three years rather than five. (pFCC Paragraph 701(2)(c).)

declaration of estimated tax or the failure to file such a declaration is not a crime. (See Paragraph 1409(e).) However, in view of the use of the term "information return" in pFCC Paragraph 1401(1)(a); the definition in Paragraph 1409(e), which excludes a declaration of estimated tax from the scope of "tax returns," but which does not exclude it from the scope of "information returns"; and the provisions of pFCC Paragraph 1352(2)(a), relating to false statements, it is not clear whether this intention is effectuated. This matter should be clarified.

IX.

VENUE

The Comment to pFCC Section 1401 states that "explicit venue provisions relating to [preparing,] . . . subscribing, and mailing [tax] return[s], if needed, would be incorporated in an amendment of 18 U.S.C. §3237, where they would apply to all offenses." Venue raises some difficult problems, especially in failure to file cases. Those problems were effectively resolved, we believe, by P.L. 83-713, which in 1966 added Section 3237(b) to Title 18. That amendment was drafted by the Committee of Civil and Criminal Tax Penalties of the Section of Taxation. Among other things, it deals effectively with the problem of Service Center filing. Accordingly, we urge that any amendment to Section 3237 not change Section 3237(b) except as may be necessary to conform section numbers.

X.

FAILURE TO PRODUCE INFORMATION

To the extent that pFCC Subsection 1342(1) represents a continuation of IRC Section 7210, it is not opposed. However, to the extent that pFCC Subsection 1342(3), specifying a few narrowly defined defenses, may be construed to eliminate other defenses or to overturn Internal Revenue Service summons enforcement procedure now established, the Section of Taxation opposes it.

Under present procedure, an Internal Revenue Summons issued under IRC Section 7602 must first be enforced by an order of a federal district court before refusal to comply with the summons may be punished as a contempt (IRC Section 7604(b)) or as a misdemeanor (IRC Section 7210). Reisman v. Caplin, 375 U.S. 440, 446-8 (1964). This requirement of procedural fairness, having its roots in due process, is for the purpose of "affording a judicial determination of the challenges to the summons and giving complete protection to the witness," 375 U.S. at 446. While under Reisman, a witness or other interested party may challenge a summons by moving in the district court to quash it, not all persons summoned will be aware of this right and many will not have the resources or capacity to bring such a proceeding. Therefore, to prevent the erosion of rights which would result from depriving taxpayers of the opportunity to explain or justify failure to comply with a summons, it

should be made clear that there is no intention to overturn or limit the procedural protections set forth in Reisman.

CONCLUSION

If the Subcommittee thinks that any of our suggestions or recommendations are meritorious, and believes that we could be of assistance in translating those suggestions or recommendations into statutory language, I would be happy to have members of the Section work further with members of the staff of the Subcommittee toward that end. We believe your project is a worthy one and that a significant start has been made. We would consider it a privilege to be called upon to assist the Subcommittee and its staff in completing the job. We applaud your dedication to the improvement of the criminal law and assure you that we share your goals.

Mr. ASBILL. Mr. Chairman, as you know, the house of delegates of the American Bar Association has endorsed in principle the approach taken by the Commission. It has authorized the association's section on criminal law to offer you its assistance and to coordinate the similar assistance of other sections, and it is pursuant to that authorization that I appear before you today to give you the views of the section on taxation on those portions of the proposed Federal criminal code which relate to tax crimes.

I am sure you are aware of the fact that any American Bar Association support of specific legislative proposals would require further approval of such by the house of delegates or the board of governors of the association.

Now, I would like to discuss briefly with you what seem to us to be the principal issues and problems relating to the tax laws which result, first from the shift of some but not all of the tax crimes from the Internal Revenue Code, title 26, over to title 18; second, from the changes in the elements of some of those crimes; and, third, from the effort to apply to tax crimes some concepts and approaches which the Commission proposes as generally applicable to all Federal crimes.

I think it will be clear from my remarks that we believe that in some respects at least tax crimes may be sui generis and may require special treatment.

First, looking at the problems arising from the transfer of tax crimes from the Internal Revenue Code to title 18, we do not quarrel with the concept of putting all crimes together in one code. We do think that problems arise from two matters in this connection. Since some but not all of the tax crimes are moved, the question arises: What happens to those that are left? Are they intended to be repealed, or do they stay as they are? Will they be melded into the new code by reference to section 1006, and so forth? These are, basically, I think, details which will have to be worked out.

As things now stand it seems to us that this area is quite unclear, and we think it deserves clarification.

The second general problem is what happens when you bring over a section or part of a section, and then make it a part of the new criminal code where it is modified, or is embodied in a generally applicable provision which may have certain differences, and we have given examples on pages 4 and 5 of my written statement of situations where those kinds of problems arise.

What happens to the provisions of 7214 (a)(4) through (6), which deal with defrauding the United States in view of the provisions in the proposed code which eliminate that as a specific crime? That is simply an example of the kind of coordination we think is necessary.

Now, one other specific example of this general problem is paragraph 1401(1)(f) of the proposed criminal code which is the one which, after specifying various means by which the crime of tax evasion may be committed, says that a person will be guilty of tax evasion if he "otherwise attempts in any manner to evade or defeat" any income, excise, estate, or gift tax. This paragraph creates a number of problems which I will discuss, but the one I want to focus

on now is the use of the word "attempt", in the clause "attempts in any manner to evade or defeat" tax.

That word comes from the current Section 7201 of the Internal Revenue Code, where it has a very specfiic meaning, which is quite different from its meaning otherwise in the criminal law. It is, itself, a crime; attempt is a crime. You do not simply stop short of the crime because you are prevented from achieving it. The "attempt to evade" is itself a crime.

Now, since the language of current law is used in paragraph (f) the question arises: Is "attempt" in paragraph (f) meant to have the same meaning that it now has, or is its meaning changed by other provisions in the proposed code which specically define "criminal attempt?"

I think these are matters which can and should be straightened out.

I think, in short, that the Commission perhaps has proceeded on the assumption that the proposed code in the tax area pretty substantially recodifies present law. I think it is clear that some significant changes have been wrought. Some of those might not be intended, and we would like to help the committee in any way we can to focus on those changes, so that it can make an informed judgment as to whether it really means to effect the changes, or whether it does not.

If I may move to another specific matter, the requirement of a deficiency as an element of income tax evasion. Now, under present law it is required under the court decisions that there be a substantial deficiency attributable to fraud in order for this to be a crime of tax evasion.

Mr. Blakey. I ask you what is the frame of reference in terms of which substantiality is determined?

Mr. Asbill. You mean whether absolute or percentagewise, is that the basis of the question?

Well, I think there is some ambiguity in the present law about that now, and I am not certain what the correct standard is. I think there are court decisions which seem to take the position that you have an absolute standard. If by looking at absolute dollars, for example, you have a substantial amount, albeit a small percentage of the total tax involved, that is sufficient.

I think other decisions tend to go the other way, and I have no particular position with respect to that here and, indeed, I question the advisability of even writing the word "substantial" into the law. If you agree with us that the present requirement of a substantial deficiency should be maintained, it would be perfectly all right with me to leave up to judicial determination precisely what "substantial" means in a given case. But, it seems rather anomalous to us to brand a person a tax evader if he has not evaded any taxes. So for that reason I think the requirement that there be a deficiency in order for the crime of tax evasion to be committed is a proper one to retain.

Now, on the other hand, there are tax crimes in the Internal Revenue Code, for example, 7206(1) which is the willful making and subscribing under penalties of perjury of a false return, which are graded as felonies even though there is no tax deficiency.

In this case the proposed code would move in the other direction.

It would, as I understand it, lower this crime to a midsdemeanor. I am not sure whether that is intended or not.

Now, back again, if I may, to paragraph 1401(1)(f), which is the general catch-all provision which I mentioned before. We are not certain, whether that embodies the present requirement of a substantial deficiency. It might be thought to do so because it lifts language bodily from the present section 7201 which, at least according to the case law, does contain that requirement. If that is the intended result, there are some rather anomalous differences between the various paragraphs of subsection 1401(1). But, in any event, it seems to us that the matter should be clarified.

Another problem arises from the fact that, although tax evasion can occur absent a deficiency under the proposed code, the crime of tax evasion is graded by the amount of deficiency. We think that is inappropriate. Under the code if the deficiency exceeds $500 the crime is a felony.

Mr. BLAKEY. Do you see an analogy between tax evasion with a deficiency, and theft?

Mr. ASBILL. I beg your pardon?

Mr. BLAKEY. An analogy between tax evasion with a deficiency and theft?

Mr. ASBILL. Yes, I think there is an analogy, and I would say this. If the deficiency is to be used as a criterion for grading, it seems to us that at least it should be that part of the deficiency attributable to fraud. That would, in some way, correspond to the amount of the stolen money. But, "deficiency" in the tax law is a term of art, and it means, generally speaking, the difference between the liability shown on the return and the actual liability.

And in many, many cases—

Mr. BLAKEY. If it were redefined in the terms of fraud-related deficiency——

Mr. ASBILL. I think that would make a great deal more sense. I still have some questions. Mr. Blakey, whether it is worth grading based on the size of the deficiency, because then I think you might get into long and time-consuming matters of proof in a trial which might not be too relevant.

Moreover, there are some crimes under the general heading of "tax evasion," in 1401, which really have nothing whatever to do with a deficiency. They can exist, and normally do, without regard to a deficiency. Those are the ones set forth in paragraph (b), (c), and (d).

For example, (b) (with intent to evade payment of any tax which is due, he removes or conceals assets) has no relationship whatever to a deficiency. If you are looking for grading standards there, presumably you would look to the size of the assets concealed or removed, rather than the deficiency.

You have similar problems in connection with paragraphs (c) and (d).

So, I would say this, if you are going to use deficiency as a standard, it certainly ought to be fraud-tainted deficiency, and furthermore, it ought to be limited to situations where the deficiency is a relevant consideration. Otherwise you will change a trial for tax evasion into a civil trial to determine the amount of tax liability,

which as you know, can be terribly detailed and terribly complex, this would simply pervert, in our opinion, the criminal process.

Now, moving for a moment, if I may, to the standards of culpability, I suppose we can express our view on this simply by saying that we agree with the substantial body of opinion in the Commission itself, which has difficulty with these subtle graduations in the proposed Federal criminal code. We are not sure we understand them. There are some features of them which I have tried to set forth in this statement which give us pause and bother us, and we wonder whether or not, at least in the tax area, the rather tried and true concept of "willfully," which has had substantial judicial interpretation in the tax field, should not be retained.

Mr. BLAKEY. You are not concerned so much about the word as you are the underlying idea?

Mr. ASBILL. That is right, if I understand what you are saying. If you used willfully, and intended by that to mean what the courts say it now means, that would not bother us.

Mr. BLAKEY. Or if we used intentionally and made it mean what willfully now means in the Internal Revenue Code?

Mr. ASBILL. That is all right, no problem about that.

Mr. BLAKEY. The problem which the culpability provision were addressed to is that the word "willfully" meaning different things in different contexts under present law. It meant one thing in the tax code, it meant one thing in regulatory offenses; and it meant 10 different other things elsewhere.

Mr. ASBILL. We understand that, Dr. Blakey.

Mr. BLAKEY. The commission's hope was to have words with dictionary meanings, roughly one meaning to one word.

Mr. ASBILL. I understand that, and I think that is a laudable goal, and I guess that is a pretty good illustration of what I meant when I said that perhaps in some matters the tax areas are sui generis. Now, you could solve the problem in one of two ways.

You could either say that for tax crimes, the standard of culpability is "willfully" as that term is now construed by the courts that would carve out an area for special treatment. Or you could attempt to define the new "intentionally" standard to mean the same thing that willfully does now, and make it clear that that is the standard of culpability that applies to tax crimes.

Mr. BLAKEY. I think that was the intent of the drafters.

Mr. ASBILL. Now, let me point this out——

Mr. BLAKEY. Whether it was executed well or not is a different question.

Mr. ASBILL. In the area of failure to file, which is presently a crime only if it is willful, the proposed code specifically states that that the standard is knowingly, and that means, if I understand it correctly, that a person who knows he is not filing his tax return, even though he has no intent to evade taxes, is guilty of a crime. We just do not think that that is appropriate.

We also have a question, what standard applies to paragraph 1401(1)(f). That paragraph does not begin as the others do, with the words with intent to evade. It begins with the word otherwise, which as we have tried to explain in the statement is quite ambiguous, and it is not clear what the standard of culpability there is.

Now, I refer in the statement to the fact that under the code, as written, failure to file a return by a taxpayer who had a reasonable belief, which turned out to be erroneous, that his accountant had applied for and obtained an extension is a crime. This is a very significant thing when the transgression stems from a mistaken reliance upon professional advice.

As the subcommittee knows, or as anybody who has ever tried it knows, making out a tax return or doing anything about the tax laws is a terribly complicated business.

Very few people are fully confident that they know exactly what they are doing, and consequently people have to rely very heavily on professional advice—accountants, attorneys, and others.

Now, we are not certain under the proposed code whether reliance, good faith reliance, on professional advice would be a defense, or what kind of defense it is. Professional advice is referred to in section 609 of the code, but, there a person seems to be limited to a defense which is based upon looking at a specific provision in a law or regulation, not simply relying on his professional adviser's advice.

We think that the conflicting provisions in the code dealing with the defense of mistake create further confusion about this, and we really believe and urge that this be clarified in some way, and that good faith reliance on professional advice be made a defense to a charge of tax evasion.

Mr. Blakey. May I ask you this. The *Platt*[1] case which you cite in your statement deals with the mistake of fact the accountant did or did not ask for an extension. The reliance was on a factual matter. This kind of reliance could be placed in one category, and it could be put in counterdistinction to reliance by a man on a lawyer, who told the man that he had no duty to include in his income tax, for example, the proceeds of an embezzlement, which would at one time have been appropriate legal advice, but would no longer be true under the *James* case.[2] Does the present code permit a defense of mistake of law, based on reliance of lawyers' advice, which is bad?

Mr. Asbill. You mean under the present code do you have a defense? Well, let me attempt to answer that, and then I will ask my real experts to see if I am right. This is why I wanted them to come. I think it is reasonably clear under present law that good faith reliance upon professional advice as to a matter of law is a defense to the crime of tax evasion and that, indeed, rather than an affirmative defense which must be proved by a preponderance of the evidence by the taxpayer, once the issue is raised, reliance must be disproved beyond a reasonable doubt by the Government.

Mr. Blakey. If you were to advise a client today that he did not have to include embezzlement proceeds in his tax return, which would be clearly erroneous legal advice, would the client nonetheless be not guilty of willful failure to file?

Mr. Asbill. I think that is correct, assuming that his reliance on my advice is good faith reliance. Now, if he knows that I do not know what I am talking about, obviously he would not be entitled to rely.

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[1] *United States* v. *Platt*, 435 F. 2d 789 (2d Cir. 1970).
[2] *James* v. *United States*, 366 U.S. 213 (1961).

But, if he relies in good faith on professional advice, I think there is no question that that would be a defense.

Mr. BLAKEY. Even though the advice is clearly, clearly beyond question, wrong?

Mr. ASBILL. Yes, sir.

Mr. BLAKEY. May I ask you this question, then: Why do not tax lawyers advise most people not to include questionable items? What you have told me, in effect, and I am really quite unaware of the tax law in this area, is that the functional law in this area is what the lawyer tells a man, and not what the Congress wrote on the books?

Mr. ASBILL. Well, we are talking now about crime, whether a person is criminally liable. I think the answer to your question is that most tax lawyers feel an obligation not only to their clients, but to the United States, they feel an obligation to see that the taxes are properly paid.

And if you are talking about a situation where there really is reasonable doubt, and he says——

Mr. BLAKEY. Well, I premised the question on the situation where there was no reasonable doubt. It seems to me what you are suggesting is that the present law is, from a client's point of view, not a lawyer's point of view, that he should get the dumbest lawyer he can, because as long as the advice is in favor of not including it——

Mr. ASBILL. I think conceptually you might go that far, but keep in mind there are lots of other sanctions in addition to criminal liability, such as penalties and interest on deficiencies. If all the fellow wanted was to stay out of jail, I think maybe you would be right.

Mr. HAWK. Particularly, if you are only going to get the least competent lawyer, he might make mistakes in the wrong direction.

Mr. BLAKEY. I added that he had a bias in the right direction.

Mr. HAWK. Far better to be certain you had the best erroneous advice available, and that requires a smart lawyer, indeed.

Mr. ASBILL. Mr. Ritholtz has pointed out to me that if you are looking hard enough for a dumb lawyer, that might be evidence that you are not relying in good faith on the lawyer's advice.

Senator HRUSKA. There are 5 minutes remaining in your time, Mr. Asbill. We have one more witness, and I understand from staff that I will be called to the chamber pretty soon.

Mr. ASBILL. All right, sir. I will proceed rather quickly.

On sentencing, we notice that the sentencing provisions under the proposed code differ substantially from those in the corresponding provisions of the present law.

In some cases they are more harsh, and in some cases they are more lenient, and this applies both to jail sentences and also to fines. We question the reason for the changes.

We are not sure they are bad, we are not sure they are good. We do not see anything that gives us any inkling why the changes are made, and consequently we have some question about it.

It seems to us, generally speaking, that the burden for showing some reason for the change would be on the proponents of the change.

With respect to the statue of limitations, the proposed code reduces the statute for failure to file and for tax evasion from 6 to 5 years if they are felonies.

You reduce the statute on misdemeanors to 3 years.

The reduction from 6 to 5 years is a pretty small change, and I am not sure we are in a position to judge its wisdom. We have a real question, however, about going down to 3 years because tax crimes by their nature are secret crimes, and we would suspect that this would give the Government some problems. If it is all right with them it is all right with us, but we really question the wisdom of reducing the statute to 3 years.

Finally, I would like to mention just one other matter and leave the rest to the written statement. That matter is venue.

There is a statement in the comment on the proposed code that explicit venue provisions relating to tax returns, if needed, would be incorporated into an amended section 3237 of title 28. The Section of taxation worked on the venue provision which is now section 3237(b), which was enacted by P.L. 83–713. We think it works very well in the tax area and we urge you not to tamper with it without the most serious consideration.

Finally, Mr. Chairman, let me say that I think perhaps the way we can be most helpful in this area, if the subcommittee agrees with any of our general comments would be to have members of our Committee on Civil and Criminal Tax Penalties work with your staff in trying to work out detailed solutions.

I have raised the problems sometimes without giving you the answers, but we would be very happy to work with you to try to find the answers. We appreciate the opportunity to come here before you.

Senator HRUSKA. That we would appreciate. We are aware that this is a very special and technical area. We have our objective to try to get an integrated Federal criminal law code here, but we are aware, at the same time, that that does not necessarily mean that that goal is achievable without sacrificing a lot of, and perhaps inflicting a lot of, uncertainty and unfairness in some areas.

So, your office will be relied upon and we will be calling on it.

Mr. ASBILL. Thank you, sir.

Senator HRUSKA. Thank you for coming, all three of you.

The final witness for this morning is Mr. William T. Plumb, Jr., an attorney from Washington, D.C. here.

Your statement has been included in the record and you may proceed.

(Biographical statement and statement of Mr. Plumb follows:)

BIOGRAPHY OF WILLIAM T. PLUMB, JR.

Partner, Hogan & Hartson, Washington, D.C.

Member, from 1958 to 1967, of the American Bar Association's Special Committee on Federal Liens, and principal draftsman of its legislative proposal that eventuated in the Federal Tax Lien Act of 1966.

Consultant to the Treasury Department on the regulations to be issued under the Federal Tax Lien Act.

Author of the ALI-ABA Committee on Continuing Legal Education's handbook on "federal Tax Liens," and of numerous articles in the field of federal tax collection.

STATEMENT OF WILLIAM T. PLUMB, JR.

Mr. Chairman, I think we can all readily agree on the answer to the rhetorical question raised by the House Committee on Government Operations in 1969 when it concluded that the efforts of the Department of Justice in collect-

ing judgments in favor of the United States, including those for criminal fines, were not then as effective as they ought to be. The Committee asked:

If criminal defendants can avoid paying fines with relative impunity knowing that the U.S. Government will not vigorously attempt collection, what harm is caused to public respect for law? [1]

Your staff has requested, therefore, that I consider whether the collection of fines in federal criminal cases, and hence their retributive and deterrent effect, might be improved by utilizing the collection weapons, and perhaps also the trained personnel, available to the federal tax collector.

Let me preface my remarks by stating that, while I know something about the tax collection process and have written extensively on the subject,[2] I have no comptetence in criminal law and procedure and no familiarity with the problem of collecting fines, except as I have briefed myself for this appearance. I have read the statistics gathered by the House Committee on Government Operations, indicating that the collection rate of federal civil and criminal judgments in the aggregate may then have been about 46 percent, and as low as 21 percent in the six largest judicial districts.[3] But those statistics are not so refined that I can tell whether those same percentages apply to the small proportion of the total judgments that consist of criminal fines, which involve circumstances quite different from those affecting judgments for civil debts. Therefore, I cannot undertake to pass judgment on the effectiveness of the Justice Department's efforts to collect criminal fines, but shall limit myself to outlining a potentially more effective procedure, for use if this Subcommittee independently concludes that one is needed.

A. TRANSFER OF FUNCTION OF COLLECTING FINES

The House Committee on Government Operations was critical of the supervision, training and instruction of the Justice Department personnel responsible for collection of fines and other judgments, and recommended, among other things, that the Department "initiate and maintain liaison with other Federal agencies having collection responsibilities (such as the Internal Revenue Service) for the purpose of exchanging information on collection training and techniques." [4] The Justice Department, however, indicated at the hearings that its principal problem in this regard was the "lack of available time of attorney and support personnel, especially in the offices of the U.S. attorneys, due to the priority attention required in case litigation and other areas such as organized crime." [5]

This may suggest the possibility of relieving the Justice Department of the responsibility, at least with respect to judgments for criminal fines with which we are here concerned, and transferring that function from the litigating arm to the Internal Revenue Service, which is undoubtedly the largest and possibly the most effecient collection agency in the world, with over 6,000 trained and specialized collection agency in the world, with over 6,000 trained and specialized collection officers. In 1970, that collection force is reported to have opened 2,624,000 new delinquent tax accounts involving $3,314,045,000 and to have closed by collection or compromise 2,139,000 accounts on which they collected $2,517,563,000.[6] I cannot, of course, speak for the Internal Revenue Service, but the typical inventory of 10,500 uncollected criminal fines, aggregating some $14,000,000,[7] should have little impact on its case-load. The yeoman service that the Internal Revenue has rendered as an adjunct to criminal law enforcement since the days of Al Capone, including its administration of the regulatory taxes on firearms and gambling, has presumably prepared it for any novel problems it might encounter in collecting criminal fines.

On the other hand, unless Internal Revenue Service were also to assume the function of collecting civil judgments—a far larger package involving an inventory of as much as $400,000,000 [8]—it would still be necessary to provide the Justice Department with trained collection personnel, and there may be little purpose served in transferring the function of collecting fines.

B. AVAILING OF TAX COLLECTION WEAPONS

Whether or not the facilities and personnel of the Internal Revenue Service are availed of for the collection of fines, however, consideration may be given to making fines collectible *in the same manner* as taxes,[9] with the benefit of the liens, priorities and summary collection procedures available to the tax collector. I have no doubt that the power of Congress to impose the fines includes the con-

stitutional power to provide for their effective collection in this manner.[10] However, if that course is to be adopted, this Committee will want to consider very carefully whether in every aspect the powerful collection weapons of the tax law should be made applicable to the collection of fines. I shall set out below the principal difference in the collection of fines and of taxes, so that the Committee may weigh the advantages to be gained and may also consider where exceptions and restrictions ought to be imposed.

1. *Collection by levy*

The usual method of enforcing a delinquent federal tax liability is by administrative levy and sale of so much of the taxpayer's property as is necessary, without need for any judicial proceedings.[11] If the taxpayer has bank accounts or is owed other debts, those obligations may be seized by serving notice on the debtor, who then becomes personally liable to the United States and is relieved to that extent of his obligation to the taxpayer.[12] If the taxpayer's debtor fails to pay over in response to the levy, without reasonable cause, the debtor may incur an additional 50 percent penalty.[13]

Criminal fines are enforced (in addition to the coercion that may be exercised through the sentencing process) by execution against the property of the defendant, at the instance of the United States Attorney's office, in the same manner as judgments in civil cases are enforced.[14] The procedures thus are basically similar, but major differences arise from the fact that the enforcement of a civil judgment of a federal court (and, therefore, of fines) is subject to the laws of the State within which the federal judgment is rendered,[15] including the State's exemption laws.[16] Taxes, on the other hand, are collectible without reference to state exemption laws,[17] and only a very limited amount of the barest necessities (wearing apparel; school books; unemployment and workmen's compensation benefits; certain federal pensions; $500 worth of fuel, provisions, furniture and personal effects, etc.; $250 worth of trade, business or professional books and tools) are exempted from tax levy by the federal tax law itself.[18]

Garnishment of wages to collect a judgment, including one for a federal criminal fine, is severly restricted by Title III of the Consumer Credit Protection Act of 1968,[19] and some state laws may be even more restrictive.[20] Congress has never been willing, on the other hand, to exempt any part of wages from levies for federal taxes (except such part as is dedicated by prior court order to the support of minor children),[21] and no state exemption law can relieve wages from that burden.[22] As a practical matter, however, a levy on one paycheck, or the treat of a levy, normally is enough to persuade the taxpayer to enter into a tripartite agreement with his employer and the tax collector under which a reasonable portion of his wages, scaled to his needs, will be paid to him each payday and the rest will be paid by the employer to the tax collector.[23]

Many state laws preclude or substantially restrict the seizure of a debtor's life insurance to satisfy a judgment, thus making the investment value of the policy (the amount the debtor could draw at will for his own purposes) unavailable for the collection of fines unless the defendant voluntarily (or under threat of imprisonment) appropriates it to the purpose. On the other hand, notwithstanding state exemption laws, a federal tax assessed before death may be collected, even after the taxpayer's death, from that part of the proceeds equal to the cash value of the policy at the date of death.[24] If levy is made during the taxpayer's lifetime, he is given 90 days to try to work out other means of payment and, if he fails, the company must pay the Government the loan value of the insurance.[25]

Many States provide an exemption for the homestead, some with no limitation whatever, others with value limits as low as a few hundred dollars (and others make no provision). Depending entirely on the policy of the particular State, a federal criminal fine may or may not be collectible from such property.[26] And, since the federal law places the Government, in collecting its fines, in the position of the ordinary civil plaintiff,[27] the State's homestead exemption law will impede collection of federal fines even if, as is true in a number of States,[28] fines imposed by a state court are collectible from homestead property.[29] On the other hand, Congress has never been willing to subject federal tax liens to the homestead exemption laws,[30] and even in bankruptcy the tax collector is permitted to pursue the exempt property set aside to the debtor.[31]

The Government has some leverage for collection of a fine if the sentence provides for imprisonment in default of payment [32] or if probation is conditioned upon payment of the fine. But a defendant may be discharged from imprisonment with his fine still unpaid, by taking a pauper's oath that he has no property, except $20, in excess of the amount which is exempt from execution under state law; [33] and, if he is on probation, nonpayment of the fine under those conditions apparently is not considered a violation.[34] Thus, as a practical matter, neither imprisonment nor probation may be effective to cause a defendant with substantial exempt property to apply it to the fine.

It may well be that the Committee will not want to go as far as the tax law goes in denying a defendant the benefit of exemption laws. A fine is not a tax, and the support of the Government does not depend upon its collection. On the other hand, the Government is no ordinary private creditor of the criminal defendant, and a fine will fail its purpose if a defendant with a substantial home, a large equity in a life insurance policy, or a salaried position can take refuge in liberal state exemption laws and escape payment of a fine he may be well able to pay. The Brown Commission recommended that fines be set in the first instance with due regard for the defendant's ability to pay, and that the court be empowered to reduce the fine or extend the time for payment if the defendant's good faith efforts to raise the funds are unsuccessful.[35] If those recommendations are adopted, they may afford all the flexibility needed to deal with genuine hardship cases, and there may not be a need to provide additional fixed exemptions that disregard individual circumstances. But, if any exemptions are to be made applicable, beyond the bare minimum provided in the tax law, they ought to be prescribed on a uniform national basis, not dependent on varying state policies adopted with private creditors in mind.[36]

2. *Collection with the aid of the courts.*

Whenever it appears that a levy may not be the most effective means of collection of a tax, or where there are conflicting claims to property that must be resolved, the Government may elect to proceed by suit in the federal court to enforce its tax lien on the taxpayer's property.[37] If necessary in the public interest, the court may appoint a receiver to hold the property pending the suit.[38] Courts, in aid of tax collection, may issue also any appropriate writs, such as a writ of *ne exeat republica* to prevent the taxpayer from defeating collection by leaving the country.[39] In addition, criminal sanctions may be invoked in the event of removal or concealment of assets with intent to evade collection of a tax (a felony) [40] or for willful failure to pay a tax (a misdemeanor).[41]

In the collection of fines, the Government may invoke the state procedures for collection of civil judgments "by execution against the property of the defendant," [42] which have been held to embrace creditors' bills and other proceedings supplementary to execution when judicial assistance in collection is necessary.[43] That apparently extends to imprisonment for civil contempt if the defendant refuses to testify about concealed assets,[44] and the Brown Commission would further empower the court to imprison the defendant for unexcused nonpayment of the fine [45] (a sanction now available only if it was provided in the original decree and has not spent its force through release of the defendant).[46]

3. *Discovery and pursuit of assets*

The tax law arms the Internal Revenue Service with effective means of discovering assets from which a federal tax may be satisfied. It may serve an administrative summons or subpoena on the taxpayer, his employees, his banker, his broker, or any other person with knowledge of his financial affairs, and may require them to testify under oath and produce relevant records for examination.[47] Failure to obey the summons or subpoena may result in a contempt citation [48] or in criminal punishment.[49] If the tax collector ascertains that the taxpayer has property in another State or district, he may simply request the Internal Revenue office at the location of the property to make a levy.[50] Information on assets abroad may be obtained from reports now required of the taxpayer himself,[51] or by subpoena addressed to the United States office of a bank having foreign branches [52] or, if fraud is involved, through the cooperation of foreign governments under certain tax treaties; [53] but, if the taxpayer himself is beyond the jurisdiction, it is doubtful that the foreign assets discovered can be reached by levy or suit, even if the bank or other holder of the assets has a United States office.[54]

In the collection of fines, the United States Attorneys, assisted by the Federal Bureau of Investigation, ascertain the nature and location of the defendant's assets,[55] and may avail of the customary judicial procedures for discovery of assets for the satisfaction of judgments. If assets are discovered to exist in another jurisdiction within the United States, the judgment may simply be registered in that other jurisdiction without need to bring suit on the judgment.[56] I am unable to compare the relative effectiveness and simplicity of the procedures for discovering and pursuing the defendant's assets with those available to the tax collector.

4. *Transferred assets*

If a debtor transfers or distributes assets without adequate consideration, leaving him unable to pay his obligations, or if he makes a transfer intended to hinder, delay or defraud creditors, a judgment creditor may in some cases disregard the transfer and levy execution on the property as if it were still owned by the debtor, or he may bring a judicial proceeding in the nature of a creditor's bill to set aside the transfer and reach the property.[57] Those remedies may be availed of in the collection of fines.[58]

The tax collector too may invoke judicial proceedings for the collection of federal taxes out of transferred assets, when it seems appropriate,[59] but ordinarily a much simpler statutory procedure is availed of. A liability, equal to the lesser of the amount of the tax or the value of the property transferred, is simply assessed against the transferee in the same manner as a tax liability is assessed.[60] It then becomes a money obligation of the transferee that may be collected by levy or otherwise, without need to trace and seize the specific assets transferred.[61] That does not mean that judicial review of the transferee's responsibility for the obligation is precluded. Like any tax liability, the amount paid by a transferee may be recovered by refund suit in a district court or the Court of Claims if it was erroneously collected.[62] In addition, if the liability is one for an income, estate or gift tax, the transferee has the further choice to litigate his liability in the Tax Court, in which event no assessment can be made or payment enforced until the Tax Court has rendered its decision[63] (unless collection of the liability is found to be in jeopardy).[64] That opportunity for litigation of a proposed transferee assessment before payment is not afforded when the liability is one for taxes *other than* income, estate and gift taxes. However, in the case of those other taxes, the simplified procedure for collection of a transferee's liability by assessment has been made available only where the transfer results from the liquidation of a corporation or partnership or from a corporate reorganization.[65] When the more complex issues of a fraudulent conveyance or the like are involved, those other taxes must be collected by an action in the nature of a creditor's bill.

Because of that difference in the available procedures, it will be necessary, if tax collection procedures are to be extended to the collection of fines, for the Committee to consider whether fines should be equated for this purpose to income, estate and gift taxes, or to other taxes. If the former, the transferee would be entitled, in the absence of jeopardy, to an opportunity to litigate this obligation in the Tax Court before assessment and collection can occur. That does not mean the Tax Court would become involved in unfamiliar questions of criminal law. The underlying issue of the defendant's liability for the fine would already have been settled by the judgment in the criminal case, which the transferee would not be entitled to question,[66] so the only issue before the Tax Court would be those of valuation, consideration for the transferer, insolvency, fraudulent intent, and the like, which are well within the court's competence. On the other hand, if fines are instead equated to other forms of taxes, the rule of pay-now-and-litigate-later would apply to the transferee: but the simplified procedure would be available only if the transfer occurred in a corporate or partnership liquidation or corporate reorganization. The Committee's choices are not that narrowly limited, however, for a provision could be framed, if desired, to permit the transferee's liability for fine to be assessed and collected without prior access to the Tax Court, whether the liability of the transferee arises from a liquidation, a fraudulent conveyance, or otherwise. (The power of Congress to deny any right of judicial review in advance of payment, provided an adequate post-payment remedy is afforded, has long been sustained where taxes are involved,[67] but I have not pursued my research to the point where I can say confidently that transferees of persons owing fines

can be made subject to such procedure.) As an alternative to the foregoing, an opportunity to test the transferee's liability before payment might be afforded in the district court that had imposed the fine.

5. *Death of the debtor*

Death of the defendant abates the liability for a judgment for a criminal fine, since the objective is to punish the defendant, not his family. While his family may suffer the same loss if the fine is collected in his lifetime, the defendant too suffers in that case; if he is already dead when collection occurs, his family alone suffers.[68] On the other hand, a civil tax penalty is not abated by the death of the offending taxpayer, since such penalties are regarded as remedial rather than punitive in purpose.[69]

That distinction would probably still be observed by the courts if fines were made collectible like civil tax liabilities, just as it has been heretofore observed when fines were collected like civil judgments. The difference in the nature and purpose of criminal fines and civil penalties would remain. However, the Committee may want to make clear its intention in this regard.

6. *Long-standing obligations*

Only executive clemency or the death of the defendant can now remove an uncollected fine from the books, however hopless its collection may be.[70] There is no federal statute of limitations on the collection of fines, and no state statute of limitations can bind the sovereign.[71] State law may make unavailable, after a certain time, the execution remedy on which collection principally depends,[72] but it cannot expunge the liability, and the right to levy execution can be regained at any time by first bringing suit on the judgment, if the Government ever sees renewed hope for collection.[73]

The liability for a federal tax is, in the first instance, definitely limited in duration. In general, the Government's power to collect a tax expires six years after assessment,[74] but the time may be extended by agreement with the taxpayer,[75] or its running may be suspended during a period of court custody of assets[76] or a period of military service[77] or absence from the country.[78] The running of the time is tolled by the commencement of suit for collection,[79] and a judgment in such a suit (like a judgment for a fine) is never barred by limitations.[80] Congress determined in 1966, however, that the power to collect by the summary remedies peculiarly applicable to tax collection should terminate when the tax would have become barred but for the judgment, and that thereafter only the remedies available for collecting judgments (such as those above described in connection with fines) may be used.[81] The Committee should consider whether it wishes to impose a comparable limitation on the time in which fines may be collected by tax collection methods.

7. *Uncollectible obligations*

A tax which is determined to be uncollectible may be "abated" by the tax collector, in order to clear the books,[82] but that act does not release the lien on the taxpayer's property (including after-acquired property)[83] or preclude collection at any time within the period of limitations.[84] Uncollectibility, however, may be an acceptable ground for a statutory compromise of the tax liability,[85] although the mere fact that payment would impose an undue hardship on the taxpayer is not such.[86]

There is at present no such power to abate or compromise an uncollectible criminal fine, short of an exercise of the pardon power.[87] If tax collection procedures are made generally applicable to the collection of fines, the Committee should consider whether the compromise power is to be made applicable, and if so, whether it should reside in the Attorney General or in the Commissioner of Internal Revenue (assuming the function of collecting fines is transferred to him). Since the Brown Commission has recommended that the court be empowered to reduce the amount of a fine when it appears that a default was excusable or that the circumstances which warranted the imposition of the original amount of the fine no longer exist,[88] it may be desirable to avoid conflict with that procedure by excluding administrative compromises.

8. *Liens for taxes and fines, generally*

Fines, as we have seen, are collected like civil judgments. A federal court judgment becomes a lien on defendant's property in the same manner and to the same extent as a judgment of a state court in the same State, and must

be registered, recorded, docketed or indexed as provided by state law.[89] Generally, state laws make a judgment a lien on all the debtor's real estate in the jurisdiction, from the time of rendition or entry of the judgment.[90] A few States extend the general lien of a judgment to personal propeerty as well,[91] but in most the personal property is free of lien under levy of execution.[92]

In contrast, a federal tax that is not paid on demand becomes a general lien on all the property of the taxpayer, real, personal and intangible, wherever it may be located in the United States,[93] if not abroad.[94] It attaches automatically to all property he may thereafter acquire, so long as the tax remains unpaid and is not barred by lapse of time.[95] Because the lien arises as a secret lien, dating back to an assessment that is known only to the taxpayer and the tax collector,[96] it has been necessary to provide for the protection of certain innocent third parties by requiring filing of notice of the lien if it is to be valid against them.[97] But a single filing in the jurisdiction where the taxpayer resides at the time of filing will bind those acquiring interests in any of his personal property, wherever located, and will continue to have that effect even if he later moves to another jurisdiction.[98] Real estate, on the other hand, is affected only if it is located in a jurisdiction in which notice has been filed.[99] In a few special circumstances, where it would not be reasonable to expect a search for liens to be made, Congress has relieved third parties from the effect of even a duly filed tax lien.[100]

If the taxpayer desires to dispose of or encumber his assets while a lien is on file, he may obtain from the federal tax collector a certificate discharging that particular property from the lien. The certificate may be granted if the taxpayer pays over an amount from the proceeds equal to the value of the Government's interest—*i.e.*, the value of the property minus any prior encumbrances. A discharge may be granted without payment if the value of the taxpayer's *remaining* property is at least double the amount of the tax lien plus any prior liens.[101]

The tax lien is a powerful collection instrument, therefore, both for inducing payment by the taxpayer and for preventing dissipation of his assets, real and personal. I have no doubt that it would be an effective instrument for the collection of fines as well. It does raise some collateral problems, however, that the Committee may want to consider.

9. *Priorities over third parties*

A federal tax lien is valid against purchasers, holders of mortgages and other security interests, judgment lien creditors, and mechanic lienors only if notice of the tax lien has first been duly filed.[102] But even those classes of third parties must meet exacting standards of perfection if they are to be protected against after-arising or existing but unfiled tax liens.[103] In all other cases the secret federal tax lien is effective against third parties from the time of assessment of the tax, without public notice of any kind, and, in a number of circumstances, the tax lien prevails even over those who *previously* had acquired liens or interests that were good against everyone else. The courts have held that, except as Congress expressly provided otherwise in the Federal Tax lien Act of 1966, a pre-existing private lien is subordinate to a federal tax lien unless the private lien had first become "choate," by a judicially defined federal standard of "choateness" more exacting than any state law imposes on such liens.

I urge that the Committee give serious policy consideration to whether liens for fines should have an effect on innocent third parties comparable to the effect of a federal tax lien. It is one thing to make the efficient tax collection procedures available for the collection of fines from the defendant's property. It is quite another to make fines collectible in derogation of the rights of third parties. It is perhaps understandable that Congress, despite the general liberality of the Federal Tax Lien Act of 1966, should have maintained the privileged position of the Government as against many classes of third parties whose claims it found less meritorious than its own. Taxes are the lifeblood of government. Fines, on the other hand, are not imposed to raise revenue for the support of the Government, but rather to punish the guilty and to deter others from criminal conduct. Fines strike the wrong target when their collection causes loss to innocent third parties. It was in recognition of this fact that Congress many years ago determined that fines, penalties and forfeitures are not to be allowed as claims against a bankrupt estate,[104] even when they are

secured by lien,[105] since to allow them would, as the Supreme Court has said, "serve not to punish the delinquent taxpayers but rather their entirely innocent creditors." [106]

Let me illustrate some of the devastating effects of a federal tax lien on third parties:

A purchaser of property, or one who has a contract or option to purchase property, is in general protected against subsequently filed federal tax liens, but only if he has so far perfected his rights that he would be protected against a subsequent bona fide purchaser from the seller.[107] If a recorded deed contains a defective description, inadvertently omitting a part of the property, the federal tax collector can seize the omitted portion to satisfy the grantor's taxes subsequently determined, even though full value was paid for the property by the buyer.[108] If a family contracts to purchase a home for installment payments, but will not obtain a recordable deed until full payment, they may lose both the home and their payments as a result of seizure of the property for later federal taxes of the seller, unless under state law their contract interest was protected against bona fide purchasers from the seller.[109]

A seller of land who, instead of taking back a mortgage, relies on an equitable vendor's lien which is protected against later judgments,[110] is nevertheless considered to have only an "inchoate" interest in the land he sold, which may be taken for a later arising federal tax lien.[111]

A person who endorses a note or signs a bail bond for a friend, who gives him security, is considered to have "inchoate" rights in the security until he is called upon to pay, and the security may be taken from him if a federal tax is assessed against the principal debtor in the interval.[112] Although the Federal Tax Lien Act of 1966 provided some protection in such circumstances, the relief was confined to transactions arising out of the surety's or endorser's business.[113]

A landlord who relies for the security for his rent upon a statutory lien on the tenant's chattels on the premises, although commonly protected from later liens for judgments against his tenant,[114] is subordinated to subsequently arising federal tax liens against the tenant, even when the landlord has first commenced distress proceedings.[115]

An unsecured creditor who is permitted under state law to levy an attachment on his debtor's property at the commencement of the action, and thus to protect his potential recovery against intervening judgment creditors and others,[116] is not protected against secret federal tax liens arising after the attachment but filed before he gets judgment.[117]

If the federal tax lien priority rules are made applicable to fines, persons holding such "inchoate" rights will bear the burden, when assets are insufficient, not only of the federal taxes of their vendors and debtors, but also of federal criminal penalties imposed upon them. Whatever may be said for subordinating them to federal tax claims, I seriously question the appropriateness of collecting fines at the expense of the rights of innocent third parties. The result in many cases may be to force creditors to commence bankruptcy proceedings in order to eliminate the fine as a preferred claim.[118]

Finally, many state laws make state and local taxes a lien (frequently a "first and prior lien") on property of the tax debtor from the date as of which the tax is incurred or from its due date, even though the amount may be determined at a later time. Such liens are not considered "choate," and are not effective against later federal tax liens, until assessment or comparable action has definitely fixed the amount payable, and then only if the state or local tax is collectible without need for judicial action.[119] Even when the state or local tax has been finally fixed in amount, its lien is not considered "choate" if it attaches to a mass of property that is "neither specific nor constant," such as all the property used in the business.[120] A state or local tax lien on specific property, or on *all* the property belonging to the taxpayer, however, is considered "choate" once the amount of the liability if fixed.[121] Since the federal tax lien also attaches to all the taxpayer's property from the tim eof assessment,[122] those rules enable the federal, state and local governments to compete on equal terms, in recognition of the comparable need and merit of each level of government in its pursuit of the means for its support. But I question whether a fine, designed to punish the guilty, should be permitted to outrank a state or local tax lien, and thus perhaps cause the latter to go unsatisfied, merely because the fine was imposed before the state or local tax was assessed.[123] The state or local government is not a consensual lienor, and it

cannot refrain from becoming a creditor of a person merely because a lien for a fine exists against his property.

I suggest, therefore, that the equating of the lien for a criminal fine to a tax lien be limited to (1) making available the efficient tax collection procedure and machinery and perhaps the freedom from state exemption laws, and (2) impeding, by filing notice of the lien, the subsequent voluntary alientation or encumbrance of the defendant's property (including property that would not be reached by a judgment lien until levy of execution). In other respects, however, I urge that the rules of state law governing the priority of judgments continue applicable to fines. Under this principle, a state or local tax, *whenever assessed*, would prevail, as it properly should, over the lien of a fine, if and when state law prefers such taxes over judgments. Those who had previously bought or contracted to buy property from the defendant, levied an attachment on his property, or taken security for endorsing his note or signing his bond, would be protected if a judgment perfected on the date the lien of the fine is perfected would not prevail over them. Since a landlord would not normally be expected to search for liens against his tenant during the term of the lease, a landlord's lien might well be protected even as to rent accruing after the lien of the fine was perfected, if state law protects the landlord against judgments in such circumstances.

10. *Place for filing notices of liens.*

Congress has delegated to the States the function of designating an office for filing notice of federal tax liens, and has provided that they shall be filed with the federal district court if the State makes no provision.[124] Every State has such laws, usually providing for filing in county or local offices, but in some cases utilizing the central state office where Commercial Code filings are made.[125] Many, if not all, such state laws, however, including the Uniform Federal Tax Lien Registration Act which many have adopted, refer to "notices of liens . . . for taxes payable to the United States." A criminal fine is not a tax, and I doubt very much that making tax collection procedures applicable to fines, or even expressly defining a lien for a fine as a tax lien, would have binding effect as a construction of the state filing laws. In the past, when there were disparities between the specifications of state law and the terms of the Congressional authority, state recording officers have refused to accept documents not conforming to the state requirements.[126] The result in such cases was to necessitate filing in the federal courts, which was inconvenient for searchers and a burden on the district courts, which are rarely equipped to handle such filings efficiently. It would be advisable, therefore, to alert the National Conference of Commissioners on Uniform State Laws to the possible need for amending 50 state laws.[127] But there is an inevitable time lag before even a substantial number of States will act.

An alternative course might be to leave the place for filing or recording of federal judgments for fines, as it is today, in the place provided by state law for registering, recording, docketing or indexing judgments,[128] where their acceptability is beyond question, but still to give such fines the *effect* of a tax lien to the extent that it is determined to do so. The principal objection I see to that course is that, except where the State has prescribed the same place for filing both federal tax liens and judgments, it adds one more place where a prospective purchaser or lender must make a search. That is not a significant factor where realty is involved, since one is already required to search for both tax liens and judgments. But, except in a few States, a judgment is not now a lien on personalty before levy of execution,[129] and a person intending to buy or make a loan on personal property would have to search the judgment files, in addition to the tax lien files, merely on the chance that there might be one of this narrow category of judgments that would have the effect of a general lien. On balance, therefore, if fines are to be given any of the lien priority effects of federal tax liens, I suggest that Congress prescribe filing thereof in the office established for filing notice of federal tax liens, even though amendment of state laws may be necessary.[130]

11. *Priority over the victim*

Finally, whatever course the Committee may take with regard to the rights of the defendant's creditors generally, I must make a special appeal for one creditor, the victim of the crime. Section 3302(1) of the bill proposed by the National Commission on Reform of Federal Criminal Law provides, in part, that:

The court shall not sentence a defendant to pay a fine in any amount which will prevent him from making restitution or reparation to the victim of the offense . . .[131]

The distinguished Chairman and Staff Director of the Commission, in an article reprinted at page 57 of Part 1 of the record of these Hearings, stated (at page 82) that:

Restitution is given a higher priority as an obligation of the defendant than a purely penal payment to the government.[132]

But if there is now added to the bill a provision giving the fine the force of a tax lien, and if dissipation or concealment of assets or other circumstances made full collection of both the fine and the restitution or reparation impossible after all, it is the fine that will be first satisfied, unless special provision is made to the contrary. The victim's plight is illustrated by a bankruptcy case a few years ago, in which a confidence man obtained funds in the guise of loans which he had no intention to repay. Since the fruits of crime are taxable income,[133] a tax was imposed on the criminal, which exhausted the funds in this bankrupt estate, so that the victims went unsatisfied.[134] This Committee is not empowered to telieve that inequity so far as it results from the tax law, but it should not aggravate the situation by entitling the lien for the fine to the same priority over the victim that a lien for the criminal's taxes would have.

In the absence of tracing of specific money or propety taken by the defendant, the victim will ordinaryly have only an unsecured claim against him. At best, he will have reduced the claim to a judgment lien, which may well be junior to the lien of the fine. To give effect to the intention expressed by Chairman Brown, that restitution have a higher priority than a purely penal payment, I suggest that a formula be devised on the model of Section 67c(3) of the Bankruptcy Act.[135] It could thus be provided that the lien for fine (whether on a real or personal property and whether or not yet enforced by sale or taking possession) shall be postponed in payment to the victim's claim for restitution or reparation, that the proceeds of sale of any property seized for satisfaction of the fine (net of prior liens) and any money collected voluntarily or involuntarily on account of the fine shall be paid over to the victim to the extent of his allowable claim, and that the Government shall be subrogated to the right of the victim (and to his lien standing, if any) to collect from the defendant. For purposes of the Commission's proposed §3303, relating to remission of fines,[136] it should be considered that the defendant has made restitution or reparation to the extent of the amount collected, and that the Government's claim by subrogation is a claim for a fine which the court in its discretion may remit.

There are complications in applying this solution, which should be considered by those better versed in criminal procedure than I. Unlike the bankruptcy situation on which I have modeled the suggestion, there will in this case have been no binding adjudication of the amount of restitution or reparation to be paid, unless the victim has meanwhile obtained a judgment against the defendant (by which the Government may not wish to be bound, since it will not have been a party); in the absence of an adjudication, the Government will be left with the burden of proving, in its subrogated position, the amount of the injury suffered by the victim who, having been paid, will have no incentive to cooperate. In two circumstances, under the Commission proposals, the criminal court itself may have made a determination of the amount of the restitution or reparation—under proposed Section 3103 (2) (e), as a condition to probation,[137] or under proposed Section 3301 (2), as an alternative measure to be used in fixing the amount of the fine.[138] Those findings, however, will have been made in a criminal proceeding to which the victim is not a party, and they cannot bind him.

Perhaps the most practicable solution may be to prescribe that the criminal court, *whenever* it imposes a fine in a case where restitution or reparation to the victim is appropriate, shall determine the amount thereof to which collection of the fine shall be postponed. If the victim in a civil action is able to prove a greater amount, he may collect it (after criedit of any amount paid to him from fine collections) but shall not have the right to payment of the excess from the fine money. (I express no view whether, as a matter of criminal law, the sentence itself might include a requirement that restitution or reparation be made in a specified amount, as part of the fine and with the same lien, but with payment to be turned over to the victim. This might be a less complex procedure, if it can be done.)

Although my suggestion is modeled on the Bankruptcy Act, it might not be effective to give the victim the benefit of a lien if the defendant becomes bankrupt. In bankruptcy, judgments for fines and penalties are allowable only to the extent of "the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty . . . arose."[139] It should be made clear, if the above suggestion is adopted, that the "pecuniary loss" referred to includes the loss to the victim which is to be paid from the fine (But that the Government's right then to collect a corresponding amount in the victim's shoes is to be disallowed as a fine).

Possibly the Commission contemplated that the procedure for remission of fines, under Section 3303 of its draft bill, would be availed of to assure payment of the victim out of sums otherwise applicable to payment of the fine. That procedure would be ineffective to assure restitution, however, if intervening liens have arisen that would exhaust the available property if the lien for the fine is removed. Some procedure along the lines above suggested, giving the victim the benefit of the lien enjoyed by the fine, would seem more effective.

CONCLUSION

I have not undertaken to draft a proposed provision embodying the foregoing suggestions, because the details would be affected by the many policy decisions and choices among alternatives that would have to be made I shall be pleased to hold myself available to the subcommittee staff in working out a proposal in accordance with any guidelines the Subcommittee may establish.

FOOTNOTES

[1] Debt Collection Operations of the Department of Justice, H.R. Rep. No. 91–701, 91st Cong., 1st Sess. 18 (1969).

[2] See Plumb, *Federal Tax Liens*, Third Edition, about to be published by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association.

[3] H.R. Rep. No. 91–701, *supra* note 1, at 2–3.

[4] *Id.* at 4–5.

[5] Hearings on Debt Collection Operations of the Department of Justice, 91st Cong., 1st Sess. 65 (1969).

[6] Commissioner of Internal Revenue, 1970 Annual Report 30–31, 79.

[7] Debt Collection Hearings, *supra* note 5, at 4.

[8] *Id.* at 11.

[9] *Cf.* 26 U.S.C. §§6659(a) and 6671(a), making certain civil tax penalties collectible "in the same manner as taxes."

[10] *United States v. Fisher,* 6 U.S. (2 Cranch) 358, 396–97 (1804).

[11] 26 U.S.C. §§6331, 6335.

[12] 26 U.S.C. §6332.

[13] 26 U.S.C. §6332(c)(2).

[14] 18 U.S.C. §3565. The Brown Commission would in effect continue this procedure. Proposed §3304(5), at p.451 of Part 1 of these Hearings.

[15] Fed. Rules of Civ. Proc., Rule 69, formerly Rev. Stat. §916.

[16] *Fink v. O'Neil,* 106 U.S. 272 (1882).

[17] 26 U.S.C §6334(c).

[18] 26 U.S.C. §6334(a).

[19] 15 U.S.C. §§1671–77.

[20] 15 U.S.C. §1677.

[21] 26 U.S.C. §6334(a)(8); 15 U.S.C. §1673(b)(3). See *Beltran v. Cohen,* 303 F. Supp. 889 (N.D. Cal. 1969).

[22] *Antrum v. United States,* 127 F. Supp. 54 (D. Conn, 1953).

[23] Treasury Regulations, 26 C.F.R. §301.6343–1(b)(4). See Plumb, *Federal Liens and Priorities—Agenda for the Next Decade,* 77 Yale L. J. 605, 608 (1968).

[24] *United States v. Bess,* 357 U.S. 51, 56–57 (1958).

[25] 26 U.S.C. §6332(b).

[26] *Fink v. O'Neil,* 106 U.S. 272 (1882).

[27] Note 14 *supra.*

[28] See annotation, 10 A.L.R. 770.

[29] *Allen v. Clark,* 126 Fed. 738, 741 (4th Cir. 1903).

[30] *Carter v. United States,* 399 F.2d 340 (5th Cir. 1968); *United States v. Heasley,* 283 F.2d 422 (8th Cir. 1960).

[31] *United States v. Jeffron,* 158 F.2d 657 (9th Cir.), cert. denied, 331 U.S. 831 (1947). See also 11 U.S.C. §35(a)(1).

[32] 18 U.S.S. §3565.

[33] 18 U.S.C. §3569.

[34] *Unite dStates v. Taylor,* 321 F.2d 339, 342 (4th Cir. 1963).

[35] Propose §3302, §3303 and §3304 at pp. 448–451 of Part 1 of these Hearings.

[36] See Plumb, *Federal Liens and Priorities—Agenda for the Next Decade,* 77 Yale L. J. 605, 607–07 (1968).

[37] 26 U.S.C. §7403.

[38] 26 U.S.C. §7403(d).

[39] 26 U.S.C. §7402(a). Such restraint is not to be imposed where it would be akin to imprisonment for debt, if it does not appear that *assets* may be removed. *United States v. Shaheen,* 445 F.2d 6 (7th Cir. 1971).

[40] 6 U.S.C. §7206(4); *United States v. Bregman,* 306 F.2d 653 (3d Cir. 1962). That provision is defective in that it does not reach acts occurring before assessment of the

tax (*United States v. Swarthout*, 240 F.2d 831 (6th Cir. 1970)); and hence, if made applicable to fines, would not reach acts done in anticipation of conviction. However, removal or concealment of assets may also constitute a willful attempt to evade or defeat payment of a tax, which is an even higher grade of felony in terms of the permissible sentence. 26 U.S.C. §7201; *United States v. Trownsell*, 367 F.2d 815 (7th Cir. 1966).

[41] 26 U.S.C. §7203. Mere diversion of assets to luxury expenditures while letting taxes go unpaid has been held not "willful" nonpayment for this purpose. *United States v. Palmero*, 259 F.2d 872 (3d Cir. 1958).

[42] 18 U.S.C. §3565.

[43] *Pierce v. United States*, 255 U.S. 398 (1921).

[44] See *United States v. Baird*, 241 F.2d 170, 175 (2d Cir. 1957).

[45] Proposed §3304(2), at p. 450 of Part 1 of these Hearings.

[46] *United States v. Baird*, 241 F.2d 170 (2d Cir. 1957).

[47] 26 U.S.C. §§6333, 7602; *United States v. First Nat. Bank of Mobile*, 267 U.S. 576 (1925), aff'g per cur. 295 Fed. 142 (S.D. Ala. 1924); *O'Donnell v. Sullivan*, 364 F.2d 43 (1st Cir. 1966), cert. denied, 385 U.S. 969 (1966).

[48] 26 U.S.C. §7604(b).

[49] 26 U.S.C. §7210.

[50] Treasury Regulations, 26 C.F.R. §301.6331–1(a)(1).

[51] 31 U.S.C. §1121.

[52] *First Nat. City Bank v. Internal Revenue Service*, 271 F.2d 616 (2d Cir. 1959), cert denied, 361 U.S. 948 (1960). See *Transnational Evasion of United States Taxation*, 81 Harv. L. Rev. 897 (1968).

[53] *X v. Federal Tax Administration*, 71–1 CCH U.S. Tax Cases ¶9435 (Swiss Sup. Ct. 1971).

[54] *United States v. First Nat. City Bank*, 321 F.2d 14, 325 F.2d 1020 (2d Cir. 1963-64), rev'd on other grounds, 379 U.S. 378 (1965). *Cf.* Treasury Regulations, 26 C.F.R. §§301.6332–1(a)(2), 301.7401–1(b).

[55] Debt Collection, Hearings, *supra* note 5, at 80.

[56] 28 U.S.C. §1963; *Hanes Supply Co. v. Valley Evaporating Co.*, 261 F.2d 29 (5th Cir. 1958).

[57] *United States v. Kensington Shipyard & Drydock Corp.*, 187 F.2d 709, 712 (3d Cir. 1951); Uniform Fraudulent Conveyance Act §9(1).

[58] *Pierce v. United States*, 255 U.S. 398 (1921).

[59] *Leighton v. United States*, 289 U.S. 506 (1933).

[60] 26 U.S.C. §6901.

[61] *Ginsberg v. Commissoner*, 305 F.2d 664, 669 (2d Cir. 1962).

[62] 26 U.S.C. §7422; 28 U.S.C. §§1346(a)(1), 1491.

[63] 26 U.S.C. §6213. The constitutional power to collect the liability of a transferee by administrative action, with prior review permitted only in the Tax Court, and with an alternative opportunity for review by the district court only after payment, was sustained (with respect to tax liabilities) in *Phillips v. Commissioner*, 283 U.S. 589 (1931).

[64] Concerning jeopardy assessments, see 26 U.S.C. §6861.

[65] 26 U.S.C. §6901(a)(2); *Lawrence v. United States*, 265 F. Supp. 590 (N.D. Tex. 1967).

[66] *Egan's Estate v. Commissioner*, 26; F.2d 779, 784 (8th Cir. 1958); *First Nat. Bank of Chicago v. Commissioner*, 112 F.2d 260, 262 (7th Cir. 1940); *David Krueger*, 48 T.C. 824 (1967).

[67] *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855). See *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931) (which involved a tax but states the principle as broadly applicable to "pecuniary obligations to the government").

[68] *Crooker v. United States*, 325 F.2d 318 (8th Cir. 1963); *United States v. Pomeroy*, 152 Fed. 279, 282 (S.D.N.Y. 1907), rev'd on other grounds, 164 Fed. 324 (2d Cir. 1908).

[69] *Kahr's Estate v. Commissioner*, 414 F.2d 621, 626 (2d Cir. 1969); *Rau's Estate v. Commissioner*, 301 F.2d 51, 55 (9th Cir.), cert. denied, 371 U.S. 823 (1962).

[70] Debt Collection Hearings, supra note 5, at 3, 4, 5. It was reported that of $14,000,000 in outstanding uncollected fines as of June 30, 1969, $4,150,000 were imposed in the years 1931 through 1959, (*id.* 4) and they obviously held out little hope of collection.

[71] *Smith v. United States*, 143 F.2d 228 (9th Cir. 1944).

[72] *Custer v. McCutcheon*, 283 U.S. 514 (1931).

[73] *Smith V. United States*, 143 F.2d 228 (9th Cir. 1944). See *Custer v. McCutcheon*, *supra* note 72, at 519.

[74] 26 U.S.C. §6502(a)(1).

[75] 26 U.S.C. §6502(a)(2).

[76] 26 U.S.C. §6503(b).

[77] 26 U.S.C. §7508(a)(1)(I) and (J); 50 U.S.C. Appendix §573.

[78] 26 U.S.C. §6503(c).

[79] *United States v. Ettelson*, 159 F.2d 193, 196 (7th Cir. 1947).

[80] *Investment & Securities Co. v. United States*, 140 F.2d 894, 896 (9th Cir. 1944).

[81] 26 U.S.C. §6502(a). See H.R. Rep. No. 1884, 89th Cong., 2d Sess. 30–31, 81 (1966).

[82] Treasury Regulations, 26 C.F.R. §301.6404–1(d).

[83] Treas. Reg. §301.6325–1(a)(1).

[84] *Carlin v. United States*, 100 F. Supp. 451, 454–55 (Ct. Cl. 1951).

[85] 26 U.S.C. §7212; Treasury Regulations, 26 C.F.R. §301.7212–1(a)(2).

[86] Opinions of Attorney General, XIII–2 Cum. Bull. 442 and 445 (1934).

[87] Note 70 *supra*.

[88] Proposed §3303 and 3304(3), at pp. 449–50 of Part 1 of these Hearings.

[89] 28 U.S.C. §1962.

[90] 46 Am. Jur., *Judgments* §246.

[91] See *Merideth v. United States*, 327 F. Supp. 429 (N.D. Miss. 1970), aff'd, 449 F.2d 187 (5th Cir. 1971).

[92] *Fore v. United States,* 339 F.2d 70 (5th Cir. 1964), cert. denied, 381 U.S. 912 (1965). See 46 Am. Jur., *Judgments* §249.
[93] 26 U.S.C. §6321.
[94] Concerning the jurisdictional problem, see *United States v. First Nat. City Bank,* 379 U.S. 378 (1965), and dissent.
[95] *Glass City Bank v. United States,* 316 U.S. 265 (1945).
[96] 26 U.S.C. §6322.
[97] 26 U.S.C. §6323(a).
[98] 26 U.S.C. §6323(f)(1)(A)(ii) and (f)(2)(B).
[99] 26 U.S.C. §6323(f)(1)(A)(i) and (f)(2)(A).
[100] Such relief is provided for purchasers and pledgees of securities, purchasers of motor vehicles, retail purchasers, certain casual purchasers, repairmen with possessory liens, holders of mechanics' liens on small residential jobs, attorney with liens on recoveries by them, and the makers of certain insurance policy and passbook loans. 26 U.S.C. §6323(b).
[101] 26 U.S.C. §6325(b).
[102] 26 U.S.C. §6323(a).
[103] 26 U.S.C. §6323(c), (d) and (h).
[104] 11 U.S.C. §93(j); *United States v. Birmingham Trust & Sav. Co.,* 258 Fed. 562 (5th Cir. 1919).
[105] *Simonson v. Granquist,* 369 U.S. 38 (1962); 11 U.S.C. §107(c)(4).
[106] *Simonson v. Granquist, supra* note 105, at 41.
[107] 26 U.S.C. §6323(a) and (h)(6).
[108] *United States v. Creamer Industries, Inc.,* 349 F.2d 625 (5th Cir. 1965). Judge Brown, dissenting, declared that "the morality of the Government's taking property which . . . was sold to, paid for by, and in equitable conscience and law belonged to a stranger, is so disturbing to me that before the heavy hand of the tax gatherer falls, it is for Congress to speak clearly to declare that this is the conscience of the country." (pp. 629–30). The law, however, remains unchanged in this respect.
[109] *Leipert v. R. C. Williams & Co.,* 161 F. Supp. 355 (S.D. N.Y. 1957). If possession is considered to put a subsequent purchaser on notice, the family may be protected against a tax lien, although the Government argued the contrary. *Engel v. Tinker Nat. Bank,* 269 F. Supp. 199 (E.D. N.Y. 1967).
[110] 46 Am. Jur. 2d, *Judgments* §294.
[111] *United States v. Morrison,* 247 F.2d 285 (5th Cir. 1957).
[112] *United States v. R. F. Ball Constr. Co.,* 355 U.S. 587 (1958), as explained in *United States v. Pioneer American Life Ins. Co.,* 374 U.S. 84, 89–91 (1963).
[113] 26 U.S.C. §6323(c)(4).
[114] 46 Am. Jur. 2d, *Judgments* §293.
[115] *United States v. Scovil,* 348 U.S. 218 (1955).
[116] 46 Am. Jur. 2d, *Judgments* §292.
[117] *United States v. Acri,* 348 U.S. 211 (1955).
[118] Notes 104–06 *supra.*
[119] *United States v. First Nat. Bank & Trust Co. of Fargo,* 386 F.2d 646 (8th Cir. 1967); *City of Dallas v. United States,* 369 F.2d 645 (5th Cir. 1966).
[120] *Cf. Illinois ex rel. Gordon v. Campbell,* 329 U.S. 362 (1946).
[121] *United States v. Vermont,* 377 U.S. 351 (1964).
[122] 26 U.S.C. §§6321–22.
[123] Real property taxes are not here involved because, even as against a federal tax lien, Congress in 1966 consented to the prior payment of subsequently assessed *ad valorem* taxes on real property (as well as special assessments and certain public service charges). 26 U.S.C. §6323(b)(6).
[124] 26 U.S.C. §6323(f).
[125] *E.g.,* Revised Uniform Federal Tax Lien Registration Act, §1, reproduced in Martindale-Hubbel Law Directory, Law Digests 3873 (1972).
[126] See *United States v. Union Central Life Ins. Co.,* 368 U.S. 291, 293 (1961); *Youngblood v. United States,* 141 F.2d 912 (6th Cir. 1944).
[127] A parallel problem arose in connection with the Federal Tax Lien Act of 1966, Public Law 89–719, 80 Stat. 1125, which for the first time provided for the issuance of certificates of subordination and of nonattachment of federal tax liens (26 U.S.C. §6323(d) and (e)) and for the filing thereof, preferably in the office where the notice of lien was on file, but if necessary in the federal court (*id.* (f) and (g)). Existing state filing laws provided only for filing of the notice of lien itself and of certificates of release or discharge thereof. The state draftsmen were at work even before the fedral law was enacted, to avoid any problem concerning the acceptability of the new certificates for filing, and the 1966 revision of the Uniform Federal Tax Lien Registration Act (note 125 *supra*) was broadened to provide for filing of any "certificates and notices relating to the liens" for taxes. But that would not embrace a lien for a fine.
[128] 28 U.S.C. §1962.
[129] Notes 91–92 *supra.*
[130] Another, probably less significant, reason for doing so is that the procedure for filing in multiple jurisdictions—*e.g.,* if the defendant resides in a jurisdiction other than the one where the fine was imposed or has realty in another jurisdiction—is simpler if the fine is treated, for filing purposes, like a tax lien rather than a judgment. Notes 50 and 56 *supra.*
[131] Pages 448–449 of Part 1 of these Hearings.
[132] Brown & Schwartz, *Sentencing Under the Draft Federal Code,* 56 A.B.A.J. 935, 940 (1970).
[133] *James v. United States,* 366 U.S. 213 (1961).
[134] *United States v. Rochelle,* 384 F.2d 748, 752 n. 5 (5th Cir. 1967), cert. denied, 390 U.S. 946 (1968).
[135] 11 U.S.C. §107(c)(3). See S. Rep. No. 1159, 89th Cong., 2d Sess. 8–10 (1966).
[136] Page 449 of Part 1 of these Hearings.
[137] Pages 432–33 of Part 1 of these Hearings.
[138] Page 448 of Part 1 of these Hearings.
[139] 11 U.S.C. §93(j). See notes 104–06 *supra.*

STATEMENT OF WILLIAM T. PLUMB, JR., ATTORNEY AT LAW, WASHINGTON, D.C.

Mr. PLUMB. Thank you, Mr. Chairman.

Mr. Chairman, I have been asked to consider whether collection of fines in criminal cases might be improved by utilizing the collection weapons available to the Federal tax collector. I emphasize I am not here to recommend that it be done. I have no competence in criminal law and procedure, and I don't have sufficient factual basis from which to conclude that the present system of collecting fines is not adequate. I am here simply as a witness on the law, you might say form law, in view of the prior discussion, to present a summary of the tools of tax collection that could be made available for collection of fines if this committee concludes, from the evidence available to it, that additional collection tools are necessary.

I have prepared a technical monograph which I offer for the record. I shall here touch on only a few points that might provoke questioning, and leave the rest to my formal statement.

One of the principal differences in the collection of fines and taxes is that fines are collected like private civil judgments, and therefore are subject to the exemptions which the States have provided to protect individuals from their private creditors. The homestead, for example, is exempt from execution in many States; and, while some laws set a value limitation as low as $1,000 or less, in others even a lavish estate cannot be appropriated for payment of a fine. Life insurance is free from execution in many States, even though it may have a large cash or loan value that is as much an investment asset of the defendant as a savings account. Garnishment of salaries and wages to collect a judgment, including one for a fine, is severely restricted by both Federal and State laws.

In contrast, Federal taxes are collectible without regard to homestead exemption laws; and the loan value of life insurance can be reached by simple levy on the insurance company; and salaries and wages can be seized without limitation, although in practice arrangements are worked out for installment payments that leave the tax delinquent enough to live on. The exemptions from tax levies that Congress has seen fit to allow are very narrow indeed.

It may well be the committee will not want to go that far in denying a criminal defendant the benefit of exemption laws. On the other hand, if State laws are left applicable, there will continue to be unfair variations in the treatment of defendants in different States, and in some circumstances a defendant may be able to shelter substantial capital from levy for a fine. I suggest the committee may want to adopt the tax law's narrow exemption rules, and then rely, for relief of genuine hardship, on the power the Brown Commission would give the court to reduce the fine or extend the time for payment when in good faith the defendant is unable to pay.

Another significant difference between the procedures for collecting fines and taxes relates to the pursuit of assets transferred by the debtor in an effort to defeat collection. A fine, like a private judgment, may be collected from transferred property, but it is often necessary to follow cumbersome procedures for setting aside a transfer. The Federal tax

collector has available a simplified procedure for assessing against the transferee a personal money liability equal to the value of the property transferred, and that claim is then collected like a tax without need to pursue particular property. Generally, the transferee may contest the assessment in the U.S. Tax Court before payment, or he may wait and contest it later in a suit for refund.

If the transferee procedure is to be adapted to the collection of fines, some questions arise. Unless the Internal Revenue Service is to take over the function of collecting fines (which is one possibility to consider), what official is to make the "assessment" of the personal liability of the transferee? And is the transferee to have the right to litigate the liability in the Tax Court before payment, or is he to be confined to a suit for refund after payment? There may be nothing anomalous, I might say, to bringing the Tax Court into the process of collecting fines in this manner. The criminal law issues leading to imposition of the fine would already have been settled by judgment, and the only issues remaining relate to the fraudulent conveyance, and those are the kind of issues the Tax Court is familiar with.

Another major difference between the collection of fines and taxes relates to the scope of the lien and its effect on third parties. In most States, a judgment generally is not a lien on personal property until the property is seized on execution. On the other hand, a Federal tax assessment is an automatic lien on all the property of the taxaper, of whatever character. The tax lien is not valid against purchasers, holders of mortgages and other security interests, judgment lien creditors, and mechanic lienors unless notice of the tax lien is first filed before those other liens or interests reach a prescribed state of perfection. In all other cases, however, the Federal tax is effective as a secret lien against third parties from the time of assessment of the tax, and in some cases the tax lien prevails even over those who had already acquired lines or interests that were good against almost everyone else.

I have set out in my monograph a number of illustrations of the devastating effects of Federal tax liens on third parties: for example, on purchases of property from the taxpayer under land contracts or defective deeds; on persons who had sold property to him retaining an equitable vendor's lien for the price; on accommodation endorses who had taken security to indemnify themselves, on landlords with liens for their rent, on prior attaching creditors; and on the tax liens of State and local governments. Congressional policy, at least as that policy is interpreted by the courts, views Federal tax liens as more meritorious than those other interests of third parties. Fines, however, are not imposed to raise revenue but to punish the guilty and to deter others from criminal conduct. Fines strike the wrong target when their collection causes loss to innocent third parties. The principle is recognized in the Bankruptcy Act, in which taxes enjoy a high priority, but fines are disallowed entirely because their collection from the estate would penalize the wrong party.

Therefore, I suggest that the equating of the lien for a criminal fine to a tax lien be limited—

First, to making available the efficient tax collection procedures and machinery, and perhaps the freedom from State exemption laws, and

Second, to impeding, by filing notice of the lien, the subsequent

voluntary alienation or encumbrance of the defendant's property that would not have been reached by a judgment lien without levy of execution.

In all other respects, however, I urge that the rules of State law concerning priority of judgments over third parties continue applicable to fines.

Finally, whatever course the committee may adopt regarding the rights of the defendant's creditors generally, I must make a special appeal for one creditor, the victim of the crime. The Brown Commission was emphatic in its view that restitution or reparation to the victim was of greater importance than collection of a fine. But if a fine is given the effect of a tax lien, and if dissipation or concealment of assets then makes full collection of both the fine and the restitution impossible, it will generally be the fine that is first satisfied, unless special provision is made to the contrary. Some formula should be devised by which the victim, when there are not enough assets to pay both, might take advantage of the priority position enjoyed by the fine, in the same way that administration expenses and wage claims are permitted to displace a Federal tax lien in some circumstances in bankruptcy. There are some complications in working out this suggestion, which I have discussed in my monograph. But, one way or another, the victim's priority ought to be assured.

I have expressly refrained from making a recommendation on whether collection of fines should be made a function of the specialized collection personnel of the Internal Revenue Service, or whether the Justice Department should continue to collect fines, with the aid of legal weapons modeled on those available to the tax collector. That is a matter of internal administration, on which I have no opinion.

Mr. PLUMB. I know I have gone awfully fast. The purpose of this statement is mainly to get your questions, if you have any. That is the conclusion.

Senator HRUSKA. Mr. Blakey, have you any questions?

Mr. BLAKEY. I must frankly confess I wish I understood it enough to ask questions.

Mr. PLUMB. Well, I will make myself available whenever you get to the point where you have policy decisions made on some of these points, and I can help and work out the details.

Mr. BLAKEY. From the staff's point of view, Mr. Plumb, thank you very much. You have been extremely helpful to us in really, at least to me, demonstrating how little I knew in an area that could be very, very important to the effective administration of the code.

Mr. PLUMB. Thank you.

Senator HRUSKA. This paper is very comprehensive, Mr. Plumb. Only some of its aspects have I, as a practicing lawyer, ever encountered.

Let me ask you this: In your discussion of real estate, you say as affected only by a tax lien. If the lien is filed in the jurisdiction in which it is effected, it is binding only if it is located in a jurisdiction in which notice has been filed.

Mr. PLUMB. Yes.

Senator HRUSKA. And you have noted that in your footnote 99. When did that become law?

Mr. PLUMB. Essentially it has always been the law. It was made more specific in the 1966 Federal Tax Lien Act, but really that was the law before.

I think previously it said where the property is "situated," and there was a great deal of litigation over what that meant. But in the real estate area it was already clear that "situated" meant where it is physically located. In the personal property area there was a great deal of conflict on where property is situated, and the Federal Tax Lien Act made that clear that in the case of personal property, a filing at the residence is adequate to reach personal property wherever it may be.

But, they also made specific that the real estate is reached if the Government files at the location of the property.

Senator HRUSKA. What is the location of the property, by State, or by Federal judicial district, or by county?

Mr. PLUMB. That is a matter for local legislation. The Congress has left it to the States to prescribe the filing office, so most of them, I think, use county offices for real estate.

In the case of personal property, a number of them go under the Uniform Federal Tax Registration Act to statewide filing such as the commercial code provides, but that is a matter of local option.

Senator HRUSKA. In case of real estate, where would it be that the file lien would have to be made to be effective?

Mr. PLUMB. The Register of Deeds, whatever the county office is.

Senator HRUSKA. In the county? That had not always been the case, had it?

Mr. PLUMB. That has always been the law, I believe. In fact, there was little litigation on it. What litigation there was established that the physical location was the location of real estate.

Senator HRUSKA. If there was, it has been many years when it was not observed within my State, as I recall it, because it was a filing that was made with the Clerk of the District Court. We have only a single division district, and it embraces the entire State, it worked a great deal of hardship upon the title lawyers, as well as purchasers of real estate. But, that has been straightened out, now, so that it is a little more practical.

Mr. PLUMB. What the law says is that you file in the Federal District Court unless the state has provided an office, and it may be that Nebraska was late in adopting legislation on that. I do not know.

But, all of the States now have uniform—well, they do not all have the Uniform Act, but they all have something similar.

Senator HRUSKA. Your paper is going to be very valuable to the committee because it will serve as a reference that we can go to for things that arise within the proposed code. Would you be willing to hold yourself available to answer by letter or supplemental statement such specific questions as we may direct to you?

Mr. PLUMB. Yes, at any time, or I can come down and talk to you.

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Senator HRUSKA. That will be very helpful. Thank you so much for coming.

Mr. PLUMB. Thank you.

Senator HRUSKA. We adjourn now, subject to the call of the Chair.

(Subsequently the following letter and suggestions were received from Mr. Plumb.)

(Thereupon, at 12:10 p.m. the hearing was adjourned, subject to the call of the Chair.)

HOGAN & HARTSON,
Washington, D.C., May 15, 1972.

Mr. ROBERT JOOST,
Subcommittee on Criminal Laws and Procedures, Senate Committee on the Judiciary, Room 2204, New Senate Office Building, Washington, D.C.

DEAR MR. JOOST: I enclose for your consideration a first draft of a section of the Criminal Code bill, in accordance with my understanding of the notes I made of our telephone conversation on May 11. If I have misunderstood your desires in any respect, revisions can be made.

I am not sure what you had in mind in proposing to provide that, except as otherwise ordered, payment of fines shall be made on the first day of each month. Since this point seems already to be covered in §3302(2) of the Brown Committee proposal, I have omitted reference to the matter.

I have set the draft up as a proposed §3305, in the chapter on Fines of the proposed Criminal Code. I shall here explain what I had in mind in the various provisions.

Responsibility for collection is imposed on "the Secretary of the Treasury or his delegate," a circumlocutory form of referring to the Internal Revenue Service that is used throughout the Internal Revenue Code of 1954. A "simplification" bill, H.R. 25, is pending on the House Ways and Means Committee, sections 726(b) and 728(b) (4) of which would make the simple term "Secretary" suffice, by use of a general definition provision. We can either follow existing form or insert a definitional subsection in our own bill to make "Secretary" serve the purpose.

I assume that many fines are paid to the court on the spot, and it would be needless complication to bring the Revenue Service into the process of collecting those. Therefore, I have proposed in subsection (1) that Service responsibility attach only to those that are not so paid. Once the fine has been certified to the Service, of course, any payments mistakenly made to the court, perhaps by less educated defendants, should be passed on to the Service to keep the records straight, as I have provided in subsection (2); this seems better than to have the court reject the mistaken tender.

Although Chapter 33 of the proposed Criminal Code provides only for fines, I have used the term "fines and penalties" because §3301 seems to contemplate the possibility of imposing civil penalties as part of the judgment of conviction in certain cases. You may determine whether it is appropriate to include "and penalties".

Subsection (1) embraces fines and penalties imposed by any "court of the United States." Under §109(d) of the proposed Criminal Code, that term embraces the District Courts of Guam and the Virgin Islands. The organic acts of those possessions convert the Internal Revenue Code into a tax law for local benefit, administered locally (48 U.S.C. §1397, 1421i; *Dudley v. Comm'r*, 258 F.2d 182; *Forbes v. Maddox*, 339 F.2d 387). Although the *Dudley* case says that the Virgin Islands were included in an internal revenue district (New York) for the purpose of pursuit of departing mainland taxpayers, I do not believe it is now true. The Service, subject to verification, does not appear to be equipped to collect fines in those areas. Therefore, following the pattern of 48 U.S.C. §1421i(e), I have substituted "the Governor or his delegate" (the island tax administrators) as the responsible party in those cases. This matter, however, should be checked out with others more knowledgeable.

Although most of the tax enforcement provisions are adopted by cross-reference in my subsection (5), my subsection (3) takes the place of a cross-refer-

ence to I.R.C. §§6321 and 6322, the basic provisions establishing the tax lien and its duration, because there are some variations proposed. I.R.C. 6321 makes a tax lien arise upon neglect or refusal to pay an assessment after demand, and §6322 then relates the lien back to the assessment date. It seems to me that, a fine being a judgment, there is no occasion to defer the attachment of the lien until a demand and refusal, especially as the lien then relates back anyway. So I have provided in my subsection (3) that the lien arises at the time of entry of judgment. I contemplate that the power to enforce the lien would be subject to any stay granted pending an appeal (Criminal Rule 38(a)(3)), but the lien would exist meanwhile as protection against dissipation of assets.

My subsection (3) also modifies the effect of I.R.C. §6322 with respect to the time when the lien expires, in order to reflect the several ways in which liability for a fine may be discharged.

My subsection (4) reflects your suggestion of a 20-year statute of limitations on collection of fines, in lieu of the unlimited life generally accorded to judgments for the United States. By cross-reference in subsection (3), the lien would expire at the same time. As in I.R.C. §6502(a), any levy or collection suit commenced within the time could be completed after the time expires. In order to set out the options in draft form, I have provided for extension of the period by agreement. In tax cases (I.R.C. §6502(a) (2)), such agreements provide some flexibility for deferring collection from an embarrassed taxpayer who appears willing and able to work off the liability without seizure of his property if he is given more time; but you or the Committee may feel that the basic 20-year period here is long enough and the fine should then either be enforced by whatever means or else forgotten. If so, the second sentence of subsection (4) may be stricken.

There is more justification, however, for incorporating the suspension provisions of I.R.C. §6503 (of which the only pertinent parts are subsection (b), relating to periods when the defendant's assets are in control or custody of a court; subsection (c), relating to absence of the defendant from the United States; and subsection (g), relating to mistaken satisfaction of the account by seizure of property that turns out to belong to a third party). Even though 20 years is a long time, the Service's hands might be tied if one of those events should occur late in the permitted collection period, so the suspension provision seems justified.

I have also, tentatively, incorporated two suspension provisions relating to military service. Whether this reference stays in depends on the resolution of the point discussed below under §7508.

In accordance with your suggestion, I have provided that death of the defendant terminates the liability for the fine. In conformity with existing court decisions, I have not extended this rule to "penalties", but you can determine what is preferred. I have inserted "if an individual" in order to avoid opening the door to the argument that the death (dissolution) of a corporation abates a fine. See *United States v. Leche*, 44 F. Supp. 765 (E.D. La. 1942).

My subsection (5) incorporates pertinent provisions of the tax law. Specificity seems preferable to blanket incorporation, since many procedural provisions of the tax law are inappropriate for the purpose. Following are the provisions of Subtitle F, Procedure and Administration, and my reasons for including or omitting reference to them:

§§6001–6110. These deal with returns and are plainly inappropriate.

§§6151–6167. These deal with time and place for paying tax. The time for payment of a fine will be set by the court under §3302(2) of the proposed Criminal Code. The draft fails to provide for the place (i.e., the District Director's office to which payments should be made), but the regulation or order by which the Secretary is to delegate responsibility can cover this; in any event, it could not be done by cross-reference to the I.R.C., which sets the place by reference to where a return is filed.

§§6201–6216. These deal with assessment of tax, and are inappropriate.

§6301. This requires the Secretary or his delegate to collect taxes. My subsection (1) requires him to collect fines and penalties. A cross-reference would add nothing.

§6302. This authorizes prescribing by regulations the mode of collecting taxes, where not otherwise provided for, and might conceivably be useful for fines, so I have incorporated it.

§6303(a) provides for notice and demand for payment of tax, and is incorporated. §6303(b) is not pertinent.

6304 relates to tariff collections, and is not pertinent.

§6311–12. These relate to payment by checks, money orders and treasury bills, and are incorporated.

§6313. Fractional parts of a cent. Not pertinent.

§6314(a). This requires giving a receipt if requested, and is incorporated.

§6314(b), 6315 and 6317. These relate to particular kinds of tax payments. Not pertinent.

6316. Payment in foreign currency may be accepted in Secretary's discretion. Incorporated.

§6321–22. Covered, with variations, in my subsection (3), so not incorporated.

§6323. This deals with priorities over third parties. Although I have reservations, as expressed in parts 9 and 11 of my statement at the Hearings, it is incorporated without modification, at your request.

§6324. Special lien for estate and gift tax. Not pertinent.

§6325. Procedures for release or discharge of lien (see my statement at the Hearings, at note 101). This is appropriate for incorporation.

§6331–32. These sections cover levy and seizure of property, and the obligation of person levied on (including a bank or life insurance company) to surrender money or property in response to a levy (see my statement at the Hearings, at notes 11–13). You stated on the telephone that there should be no additional 50% penalty for nonpayment, as the response to nonpayment should be left to the court. I believe you misunderstood my reference to the 50% penalty (note 13). That is not a penalty on the delinquent but on *his debtor* or the person in possession of his property, who without reasonable cause refuses to pay or surrender the property in response to a levy. Therefore, I have incorporated the provision without modification.

§6333. Permits examination of books and records bearing on property that may be levied on. Incorporated.

§6334. Property exempt from levy. This is incorporated, thus making applicable the narrow exemptions in the tax law, rather than the liberal ones under state and other laws (see part B.1 of my statement), thus leaving it to the sentencing court to relieve any hardship.

§§6335–42. These provisions for sale of seized property are incorporated.

§6343. Release of levy, when it will facilitate ultimate collection to do so, or when a third party's property is taken by mistake. Incorporated.

§6401(a). Treats as an overpayment an amount collected after the period for collection expires. This seems appropriate for incorporation, so that one who pays a fine that could not have been lawfully enforced against him after 20 years will not suffer for his ignorance. §6401(b) deals with certain special taxes and is not pertinent.

§6402(a). This authorizes the Secretary to credit any overpayment on any other outstanding tax liability and to refund the balance; it is incorporated.

§6402(b) relates to estimated tax and is not pertinent.

§6403. Overpayment of an installment of a liability payable in installments is to be credited on the next installment rather than refunded. Incorporated.

§6404. Abatement by the Secretary of excessive assessment. Not pertinent, as only the court can reduce a fine.

§6405. Report of large refunds to Joint Committee on Internal Revenue. Not pertinent.

§6406. No review of merits of tax determinations by G.A.O. Not pertinent.

§6407. Date when refund or credit is deemed allowed. Not pertinent.

§§6411–27. Rules of special application. Not pertinent.

§6501–04. Statutes of limitations on assessment and collection. Except so far as the suspension provisions of §6503 are incorporated, my subsection (4) provides the only applicable statute of limitations, and no incorporation of the tax rules (most of which would not be pertinent anyway) is necessary.

§§6511 and 7422. These provisions require that, before a suit may be brought for refund of an overpaid tax, a claim for refund must be filed with the Service, and the taxpayer must then wait six months or until earlier rejection of the claim before he can sue. They also set the period of limitations for filing claims and suits, which are shorter than that generally applicable for suits against the United States (28 U.S.C. §§2401, 2501). Those requirements are necessary to tax administration, to afford the opportunity for audit before suit. But I see no occasion to impose such requirements in the rare cases where a fine may have been overpaid. Since the judgment will have settled the merits, an overpayment could, it seems, result only some inadvertence on the part of either the Government or the defendant. There is no need for time for an administrative audit. If a simple request for refund does not produce results, the defendant should be able to seek judicial relief without formalities, at any time within the six years provided by 28 U.S.C. §§2401 and 2501.

§6512–33. Other periods of limitation. Not pertinent.

§§6601–12. Interest on over and underpayments of tax. Not pertinent.

§§6651–85. Penalties for various acts and defaults related to taxes. Not pertinent.

§§6801–08. Taxes payable by stamp. Nor pertinent.

§§6851–64. Assessment of tax when collection is in jeopardy. Not pertinent.

§§6871–72. Claims for taxes in bankruptcy and receivership. Claims for fines are not allowable in bankruptcy, and penalties are allowable only so far as they make good a pecuniary loss; on the other hand, both are allowable in receiverships. However, incorporation of these provisions would serve no purpose even in situations where the claims would be allowable. §6871 relieves of certain restrictions on assessment, so that claim may be filed without opening the door to the Tax Court, and is not pertinent. §6872 suspends the period of limitations on assessment, and is not pertinent.

§6873. Requires payment, on notice and demand after termination of a bankruptcy or receivership, of any claim allowed therein but not satisfied. Incorporated (but presumably controlled by §17 of the Bankruptcy Act to the extent that liability may have been discharged).

§§6901–05. Liability of transferees and fiduciaries. You indicated that provision for collection from transferees of a taxpayer's property by assessment, which open the door to the Tax Court on the issues of fraudulent conveyance and the like, should not be incorporated. Therefore, the procedures under the Uniform Fraudulent Conveyance Act and other state laws must be availed of. See part B.4 of my statement at the Hearings.

§§7001–11. Licensing and registration. Not pertinent.

§§7101–03. Bonds. Not pertinent.

§§7121–23. Closing agreements and compromises. Not pertinent, as only the court is to have the power to adjust the fine.

§§7201–09, 7211–15. Tax crimes. Not pertinent.

§7210. Crime of failure to obey a subpoena to testify or produce records (applicable to defendant or any third party with knowledge of his assets). Incorporated. as necessary to enforcement of the subpoena power, §§7602–05, below.

§§7231–75. Penalties applicable to certain taxes. Not pertinent.

§§7301–44. Miscellaneous penalties and forfeitures. Not pertinent.

§7401. Civil action for collection (when administrative action is ineffectual) must be authorized by Secretary of the Treasury and directed by Attorney General or their delegates. Incorporated. (Do you have in mind that sentencing court should also be required to approve before suit is resorted to?)

§7402. Jurisdiction of district courts to issue certain writs, appoint receivers, enforce subpoenas. etc., in such suits. Incorporated.

§7403. Action to enforce tax lien on property. Incorporated.

§7404. Special provision for estate tax. Not pertinent.

§7405. Action to recover erroneous refund. Incorporated.

§7406. Judgments for taxes to be paid to Secretary as collections of taxes. Not incorporated. Instead, my subsection (7) says recoveries are to be accounted for as fines and penalties even though collected like taxes.

§7421. Suit to restrain collection of taxes prohibited. I have not incorporated this prohibition. While the circumstances in which there would exist grounds

to enjoy collection of a fine (the merits having been settled by judgment) may be rare, the remedy should not be precluded where grounds exist—e.g., if a fine has been paid or remitted but the tax collector doesn't get the word. If the defendant has grounds that would move a court to enjoin erroneous collection of a fine, there is no such "imperious need" for revenue from fines (as there is supposed to be in the case of taxes) that would dictate requiring that he pay first and litigate later.

§7422. No suit allowed to recover an overpayment of taxes unless a claim for refund is first filed. Not incorporated (see above discussion of §§6511).

7423. This indemnifies revenue officers for certain liabilities they may incur for erroneous collection of taxes, etc. Incorporated.

§§7424–25. Procedure for cases where a third party having a lien on the taxpayer's property forecloses such lien, with or without joining the United States, when the latter has a tax lien. Incorporated and made applicable where the federal lien is one for a fine.

§7426. Actions permitted to a third party whose property is wrongly levied on or sold for taxes of another. Incorporated.

§§7441–93. Tax Court proceedings. Not pertinent.

§§7501–04. Miscellaneous provisions. Not pertinent.

§§7505–06. Administration and disposition of property acquired by the United Sates in payment of taxes. Incorporated, except for §7505(b), which directs accounting for proceeds as tax collections.

§7507. Exemption of insolvent banks from tax. Not pertinent.

§7508. This provision, which suspends collection of taxes while a person is serving in a combat zone, has been tentatively incorporated. It is related to, but not integrated with §513 of the Soldiers and Sailors Civil Relief Act of 1940 (50 U.S.C. Appendix §573) which defers collection of income taxes of any person in military service whose ability to pay is materially affected by such service. So far as I am aware, no similar deferments of payment are now applicable to fines, and the mere fact that tax collection procedures are to be made applicable to fines is not necessarily a reason for extending this form of relief to new territory. In general, the policy of the 1940 Act was to defer *civil* liabilities only. Therefore, you may wish to strike from my subsection (5) the references to I.R.C. §7508 and to the 1940 Act, and to remove the related references from subsection (4).

§§7509–16. Miscellaneous provisions. Not pertinent.

§7601. Canvass of district for taxable persons. Not pertinent.

§§7602–05. Examination of books and witnesses. Incorporated.

§§7606–21. Special provisions. Not pertinent.

§7622. Authority to administer oaths and certify papers in tax matters. Incorporated.

§§7623–41. Not pertinent.

§7651. Administration and collection of taxes in possessions. If I read the proposed Criminal Code correctly, it is not applicable in possessions other than Guam and the Virgin Islands; and I.R.C. 7651, by its initial clause, does not apply in those two possessions. Therefore, the provision seems not to be pertinent. But I am too unfamiliar with the set-up of the possessions to be sure I have not missed some point at which it may be pertinent.

§§7652–55. Not pertinent.

§7701. Definitions. Most of the definitions have no relevance for present purposes. But, since some of the defined terms may appear in provisions which I propose to incorporate, it seems wise to embrace the definitions provision as well in the incorporation.

§7801–04. General organization and powers of the Treasury. I doubt the need to incorporate this, since the draft amendment itself empowers the Secretary to act in this new area.

§7805. Authority to adopt regulations. Incorporated.

§7806–07. Not pertinent.

§7808. Depositaries for collection. Tentatively incorporated, but perhaps unnecessary.

§7809. Deposit of collections in the treasury. Although not pertinent in all respects, this seems appropriate for incorporation.

§7810. Revolving fund for redemption of real property from sales under foreclosure of prior private liens. This ties in with §7425, which is incorporated.

§7851–52. Not pertinent.

Following the incorporation of those provisions, making them applicable as if the fines were tax liabilities, I have added a general provision permitting the Treasury to modify their application by regulations where necessary or appropriate to reflect differences in the nature of the liabilities. Precedent for this is found in H.R. 14370, recently reported by the House Ways and Means Committee, providing for federal collection of state income taxes. Proposed I.R.C. §6361(a) makes the procedural and administrative provisions of the I.R.C. applicable "except to the extent that their application is modified by the Secretary or his delegate by regulations necessary or appropriate to reflect the provisions of this subchapter [added by the bill], or to reflect differences in the taxes or differences in the situations in which liability for such taxes arises." The committee report states, "To deal with unanticipated difficulties whch may arise in the administration of any newly designed system, the bill provides [as above quoted]." There seems to be a similar need for flexibility in our "newly designed system."

My subsection (6) is a possibly futile attempt to forestall the problem discussed in part B. 10 of my statement for the Hearings. I doubt that Congress can establish a rule for interpretation of state laws, even when such laws were adopted in response to a Congressional delegation of authority. But the suggested provision may induce some filing authorities not to refuse the tendered filings. If they nevertheless refuse to accept a notice of lien for a fine as constituting a tax lien notice under State law (as in *U.S. v. Est. of Donnelly*, 397U.S. 286, 290), either by rejecting the notice in the particular case or by some general determination that such notices are unacceptable, an alternative place for filing will be needed. If left to the I.R.C., the alternative would be the federal court (I.R.C. §6323(f) (1) (b)), thus requiring a prospective purchaser or lender to search in three different places—in the office designated for tax liens, in the registry of judgments, and in the federal court. I have attempted to reduce this by one, by having the fine recorded as judgment (as it is today), but giving that record the same effect as the filing of a federal tax lien. If preferred, we could omit subsection (6) and let §6323(f), which is incorporated by subsection (5), throw the filing into the federal courts until the States conform their laws or voluntarily accept the filings.

Subsection (7) provides that the collections shall be accounted for as fines and penalties even though collected under tax enforcement provisions, and also provides for keeping the Attorney General and the court informed of collections.

Subsection (8) is the reporting requirement you requested, for keeping the Attorney General and the court informed of whether the fine is delinquent and enabling an appropriate "response to nonpayment" (other than continued collection efforts by the Service) to be initiated by the Justice Department or the court.

Please let me know of any modifications you may desire.

Sincerely,

William T. Plumb, Jr.

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§3305. Collection and Payment of Fines and Penalties.

(1) Fines and penalties imposed by a court of the United States, if not paid to the sentencing court upon the imposition thereof. shall be paid to the Secretary of the Treasury or his delegate, who shall be responsible for the collection and enforcement thereof. other than as provided in section 3304. In the case of fines and penalties imposed by the District Court of Guam or the District Court of the Virgin Islands, the term, "the Secretary of the Treasury or his delegate," whenever used in this section or in any provision to which this section refers, shall be read as "the Governor or his delegate."

(2) With respect to any fine or penalty so imposed and not paid, including any for which delayed or installment payment is provided for, the sentencing court shall promptly certify to the Secretary of the Treasury or his delegate

the name of the defendant, his last known address, his identifying number (as prescribed by 26 U.S.C. §6109 and regulations thereunder), the docket number of the case, the unpaid amount of the fine or penalty, and the terms of payment prescribed by the court. The court shall further promptly certify to the Secretary of the Treasury or his delegate any remission or modification of the fine or penalty, and shall transmit to him any payments which the court may receive with respect to fines and penalties previously certified.

(3) Such fine or penalty, together with costs, shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to the defendant. The lien shall arise at the time of entry of the judgment and shall continue until the liability is satisfied, remitted or set aside, or until it becomes unenforceable by reason of subsection (4).

(4) Such liability shall not be collected after the expiration of 20 years from the entry of judgment (or the expiration of any stay of execution thereof), unless pursuant to a levy made or judicial proceeding begun within that time. The period for collection may be extended by agreement in writing entered into by the defendant and the Secretary or his delegate prior to the expiration of the period. The running of such period shall be suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended under subsections (b), (c) or (g) of 26 U.S.C. §6503, under subsection (a) (1) (I) of 26 U.S.C. §7508, or under section 513 of the Act of October 17, 1940, c. 888, 54 Stat. 1190. Notwithstanding the foregoing, a liability for a fine shall in no event be collected after the death of the defendant, if an individual.

(5) The provisions of 26 U.S.C. §§6302, 6303(a), 6311, 6312, 6314(a), 6316, 6323, 6325, 6331 through 6343, 6401(a), 6402(a),6403, 6873, 7210, 7401 through 7403, 7405, 7423 through 7426, 7505(a), 7506, 7508, 7602 through 7605, 7622, 7701, 7805, 7808 through 7810, and of section 513 of the Act of October 17, 1940, c. 888, 54 Stat. 1190, shall apply to such fine or penalty and to the lien imposed by subsection (3) as if the liability of the defendant were one for an internal revenue tax assessment, except to the extent that their application is modified by the Secretary of the Treasury or his delegate by regulations necessary or appropriate to reflect differences in the nature of the liabilities.

(6) A notice of the lien imposed by subsection (3) shall be considered a notice of lien for taxes payable to the United States for the purpose of any State law providing for the filing of notices of such tax liens. If the Secretary of the Treasury or his delegate shall proclaim that the responsible authorities in any State or subdivision thereof in which notices of federal tax liens are required to be filed have determined notices of the lien imposed by subsection (3) to be unacceptable for filing as federal tax liens, the registration, recording, docketing or indexing of the judgment for the fine or penalty in accordance with 28 U.S.C. §1962 shall be considered for all purposes as the filing prescribed by 26 U.S.C. §6323 (f) (1) (A) and this section.

(7) All moneys recovered hereunder shall be accounted for as collections of fines and penalties, and shall be promptly reported by the Secretary or his delegate to the Attorney General and to the sentencing court.

(8) With respect to each liability for a fine or penalty, the payment of which has become delinquent, the Secretary of the Treasury or his delegate shall make reports to the Attorney General and to the sentencing court, at monthly intervals, or oftener if requested in a particular case, setting out the name and last known address of the defendant, the docket number of the case, the amount which is delinquent, the period for which it has been delinquent, the levies which have been made or attempted, the notices of lien which have been filed, and any information in the possession of the Secretary or his delegate which may bear upon the appropriate response to nonpayment under section 3304, except so far as such information has been previously reported and has not changed materially.

THE USE OF PUBLICITY AS A CRIMINAL SANCTION AGAINST BUSINESS CORPORATIONS

by

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THE USE OF PUBLICITY AS A CRIMINAL SANCTION AGAINST BUSINESS CORPORATIONS

By Brent Fisse*

After noting past instances of judicial and administrative bodies formally publicizing adverse determinations of responsibility, Mr Fisse discusses the theoretical basis for the use of such sanctions against business corporations which breach regulatory statutes, in order to accomplish the major purposes of lowering corporate prestige and inducing government intervention, rather than to inflict a monetary loss. The author then examines the disadvantages involved, and in conclusion evaluates the usefulness of such 'limited formal publicity sanctions'.

Corporate criminal responsibility is at an uncertain stage of development. Extensive academic enquiry in this field during the last decade has produced a number of criticisms and suggestions, many of which involve important or fundamental questions. At the heart of current concern is the effectiveness or otherwise of the fine as a method of deterring business corporations, especially those which are large. In the U.S.A. the fine has been widely criticised on the grounds that fines imposed frequently have been much lower than the profits made by corporations from the commission of offences, and have not been felt by wealthy corporations. The maximum fines under most statutes are low and often the courts have not imposed even the maximum penalty.[1] In Australia fines against corporations have received little criticism. The reasons are not clear. The extent and nature of corporate crime, and the amounts of fines authorised by statute or imposed by courts have yet to be documented. We have no study corresponding to Sutherland's *White Collar Crime* or to the recent American surveys. Yet it is probable that the present debate in the U.S.A. and elsewhere is relevant in Australia, or will become so in the near future.[2]

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[1] Davids, 'Penology and Corporate Crime' (1967) 58 *Journal of Criminal Law, Criminology and Police Science* 524; Dershowitz, 'Increasing Community Control over Corporate Crime—A Problem in the Law of Sanctions' (1961) 71 *Yale Law Journal* 280, reprinted in Geis, *White-Collar Criminal* 136.

[2] See Leigh, *The Criminal Liability of Corporations in English Law* ch. 9; Kadish, 'Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations' (1963) 30 *University of Chicago Law Review* 423, reprinted in Geis, *op. cit.* 388.

Academic dissatisfaction with the fine and with entity responsibility has given rise to three different basic suggestions for change. The first is that entity responsibility should be abandoned and a greater attempt should be made to locate and punish guilty individual officers and employees. This approach is scarcely novel but in recent times has found some tenacious and persuasive advocates.[3] Second, there is the possibility of discarding the notion that corporations are to be punished and deterred, and stressing instead the ideal that they should be reformed and rehabilitated. This suggestion has yet to be presented in detailed form but a preventive, behavioural approach has of course been the subject of considerable comment in the context of human offenders.

A third approach is to devise new entity sanctions, or to improve those now in use, so that effective deterrence will be achieved. Thus, many commentators have argued for higher maximum fines and some have suggested fines assessed on the basis of a percentage of corporate turnover or profits so that the monetary loss will be felt by large and wealthy corporations.[4] The hunt for an effective sanction has also led to the suggestion that the powerful force of public opinion be directed as a formal sanction against corporate offenders.[5] This suggestion is based upon the general belief that favourable public opinion is valued highly by business corporations. The methods of utilising public opinion as a formal sanction have yet to be worked out precisely, but mass media advertisements setting out the details of a corporation's criminal conduct, compulsory notification to shareholders and others by means of the annual report, and even a temporary ban on advertising are contemplated.[6] Clearly, these uses of publicity go far beyond the present informal and haphazard processes of news reporting.

This article is concerned with the third approach described above, and examines what publicity has to offer as a formal sanction in comparison to the fine. The scope of discussion is limited in several ways.

It is true that very heavy penalties are possible under revenue laws and have been imposed in several widely publicised cases concerning evasion of customs duties. *E.g. Anderson v. L. Vogel & Son Pty Limited* (1967) 41 A.L.J.R. 264. More recently fines amounting to one million dollars were imposed upon Godfrey Phillips International Pty Ltd, another company, and three company directors.

[3] Notably Leigh, *op. cit.* ch. 9. See also Mueller, '*Mens Rea* and The Corporation' (1957) 19 *University of Pittsburgh Law Review* 21. The substance of much of the literature is covered by Heerey, 'Corporate Criminal Liability — A Reappraisal' (1962) 1 *University of Tasmania Law Review* 677.

[4] See references in n. 1 *supra*.

[5] This view is currently being debated by the framers of the proposed new code of federal criminal law. I am indebted to Professor Louis Schwartz of the University of Pennsylvania Law School, and Director of the National Commission on Reform of Federal Criminal Laws, for indicating to me this future possible use of publicity sanctions and for making available to me the materials upon corporate criminal responsibility.

[6] The former two methods are contemplated in the reform proposals for the federal criminal law. See n. 5 *supra*. For mention of the possibility of an advertising ban, see Davids, *op. cit.* 530, n. 37.

First, the use of publicity as a formal sanction is emphasized. By 'publicity as a formal sanction' I mean publicity which follows upon a determination of responsibility by a court or administrative body, and which is activated for the purpose of imposing a sanction either by the court or administrative body itself, or by some other official agency.[7] An example is an advertisement of a conviction published by order of the court in which the conviction has been recorded. Publicity amounts to what may be described as an informal sanction in situations where charges, hearings, convictions or sentences are reported by the mass media at their own discretion.[8] An informal publicity sanction would also be imposed where warnings about consumer or investor deception are issued by an Attorney-General or by consumer groups and other bodies,[9] or where homilies or criticisms are given by a court at the time of conviction.[10] There are many situations in which publicity can operate as an informal sanction and sometimes it is difficult to say whether a publicity sanction is formal or informal. In placing emphasis upon the formal use of publicity I do not mean to deprecate the impact which informal publicity frequently has. Wherever possible this impact should at least be taken into account in determining the quantum of formal sanctions and restraints upon some forms of informal publicity may well be desirable.[11] Secondly, my focus is upon business corporations, although some points will also be relevant to other entities such as public instrumentalities. Third, no specific distinction is drawn between large and small corporations. However, the need for a sanction against the entity is much greater in the case of a large or 'endocratic' corporation and usually there is no need for publicity or other sanctions to be directed

[7] Where the publicity sanction is imposed by an agency other than that which determines D's responsibility problems of co-ordination in sentencing will usually arise. See text to n. 28 *infra*.

[8] See the discussion in the text to n. 49 *infra*.

[9] *E.g.* Consumers Protection Act 1964, s. 4(1)(a).

[10] *E.g. Houghton v. Trafalgar Insurance Company Ltd* [1953] 2 All E.R. 1409, a case kindly mentioned to me by my colleague Professor A. Rogerson.

Examples of informal publicity sanctions abound. The stigma of indictment or prosecution alone is often important, as indicated in U.S.A., *The Report of the Attorney-General's National Committee to Study the Antitrust Laws* (1955) 352-3. For further examples see *Pennsylvania Railroad System v. Pennsylvania Railroad Company* (1924) 267 U.S. 203, 215-7; Clinard, *The Black Market* 79-80; Moberly, *The Ethics of Punishment* 62; Windeyer, *The Law of Wagers Gaming and Lotteries in the Commonwealth of Australia* 142-3; Rourke, 'Law Enforcement Through Publicity' (1957) 24 *University of Chicago Law Review* 225; Comment, 'Extrajudicial Consumer Pressure: An Effective Impediment to Unethical Business Practices' (1969) 7 *Duke Law Journal* 1011; Indecent Publications Act 1963 (N.Z.), s. 17; 'Milk', a Victorian Milk Board advertisement in the Melbourne *Age*, 18 July 1970, 6.

[11] University of Adelaide Law School, *Report on The Law relating to Consumer Credit and Moneylending* (1969) 72; *Report to The Standing Committee of Attorneys-General on Special Investigations* (1969) 9-11; Rourke, *Secrecy and Publicity* ch. 7; Lemov, 'Administrative Agency News Releases: Public Information Versus Private Injury' (1968) 37 *George Washington Law Review* 63.

against small corporations.[12] Fourth, this article is aimed at providing some theoretical underpinning upon which future specific applications of publicity sanctions might be based, rather than at giving a treatment specifically related to different types of offences. A wide range of offences, from manslaughter to supplying unclean food or violating the penal provisions of the restrictive trade practices legislation, comes within scan. Finally, there is no consideration of possible problems of constitutional law which might arise from the use of publicity sanctions.[13]

The order of this article is as follows. A brief description of examples where publicity has been used as a sanction introduces a discussion of the targets which may be attacked by publicity for the purpose of achieving deterrence, and the forms of publicity most appropriate for reaching those targets. Then follows an account of the disadvantages suffered by publicity sanctions. The remainder of the article suggests how future publicity sanctions might be most effectively deployed. One terminological point: D stands for a corporation accused of an offence, and, in keeping with the reputed anonymity of those individuals who perform criminal conduct on behalf of large corporations, X represents an employee, at any level,[14] in respect of whose conduct it is sought to hold D responsible.

1. EXAMPLES OF PUBLICITY AS A SANCTION

Since the abolition of the stocks, formal publicity sanctions have been rare. However, a number of statutory provisions have provided for the publication of convictions, although some are no longer in force.

(a) *England*

Several Bread Acts in force in England during the first half of the nineteenth century contained provisions which authorised magistrates and justices to order publication of convictions in the case of persons responsible for adulterating bread. The following provision in section 10 of the Bread Act of 1822 is typical:

> It shall be lawful for the Magistrate or Magistrates, Justice or Justices, before whom any such Offender or Offenders shall be convicted, to cause the Offender's Name, Place of Abode and Offence, to be published in some Newspaper which shall be printed or published in or near the City

[12] Rostow's unhappy term 'endocratic' is used to describe the 'large publicly-held corporation, whose stock is scattered in small fractions among thousands of stockholders'. Dershowitz, *op. cit.* 281, n. 3.

[13] Would there be State power to compel television publicity? Are fines assessed on turnover, duties of excise? Would news media be exposed to liability interstate for defamation?

[14] In some jurisdictions, including those in Australia, a distinction is drawn between primary and vicarious corporate responsibility. Leigh, *op. cit.* ch. 6; Fisse, 'The Distinction Between Primary and Vicarious Corporate Criminal Liability' (1967) 41 *Australian Law Journal* 203.

of *London* or the Liberty of *Westminster*, and to defray the Expence of publishing the same out of the Money to be forfeited—in case any shall be so forfeited as last mentioned, paid or recovered.[15]

Bentham states that in the case of such offences it was quite common for magistrates to threaten offenders with advertisement upon a second conviction, and that publicity was regarded as being a more severe punishment than the statutory fine.[16] Undoubtedly the intention of the legislature was to warn prospective buyers, but the additional elements of punishment and deterrence must have been contemplated. Adulteration of bread was a significant problem of the time and its comparative importance is shown by the fact that the publicity provisions did not extend to selling bread by short-weight, baking bread on Sunday or other offences.[17]

Publication of offenders' names was also possible under later legislation dealing with the adulteration of other items as well as bread. During the early history of food and drug legislation in the mid-nineteenth century many reformers stressed the value of publicity as a deterrent, and as a method of warning and educating.[18] The Adulteration of Food or Drink Act of 1860 enabled a court to order publication of the offender's name, place of abode and offence on the occasion of a second conviction for knowingly selling adulterated food or drink. Publication was authorised to be 'in such Newspaper or in such other Manner' as seemed desirable to the court and was at the expense of the offender.[19] A similar provision was enacted in the Adulteration Act 1872, an act which applied to drugs as well as to food and drink.[20] Despite widespread advocacy of the need for publicity sanctions, they were not made available in the Sale of Food and Drugs Act 1875.[21] It seems that the change was not due to any doubts about the efficacy of the sanction, but rather to a policy of *laissez-faire*.[22] The use of publicity has not been revived in this area, except that there does exist a provision in the

[15] 3 Geo. IV c. cvi (1822). Similar provisions were: 55 Geo. III c. xcix (1815), s. 3; 6 & 7 Will. IV c. 37 (1836), ss. 8 and 12; 1 & 2 Vict. c. 28 (1838), ss. 7 and 11.

[16] Bowring (ed.), *The Works of Jeremy Bentham* 460. The statement in Leigh, *op. cit.* 159 that power to order publication existed only in the case of a second offence seems wrong.

[17] See 6 & 7 Will. IV c. 37, ss. 6 and 14, and Court, *A Concise Economic History of Britain* ii. 236.

[18] See Stieb, *Drug Adulteration* 136-8, where numerous useful references are collected.

[19] 23 & 24 Vict. c. 84 (1860), s. 1. Stieb, *op. cit.* 288 n. 16, errs in stating that '[t]he clause providing for publication of names disappeared from the final 1860 Act'.

[20] 35 & 36 Vict. c. 74 (1872), s. 2. See also 32 & 33 Vict. c. 112 (1869), s. 3.

[21] Stieb, *op. cit.* 141. However, note the publicity sanction under 54 & 55 Vict. c. 76 (1891), s. 47(4) relating to sale of unfit meat.

[22] Stieb, *op. cit.* 141.

Weights and Measures Acts of 1889 and 1936 which enables a court to have the conviction of any offender published in such a manner as it considers desirable.[23]

(b) *Australia and New Zealand*

In Australia and New Zealand publicity sanctions have rarely been adopted in weights and measures legislation,[24] but are very common in food and drugs laws.[25] The publicity sanctions relating to food and drugs differ in several respects.[26] The provisions in South Australia, Queensland, New South Wales and Tasmania, unlike those in New Zealand and Victoria, require a second conviction, although not necessarily for exactly the same offence. In South Australia publication is ordered by the court, which has a free hand as to the method of publication. In New Zealand, the court also orders publication, but the only method of publication is by newspaper. Under the Victorian legislation publication in respect of a first offence requires a court order, and the Government Gazette is the only medium possible. In the case of a subsequent offence, the administrative body responsible for the operation of the food and drugs legislation automatically inserts a notice in the gazette, and publication in a newspaper is also possible where a court so directs. Publication in Tasmania and New South Wales is at the discretion of the relevant administrative authority and publication is to be in the gazette, or in newspapers as well. The same is true of Queensland except that the notice in the gazette may also be posted up outside the offender's place of business.[27] An important feature peculiar to the provisions in Queensland, Tasmania and New South Wales is that the court does not have control over the use of publicity. Consequently problems of co-ordination in sentencing may arise.[28]

[23] Weights and Measures Act 1889 (Eng.), s. 14; Weights and Measures Act 1936 (Eng.), s. 8(1). Note also the survival of the publicity sanction provided under 32 & 33 Vict. c. 112 (1869), s. 3.

[24] Only New Zealand has such a provision: Weights and Measures Act 1925, s. 37.

[25] Pure Food Act 1908 (N.S.W.), s. 3; Health Act 1937 (Qld), s. 151; Health Act 1958, s. 294; Food and Drugs Act 1947 (N.Z.), s. 28; Food and Drugs Act 1910 (Tas.), s. 58; Food and Drugs Act 1908-1962 (S.A.), s. 48. For earlier examples see Adulteration of Food or Drugs Act 1880 (N.Z.), s. 40; Licensing Act 1908 (N.Z.), s. 236. Early Bread Acts in Australia apparently did not follow the English practice. See Bread Act 1835 (N.S.W.); Bread Act 1845 (S.A.); and Bakers and Millers Act 1865.

[26] The only feature common to all the provisions is that the penalty imposed upon D must be mentioned. In this respect they differ from s. 10 of the Bread Act 1822, which required publication of D's *offence* and not necessarily the penalty. See text to n. 69 *infra*.

A difference between the various provisions which is not mentioned in the text is that in New South Wales, Queensland and Victoria, publication is possible where only D's servant or agent has been convicted, and it does not appear necessary that the relevant conduct be within the scope of employment.

[27] Also, in Queensland, milk vendors can receive further exposure. The notice in the gazette may be posted upon any vehicle used in connection with the sale or distribution of milk.

[28] See n. 7 *supra*. The position would be different if gazette notices were required *automatically* upon conviction in a court, as in the case of the gazette notice which

Another example of publicity as a sanction is to be found in the income tax laws. In Australia the Commissioner of Taxation is required to furnish, for presentation to Parliament, an annual report in which he must 'draw attention to any breaches or evasions . . . which have come under his notice'.[29] The 1969 report[30] contains only bare details of criminal prosecutions without any reference to the names of tax offenders,[31] but much fuller particulars, including names, are supplied in respect of cases where income has been understated but no prosecution has been launched.[32] This current interpretation of the report requirement indicates that publication is regarded as unnecessary where tax evaders are prosecuted. Apart from a desire to keep the administration of revenue laws open to parliamentary and public scrutiny,[33] publication is used to achieve deterrence without the expense and inconvenience of criminal prosecution.[34] The New Zealand income tax legislation requires the commissioner to publish in the gazette the names of tax defaulters and other specified particulars.[35] This information is laid before Parliament, as in Australia. Full particulars are required in respect of cases resulting in conviction as well as cases dealt with solely by the taxation department.[36] Thus, unlike the position in Australia, adverse publicity is regarded as a sanction which should accompany a fine or gaol sentence imposed by a court.

the Victorian food and drugs agency is required to insert automatically upon a second conviction. However, compare the position in Victoria in the case of a first offence. Under the Health Act 1958, s. 294(1) a conviction 'may' be published by the administrative authority 'if the court so directs'.

[29] Income Tax Assessment Act 1936-1969 (Cth), s. 14. Similar provisions appear in the statutes relating to sales tax, pay-roll tax, estate duty, gift duty, and the stevedoring industry charge. See also Customs Act 1901-1968 (Cth), s. 265; Trade Practices Act 1965 (Cth), s. 105.

It may be wondered why this type of publicity sanction is classified as 'formal' when the report to Parliament made by the Victorian Consumers Protection Council is not. The tax provisions more clearly relate to an administrative body charged with determining D's responsibility, a point evident from the provision made for appeals. The main functions of the Consumers Protection Council are to provide information and to warn. See also n. 50 *infra*.

[30] *Forty-eighth Report of the Commissioner of Taxation* 1968-69, (1969) Parliamentary Paper No. 53.

[31] In this respect, contrast the views of Latham C.J. in *Jackson v. Magrath* (1947) 75 C.L.R. 293, 304: '[a] description of a breach of the Act which does not identify the offender is a very imperfect description'. *Ibid.* 314, *per* Dixon J.

[32] The particulars given are name and address, occupation, financial year of evasion, amount of understated tax, increase in assessed tax, and additional tax charged. Details relating to corporate offenders are set out separately.

[33] Letter to author from Mr P. J. Lanigan, Second Commissioner of Taxation, Canberra. See also *Jackson* v. *Magrath* (1947) 75 C.L.R. 293, 312, *per* Dixon J.

[34] *Ibid.* 295; and see Lee, 'The Enforcement Provisions of the Food, Drug and Cosmetic Act' (1939) 6 *Law and Contemporary Problems* 70, 90.

[35] Land and Income Tax Act 1954, s. 238. The particulars required are the name, address, occupation of the defaulter, such particulars of the offence or evasion as the commissioner thinks fit, year of evasion or offence, amount of tax evaded and penalty.

[36] *Ibid.* s. 238(1)(a).

A final example is the use made of publicity in Australia under the Black Marketing Act 1942 (Cth), a statute in force until shortly after the end of the war. This legislation, which was passed in order to strengthen the sanctions available to enforce the prices regulations made under the National Security Act 1939,[37] contained a number of sections designed to make extensive use of adverse publicity. Details of convictions for the offence of black marketing were required to be published in the Commonwealth Gazette.[38] At the time of conviction the court was required to order a notice or several notices of the conviction to be displayed at the offender's place of business continuously for not less than three months.[39] The court was also required to decide the size, lettering, position, and content of such notices.[40] Every notice was to be headed in bold letters 'Black Marketing Act 1942', and the entire notice was to be easily legible to prospective buyers or other persons conducting business at the offender's place of business.[41] If such a notice would not effectively draw the conviction to the attention of persons dealing with the offender, a court could direct that a similar notice be displayed for three months on all business invoices, accounts, and letterheads.[42] In addition, the Attorney-General was authorised to direct newspaper publication or radio broadcasts of particulars relating to any black marketing offence.[43]

Although it is highly doubtful whether newspaper or radio publicity was used often,[44] all cases prosecuted under the Act were intended to be publicised by notices and description in the gazette.[45] Even this limited form of publicity may not have been used extensively. Despite the government's belief that profiteering was a grave offence,[46] it is likely that the Black Marketing Act was aimed at only the more serious breaches. The vast majority of cases were almost certainly dealt with under the National Security Act, which did not make available any

[37] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 24 September 1942 863, *per* Dr Evatt. These provisions seem to have been peculiar to Australia. In the U.S.A. the OPA used publicity extensively but the methods were informal, and in the main were confined to newspaper reports of court actions. Clinard, *op. cit.* 79-80; Redford, *Administration of National Economic Control* 172.

[38] Black Marketing Act 1942, s. 14 (1).

[39] *Ibid.* s. 12 (1). See also s. 12 (2).

[40] *Ibid.* s. 12 (1).

[41] *Ibid.* s. 12 (4).

[42] *Ibid.* s. 12 (5).

[43] *Ibid.* s. 14 (2) (newspaper); s. 13 (1) (a) & (b) (radio).

[44] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 25 September 1942 1000, *per* Dr Evatt.

[45] But see n. 48 *infra.*

[46] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 25 September 1942, 975 ff. For Dr Evatt black marketing was 'little short of treason'.

formal publicity sanction.[47] The precise number and the nature of the cases prosecuted under the Black Marketing Act are unknown, but probably the main targets were corporations, against which fines alone were considered by the framers of the legislation to be inadequate.[48]

(c) *U.S.A.*

Recent suggestions that publicity be used as a formal sanction have been made in the U.S.A. but past experience in that country has for the most part been confined to informal publicity sanctions. This experience is considerable.[49] Publicity has often been used by administrative agencies for the purpose of warning the general public.[50] The Securities and Exchange Commission frequently issues news releases relating to stop-order proceedings and other matters, and news releases containing details of charges and proceedings are commonly issued by other agencies, particularly the Federal Trade Commission and the Food and Drug

[47] This is indicated by the Black Marketing Act 1942, s. 4 (4) which required the written consent of the Attorney-General to proceedings under the Act. Also required were reports from the Minister responsible and a special committee constituted under s. 4(4). See also Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 24 September 1942 865, *per* Evatt. *Ibid.* 25 September 1942 993, *per* Calwell.

Two cases reported are *Fraser Henleins Pty Ltd v. Cody* (1945) 19 A.L.J. 84 and *All Cars Ltd v. McCann* (1945) 19 A.L.J. 129. The order made by the magistrate in the *All Cars* case recited that D should 'exhibit outside its place of business at 28 Grote Street, Adelaide, alongside the main entrance door and also inside the same premises alongside the door of the office of Louis Bernard Steinke at the said premises the following notice:—

"BLACK MARKETING ACT, 1942.

On the 15th day of March, 1945, in the Adelaide Police Court All Cars Limited was convicted with others of the offence of black marketing, in that it sold a second-hand motor car at a price which exceeded the maximum price fixed by the National Security (Prices) Regulations by the sum of £76.8s.11d." and to keep them so exhibited continuously for a period of six months from this date, the heading "Black Marketing Act, 1942", of the notice to be in two inch type, and the lettering of the body of the notice to be of a size equal to the capital lettering of the type of a typewriter similar to the Remington in use in the number 2 Courtroom, Adelaide Police Court.'

Transcript in the High Court of Australia, South Australian Registry, No. 1 of 1945, 66. I am indebted to Bruce Roberts Esq., an Adelaide solicitor, for making a copy of this transcript available to me.

[48] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 24 September 1942 866, *per* Evatt. *Ibid.* 1 October 1942 1177, *per* Cameron. The cases reported in the Commonwealth Gazette concerned only individual offenders ((1943) 2219-20; (1945) 165), but I think it would be unwise to assume that all cases were published in the gazette. For example, I found no trace of the two cases concerning corporations cited in n. 47 *supra.*

[49] But consider Theodore Roosevelt's Bureau of Corporations. See n. 85 *infra.*

[50] Davis, *Administrative Law Treatise* i. 234, 250; *Ibid.* iii. 317; Rourke, *op. cit.* 13, 124-35; 'Federal Alcohol Commission', *Monograph No. 5 of the Attorney-General's Committee on Administrative Procedure,* 16, Administrative Procedure in Government Agencies, U.S. Senate Doc. No. 186, 76th Cong., 3rd Sess. (1940); Lee, 'The Enforcement Provisions of the Food, Drug, and Cosmetic Act' (1939) 6 *Law and Contemporary Problems* 70, 90; Lemov, *op. cit.;* Rourke, 'Law Enforcement Through Publicity' (1957) 24 *University of Chicago Law Review* 225, 232-8.

Administration.[51] Such news releases are intended to be preventive rather than punitive measures,[52] but have been generally recognised as an informal sanction having a significant punitive and deterrent effect.[53] In the recent case of *F.T.C. v. Cinderella Career & Finishing Schools, Inc.*,[54] which arose from an F.T.C. news release concerning a charge that D had used misleading advertising to induce persons to sign contracts for its courses, the Court of Appeals for the District of Columbia stated that it had 'no doubt that a press release of the kind herein involved results in a substantial tarnishing of the name, reputation, and status of the named respondent throughout the related business community as well as in the minds of some portion of the general public'.[55] However, many releases issued by the F.T.C. are apparently ignored by the mass media on the grounds of triviality and lack of public interest,[56] and find their way only into such specialised publications as the Consumer Reports. Usually the news media will publish releases issued by the various agencies provided that they concern such matters of immediate concern to the general public as false or misleading security promotions, serious consumer frauds, and impure or dangerous food and drugs. Yet fair employment cases under state law and antitrust cases have also been reported frequently, notwithstanding their relative lack of popular appeal.[57]

It is more difficult to find examples of formal publicity sanctions. One example appears in the Food, Drug and Cosmetic Act (1938). Under section 375 (a) the Secretary of Health, Education and Welfare is required to 'cause to be published from time to time reports summarising all judgments, decrees, and court orders [under the Act] . . . including the nature of the charge and the disposition thereof'.[58] The

[51] See Lemov, *op. cit.* in respect of the SEC and the FTC. As regards the FDA, the Food, Drug and Cosmetic Act (1938), 21 U.S.C. s. 375 (b) provides that the Secretary of HEW may 'cause to be disseminated information regarding food, drugs, devices or cosmetics in situations involving, in the opinion of the Secretary, imminent danger to health or gross deception of the consumer'. This type of FDA publicity is informal, unlike that authorised under s. 375 (a), as discussed in the text. For a description of FDA publicity sanctions see: *Hoxsey Cancer Clinic* v. *Folsom* (1957) 155 F. Supp. 376; McKay, 'Sanctions in Motion: The Administrative Process' (1964) 49 *Iowa Law Review* 441, 457-8; Comment, 'Developments in the Law — Deceptive Advertising' (1967) 80 *Harvard Law Review* 1005, 1115.

[52] Loss, *Securities Regulations* i. 310. However, see Arens and Lasswell, *In Defense of Public Order* 63-6.

[53] Lee, *op. cit.;* Rourke, *op. cit.* (Consumer Reports (U.S.), June 1968, 308.) The problems have been discussed recently by Lemov, *op. cit.* The effect of some news releases has been particularly severe, as in the case of the contaminated cranberries incident. Rourke, *Secrecy and Publicity* 127-8.

[54] 5 Trade Reg. Rep. (1968 Trade Cas.) TT 72385.

[55] *Ibid.* 85144-5.

[56] Letter to author by Professor Louis M. Starr, Graduate School of Journalism, Columbia University.

[57] Rourke, 'Law Enforcement Through Publicity' (1957) 24 *University of Chicago Law Review* 225, 236-8.

[58] 21 U.S.C., s. 375 (a). These reports, since February 1967, have appeared in a periodical, FDA Papers.

For Canadian provisions no longer in force see Leigh, *op. cit.* 159.

Secretary's reports have been regarded as producing a significant deterrent effect additional to that resulting from other sanctions.[59]

A further example, of greater fame, is the blue eagle campaign conducted by the National Recovery Administration, a body established in 1934. Corporations which refused to co-operate in the economic programs of the N.R.A. were not allowed to display on their products or elsewhere the blue eagle emblem. Public speeches and ticker-tape parades made this emblem the subject of moral pressure. Few corporations could afford not to display the emblem, and the possibility of disqualification was in itself sufficient to compel compliance, at least during the early stages of the N.R.A. programmes.[60] This type of publicity sanction is interesting in that compliance with the law, or rather non-detection, produces a form of publicity which is advantageous to D. The usual type of publicity sanction produces no official reward; the stress is upon adverse or negative publicity in the event of non-compliance.[61]

2. AN ENQUIRY INTO PURPOSES

The main claim of those who advocate the use of formal publicity sanctions is that publicity has effects important for deterrence. But what precisely are these effects?

First, there should be considered the use of publicity to inflict monetary loss. For example, advertisements describing D's offence may lead to a downturn in sales of such moment that a large financial loss results.[62] Or possibly D's shares may drop in value thereby diminishing the amounts of capital which can be obtained for expansion.[63] There is no doubt that publicity sanctions in the past have been used at least in part for the purpose of inflicting a monetary penalty. The N.R.A. blue eagle emblem campaign and the Australian Black Marketing Act are clear examples. Yet the case for using publicity as a deterrent measure is weak if infliction of monetary loss is the only effect desired. Why not simply

[59] Lee, *op. cit.;* Comment, *op. cit.* 1005, 1115.

[60] Rourke, *Secrecy and Publicity* 132; Swisher, *American Constitutional Development* (2nd ed.) 895-6. By the beginning of 1935 withdrawal of the blue eagle emblem had become much less effective and provided a real threat only to those corporations anxious to win government contracts. Chamberlain, Dowling and Hays, *The Judicial Function in Federal Administrative Agencies* 107.

For a good account of the NRA and the blue eagle campaign see Schlesinger, *The Coming of the New Deal* 108 ff.

[61] Rewarding honest businessmen may be an important aspect of enforcement. Clinard, *op. cit.* 357. But is a reward a 'sanction'? Austin, *The Province of Jurisprudence Determined* 16-7.

[62] Particularly if the advertisement provokes concerted consumer pressure. See Comment, 'Extrajudicial Consumer Pressure: An Effective Impediment to Unethical Business Practices' (1969) 7 *Duke Law Journal* 1011.

[63] A drop in share prices would not affect expansion programmes where D can obtain money from other sources such as accumulated reserves. There is also the possibility of monetary loss where competitors take advantage of D's misfortune. See n. 58 *infra.*

increase fines to such a level that the same monetary loss can be inflicted? To argue that as a matter of political reality it would be impossible to enact such large maximum fines, or that judges would not impose large fines even if they were made possible, misses the point that the same problems face publicity sanctions.

A much stronger case for the use of publicity can be made out if it is sought to achieve deterrence by inducing loss of prestige or respect, provided that 'prestige' and 'respect' are not merely qualities which reflect financial standing. A fine will produce a loss of prestige to the extent that prestige is governed by wealth[64] and, as indicated above, there is little point in using a publicity sanction solely for the purpose of inflicting a monetary loss. However, there is much more to the notions of prestige and respect than financial standing.[65] Even the wealthy may wilt from social disapproval. Thus, a publicity sanction which lowers prestige or respect may well have a deterrent potential beyond that of the fine. This power of publicity is of particular importance in an area of crime inhabited by white-collar offenders rather than by under-privileged people or members of deviant sub-cultures. Undoubtedly these appealing features influenced the architects of the blue eagle campaign, the publicity sanctions in food and drugs legislation, and the Black Marketing Act.

Publicity might also be used to induce government intervention. Various forms of government intervention may be triggered off by publicity more easily than by conviction and fine.[66] The possibilities include formal enquiries, appointment of official administrators, more active investigation and enforcement by prosecuting agencies, new regulatory legislation, unfavourable changes in tax or tariff structures,[67] black-listing in respect of government contracts,[68] and unsympathetic treatment of requests for

[64] Prestige is often linked very closely with financial standing. The concern of some writers is almost exclusively with the monetary aspect of prestige and images. See Bristol (ed.), *Developing the Corporate Image;* Lauterbach, *Men, Motives, and Money* (2nd ed.) 227; Riley (ed.), *The Corporation and its Publics.*

[65] Berle, *The Twentieth Century Capitalist Revolution* 90-1; Cheit, *The Business Establishment* 184, 188, 191; Katona, *Psychological Analysis of Economic Behaviour* 204; Riesman, *The Lonely Crowd;* Ross, *The Image Merchants* 266-7; Rourke, 'Law Enforcement Through Publicity' (1957) 24 *University of Chicago Law Review* 225. In the U.S.A. the new ideals of graduates seeking employment indicate a further important aspect of prestige or respect which is independent of wealth. See Baumhart, *Ethics in Business* 106; Note, 'Libel and the Corporate Plaintiff' (1969) 69 *Columbia Law Review* 1496, 1510.

[66] I am not suggesting that the decision of a criminal court should compel action by governmental agencies, which, as I see it, would make such use of the publicity received as they see fit. Contrast Salwin, 'Japanese Anti-Trust Legislation' (1948) 32 *Minnesota Law Review* 588 where it is noted that Japanese courts have power to ban violators from obtaining government contracts.

[67] Dr J. Cairns, M.H.R. has indicated informally to my colleague Mr M. Detmold his preference for controlling certain forms of restrictive trade practices by means of tariffs.

[68] Cheit, *op. cit.* 150-1; McFarlane, *Economic Policy in Australia* 34; Weissman, *The Social Responsibilities of Corporate Management* ch. 8; Dershowitz, *op. cit.* 289, n. 37.

financial assistance from the government. Several of these possible forms of government intervention will be feared principally because of the prospect of monetary loss. Unfavourable changes in tax or tariff structures and unsympathetic treatment of requests for financial assistance fall into this category. In such cases a fine would be much more appropriate than a publicity sanction. However, consider the appointment of an official administrator or increased investigation by a prosecuting agency. These types of intervention will be feared not simply because of monetary loss but more because of resentment of government intervention itself. It may be added that many forms of government intervention which are feared mainly because of monetary loss will also produce loss of prestige. Black-listing in respect of government contracts is a case in point.

Publicity therefore may have a useful role to play as a deterrent sanction by instilling fear of loss of prestige or fear of certain forms of governmental intervention. Publicity may also be well-cast if used for three supplementary purposes. First, publicizing the sanction imposed upon D may be expected to increase the general deterrent impact of that sanction.[69] Most publicity sanctions have the unusual advantage of being self-publicizing. If conventional sanctions such as the fine are accompanied by a publicity sanction, the advantage is shared. Second, publicity may be used to warn prospective buyers of defects in products, of deceptive advertising, or of consumer fraud, and to warn investors of fraud or simply of D's tendency to violate regulatory provisions and thereby to expend profits in payment of fines and costs. Admittedly, a warning issued upon conviction is not as timely as is desirable, but at least there would be an improvement upon the present incomplete warning system. Third, publicity could be used to inform the public about the operation of the relevant legislation. The educative and moralizing effect of such publicity could increase the level of compliance, particularly in the long term.[70] An increase in condemnation, and a more widespread internalization of the norms embodied in the legislation concerned might even make further publicity unnecessary.

3. THE FORM OF PUBLICITY SANCTIONS

The form of publicity sanctions is determined by the purposes pursued. The following discussion concerns the different forms of publicity which are appropriate for the possible primary purposes of lowering prestige, inducing

[69] See Moberly, *The Ethics of Punishment* 51.

[70] A recent article is Hawkins, 'Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects' [1969] *Wisconsin Law Review* 550. However, see Ball and Friedman, 'The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View' (1965) 17 *Stanford Law Review* 197, reprinted in Geis, *op. cit.* 410. On the use of legislative hearings and enquiries and attendant publicity in the U.S.A. to reinforce values see Truman, *The Governmental Process* 385; Rourke, *op. cit.* 225, 227 ff.

monetary loss, and inducing government intervention, and for the possible supplementary purposes of warning, moralizing and notifying prospective offenders of penalties imposed upon convicted offenders.

(a) *Lowering Prestige*

If publicity be used for the purpose of lowering prestige, an important enquiry is whether the prestige of corporate employees should be lowered as well as the prestige of the corporation itself. Corporate prestige will be reflected upon officers and employees but sanctions directed at the entity's prestige will have less effect upon individual officers and employees than sanctions which overtly attack personal status and prestige. This enquiry reaches into the very basis of corporate or entity responsibility. Why not convict the guilty individual employees and abandon the concept of corporate responsibility? The answers to this question have not always been compelling.[71] Probably the most convincing explanation for entity responsibility is that it is difficult to locate guilty individuals in the corporate hierarchy, particularly in the case of large enterprises.[72] Further, some individual employees may be so much in the thrall of their corporate employer that they are prepared to risk their personal fame and fortune in order to advance what they consider to be the corporation's interests.[73] Thus, possibly in a large number of cases, sanctions against the entity provide the only method of deterrence effective against individual employees. For the purpose of this article the assumption will be made that corporate responsibility rests firmly upon the above grounds.

Assuming that entity sanctions are justified, should publicity sanctions against corporations also be directed at individual employees? Should the directors and superior officers be expressly identified in advertisements which describe D's conviction? Should any guilty employees who have been located and convicted be identified? First, it would seem unnecessary to identify those guilty employees who have been convicted. The main purpose of entity responsibility is not to provide additional sanctions against convicted employees, but to provide a method of deterring those guilty individual employees who cannot be located and convicted. Admittedly the purpose of entity responsibility is to provide an additional sanction in the case of employees who are prepared to sacrifice themselves on behalf of the corporation, but the dedication of such employees may mean that even personal adverse publicity would be

[71] See Leigh, *op. cit.* ch. 9.

[72] As in the important U.S. electrical equipment conspiracy cases in 1960-1. See Geis, 'The Heavy Electrical Equipment Antitrust Cases of 1961' in Geis, *op. cit.* 103; and Smith, *Corporations in Crisis,* chapters 5, 6. In some situations there may be no guilty individual employee even in theory. *R. v. Australasian Films Ltd* (1921) 29 C.L.R. 195.

[73] See n. 72 *supra* and Model Penal Code, Tentative Draft No. 4, 148-9.

of little effect.[74] There is the further point that in situations where only a few guilty employees have been located, the severity of identification by advertisement seems unfair, particularly where there is reason to suspect that officers in higher positions have been implicated.[75]

Second, should an advertisement describing D's conviction identify all directors and superior officers irrespective of whether they have been convicted as individual offenders? Clearly there are serious objections to such an approach. In particular it should be realised that the power of sanctions against entities is indirect and diffused, and therefore a more potent sanction usually will be necessary than in cases where sanctions can be applied directly to individual persons. The suggested use of publicity as a sanction against corporations reflects a desire to use potency to counter dissipation of effect. If publicity is used because of its severity it would be inappropriate to extend the sanction to individual officers and employees. A fine or some other conventional sanction would be more fitting. Further, an obvious objection to automatic identification of directors and officers is that a type of strict responsibility would be involved in which defences or mitigating circumstances could not be pleaded.[76] Provision for a court hearing could be made, but an approach so closely concerned with individual responsibility goes far beyond the scope of entity responsibility, the subject of this discussion.

There is also the question whether D's products should be the target of adverse publicity, assuming that the aim is to inflict loss of prestige upon D rather than monetary loss. Attacks upon D's products in many cases would produce a loss of prestige (in a non-monetary sense) but the clear risk of substantial monetary loss seems to preclude this approach,[77] if the view be held that only the fine should be used to inflict a large monetary penalty. Instead the emphasis should be upon lowering the prestige of the corporation itself. Attempts to lower corporate prestige will have a crossover effect which causes some reaction against D's products, but it is far from correct to say that our impressions of a corporation coincide with our estimation of its products. We may dislike a corporation and yet favour its products or services.[78] Thus, if D's convictions are to be advertised, the content of the advertisement should stress D's wrongdoing and should not discourage the purchase of D's products or services. The Australian and New Zealand tax provisions,

[74] However, see Model Penal Code, Tentative Draft No. 4, 149.

[75] As in the electrical equipment cases, *supra* n. 72. See also Arnold, *The Folklore of Capitalism* 10.

[76] Consequently it would also be inappropriate to require all directors and superior officers to attend court when D is convicted and to be exposed personally to criticism from the court.

[77] See text n. 64 *supra*.

[78] Carlson, 'The Nature of Corporate Images', in Riley (ed.) *op. cit.* 24, 27. Similarly, we may dislike South Africa and yet like its wines, tobacco and cricketers, and Juliet Prowse.

which require mention of the corporate offender's name but not the precise nature of its business operations, may be based upon this principle.[79] However the Black Marketing Act and the N.R.A. blue eagle campaign were clearly aimed in part at discouraging the purchase of D's products since profiteering notices and the blue eagle emblem were forms of publicity very closely associated with D's products and D's day to day contact with the world of commerce. Those provisions in the Bread Acts and in food and drugs legislation which provide for publication by newspaper probably were also designed to inflict a substantial monetary loss. The nature of the subject matter is such that avoidance of monetary loss by D would be surprising. On the other hand, provisions in food and drugs legislation which require publicity only in the gazette are little concerned with inflicting monetary loss and seem aimed primarily at inducing loss of prestige and recording information for the use of government departments.

(b) *Inflicting Monetary Loss*

If publicity is used for the purpose of inflicting monetary loss upon D it should be directed at decreasing the volume of sales of D's products or services.[80] Decreasing the volume of sales might be accomplished by a positive appeal to consumers not to purchase, or by a ban on advertising. An appeal to consumers not to purchase has been used in newspaper advertisements describing convictions relating to food and drugs, and in the notices and emblems used under the Black Marketing Act and the blue eagle campaign respectively. The appeal 'Do not buy' is not explicitly stated in such instances, but the implication is obvious, particularly in the case of profiteering notices. An advertising ban has yet to be used, but the possibility has been suggested.[81] As a method of inflicting monetary loss, banning advertising is probably more potent than adverse publicity but it is much less likely to produce the additional desirable effect of lowering D's prestige. Furthermore, if an advertising ban is used instead of adverse publicity additional forms of publicity are required to warn, to educate or moralize, or to notify prospective offenders of the penalty which has been imposed upon D.

Where adverse publicity or an advertising ban is used to inflict monetary loss, it may be necessary to ask consumers to refrain from buying products which are sound or even superior to those offered by competitors. If the offence for which D has been convicted involves only one product and

[79] But see the discussion of 'innocent' products in the text *infra*.
[80] There is also the possibility of directly persuading shareholders to sell their shares, or to exert pressure upon management. I do not discuss this possibility. Suffice it to say that publicity only in the annual report would be an inefficient method. Contrast n. 6 *supra*.
[81] See n. 6 *supra*. The ban might be on all advertisements or possibly D may be ordered not to use an advertisement which is popular and proven. *Cf.* Comment, 'Developments in the Law — Deceptive Advertising' (1967) 80 *Harvard Law Review* 1005, 1051.

D markets hundreds of products, should the sanction be designed to discourage purchase of that one product or should 'innocent' products also be affected? Alternatively, suppose that the particular product has been discontinued at the time of conviction or that the relevant offence concerned a defect in the product and the defect has been cured by the time of the conviction. Under a determined loss-inflicting approach presumably the infliction of a given monetary loss would be important, and therefore it might be necessary to discourage the purchase of 'innocent' products.[82] Many publicity sanctions in the past have not exempted 'innocent' products. For example, a newspaper advertisement describing an offence by D under the food and drugs legislation described above could comply with the statutory requirements although no reference is made to the precise drug or item of food involved.[83] Consequently, unwillingness to buy D's 'innocent' products could easily result, as in the situation where D manufactures an excellent range of drugs bearing the name of the corporation, and only one or two drugs have been impure or dangerous. In the case of some offences 'innocent' products will almost always be affected by a publicity sanction designed to inflict monetary loss. For example, if D understates its income for tax purposes, the offence committed does not relate to any particular product.

The element of distortion involved in persuading consumers not to buy 'innocent' products does not exist where D is fined or where use is made of a publicity sanction designed to lower corporate prestige by attacking D and not its products.

(c) *Inducing Government Intervention*

Exploitation of fear of government intervention suggests a form of publicity which makes clear the possible methods of intervention, and which is directed towards the persons and agencies most appropriate for instituting these methods of intervention. Thus, if new regulatory measures be the method of intervention desired, information in support of such new measures should be conveyed to politicians and law reform bodies. Increased surveillance by prosecuting agencies would require notification of persons in control of such agencies, and possibly there should be an interstate system of notification. Wider publication, by newspaper advertisement or similar means, would be relevant only to the extent that public pressure is necessary to achieve the particular form of government intervention. Ideally, the content of such newspaper advertisements, or the content of publicity directed towards politicians or government bodies would indicate the reasons why the method of intervention specified is desirable.

[82] Consider also the possibility of employing the sanction against those 'innocent' products which are the easiest to attack. Note that 'innocent' products would also be affected where *e.g.* D uses one trade name for all its products.

[83] See text to n. 27 *supra*.

Past and present publicity sanctions reveal that there has been little focus upon the use of publicity for the purpose of inducing government intervention.[84] Apart from the tax reports which must be laid before Parliament in Australia and New Zealand, publication of convictions in the gazette has been the only type of communication to official agencies which has been formally recognised. This form of communication is of a very limited nature. Under the Australian food and drugs provisions described above, gazette notices are not required to indicate whether there is any need for increased investigation of D's activities, or whether any weaknesses in the law are disclosed by the circumstances of D's offence. This is also the position in respect of the newspaper publicity commonly authorised in food and drugs legislation.

It is obvious from the discussion above that the principal problem is not so much the form of the publicity required to induce government intervention, but the nature of the body which is to design and direct that publicity. Clearly publicity appropriate to inducing government intervention would often require the courts to play an excessively political role. The most which could be expected of the courts would be some specific treatment in judgments of such matters as weaknesses in the present law, suspicion of additional undetected offences, the extent to which offences have been repeated, and the measures taken by D to remedy the cause of its offence. If such information were always to be found in judgments, publication in gazettes would be relatively simple, and by placing a greater emphasis upon fear of government intervention, this approach would be an improvement upon past practice. An alternative would be to create a government agency with a mandate to define methods of government intervention appropriate to D's case, and to design and implement the forms of publicity necessary to bring about such intervention. Theodore Roosevelt's ill-fated Bureau of Corporations is an example.[85]

(d) *Supplementary Purposes*

(i) NOTIFYING PROSPECTIVE OFFENDERS OF PENALTIES

Publicity may be used to increase general deterrence by informing prospective corporate offenders of the sanctions which have been imposed

[84] But see Lane, *Lobbying and the Law* 67-9, where provisions relating to dissemination of information about lobbyists are described.

[85] This agency was created in 1903 by a statute which established the Department of Commerce and Labor (see 32 U.S. Stat. at Large, 825). The major purpose was to marshal public opinion against various malpractices of large corporations, notably the trusts. Its function was not only to investigate particular companies but also to maintain an enquiry on an industry-wide level. See Roosevelt, *The Roosevelt Policy* i. 191-5, 236-7. Apparently the Bureau was disbanded after a very short time because of the need to obtain election funds from the large corporations. I have yet to find any writings which provide an adequate post-mortem.

A Bureau of this nature would create problems of co-ordination in sentencing. See n. 28 *supra*.

Consider also the suggestion in Lane *op. cit.* 168-9, that an administrative agency be created to make publicity effective in the context of lobbying.

upon D. Widespread notification is probably unnecessary. Notification to corporations and their employees alone would achieve the desired effect, and for this purpose a circular to all directors, officers, and employees at high levels would be more effective than a newspaper advertisement or a notice in a gazette.

(ii) WARNING CONSUMERS[86]

If it is considered desirable to provide a warning to consumers as well as to lower prestige or to produce some other deterrent effect, there are several basic requirements. A warning should relate closely to the matters which gave rise to D's offence. Warning prospective purchasers about 'innocent' products would be inappropriate. Further, a warning should be so positioned that it can easily be associated with the object to be avoided. If D is convicted of selling soap powder by short-weight and it is considered necessary to warn consumers, a prominent warning attached to the actual packets would be more effective than a mere warning in a newspaper advertisement.[87] On the other hand a newspaper advertisement identifying D rather than its products would be a more appropriate method of inducing loss of corporate prestige without inflicting a substantial monetary loss.

The design of publicity sanctions in the past has not always allowed an effective warning to be given. The food and drugs legislation now in force in Victoria, Tasmania and New South Wales suffers in this respect. Convictions are authorised to be publicized only in newspapers and the gazettes. Provision should be made for warnings more closely linked with the objects which are impure or dangerous. The Queensland legislation which allows notices to be posted up outside D's place of business is superior, but even more adequate warnings are possible in South Australia, where a court can order whatever form of publicity it considers to be necessary.[88]

(iii) EDUCATING AND MORALIZING

The view has been expressed frequently that an approach which seeks to educate and moralize by explaining the social impact of deviance and the aims of the legislation which has been violated is more effective than an approach which teaches merely that conduct is wrong because it

[86] I have considered only consumers in the text. Warning investors adequately requires a different approach, possibly along the lines of SEC procedures. In respect of warning the government and its agencies see the discussion in the text *supra* of the form of a sanction designed to achieve government intervention.

[87] It would be desirable, particularly in the case of products harmful to health, to require warnings to be placed upon items already in stock, or even to require seizure of those items. Clearly problems of compensation then arise.

[88] See n. 25 *supra*. The South Australian provision is similar to the Adulteration of Seeds Act 1869, s. 3 (n. 20 *supra*); Adulteration Act 1872, s. 2 (see n. 20 *supra*); Weights and Measures Act 1889, s. 14 (n. 23 *supra*); Adulteration of Food Act 1880 (N.Z.), s. 40 (n. 25 *supra*); and to Weights and Measures Act 1925 (N.Z.), s. 37 (n. 24 *supra*). For an example in the U.S. see 21 U.S.C. s. 375 (b), as applied in *Hoxsey Cancer Clinic v. Folsom* (1959) 155 F. Supp. 376.

attracts a penalty.[89] Most publicity sanctions have concerned matters where the impact of deviance and the aims of the legislation are so obvious that either no educative or moralizing effect is required or a brief description of the details of D's conviction and offence is sufficient; adulterated bread is adulterated bread. However some regulatory measures, such as those dealing with restrictive trade practices, are much more obscure and short statements of the type usually authorised in food and drugs legislation plainly do not offer an adequate method of enlightenment.

I turn now to an account, in three sections, of the disadvantages suffered by publicity sanctions. These sections are headed 'Problems of Persuasion', 'Counter-Publicity', and 'Uncertainty, Fiscal Loss, and General Disadvantages'. It should be stressed that this account of disadvantages is not a series of arguments aimed at proving the inutility of publicity as a sanction (though some might see it so), but a prelude to the composition of a publicity sanction which takes into consideration the difficulties outlined.

4. PROBLEMS OF PERSUASION

Considerable problems of persuasion arise if publicity sanctions are used in order to lower D's corporate prestige in the eyes of the general public, or to inflict a large monetary loss by asking consumers not to buy D's products or services. Effective persuasion may be difficult for any of four main reasons.[90] First, the characteristics of D and its products or services may create a favourable impression which is difficult to dislodge. Second, the methods of persuasion available are likely to be of limited effect. Third, the nature of corporations and corporate criminal responsibility creates problems of general understanding. Fourth, the type of offence committed by D may not be of popular concern.

The above problems arise in the context of mass media attempts to persuade the general public either to think less of D or to refrain from buying its products. Problems of persuasion also arise where publicity is used to induce government intervention, or to achieve the supplementary purposes of warning and educating and moralizing. The problems which arise in these contexts are mostly of a different nature from those which exist where lowering prestige or inflicting a monetary loss is the aim sought. Where government intervention is desired, political pressures, questions of finance, and reluctance to intervene in the operations of business corporations are the main sources of difficulty, not deep-seated consumer impulses or low levels of comprehension. The general problems of persuasion involved in inducing government intervention or in educating and moralizing are obvious, and a specialized account is beyond the scope of the present discussion.

[89] Hawkins, *op. cit.* 555-60.
[90] A further problem is lack of familiarity with many corporations. Riley (ed.), *op. cit.* 26, 28. Which company makes Maxwell House Coffee?

(a) *D's Favourable Characteristics*

Publicity directed against D for the purpose of lowering D's prestige or inflicting a monetary loss will usually be in competition with the favourable characteristics of D's products or D itself. Where such competition exists clearly it will be difficult to induce changes of attitude or habit.

Where lowering corporate prestige is the aim of a publicity sanction the factors competing for influence will arise from the many component parts of the notion of corporate prestige. A corporate image has been defined as a 'composite of knowledge, feelings, ideas and beliefs associated with a company as a result of the totality of its activities'.[91] The facts which can affect the image or prestige of a corporation are numerous and include the reputation of a corporation's products in respect of price, design, quality, servicing, and re-sale value; the amount of turnover, profits, dividends and growth; the appearance and size of the corporation's plant and offices; the nature of the corporation's advertising; the part played in the country's economic growth or stability; the extent of involvement in government projects such as the construction of weapons or space vehicles; the ability to innovate; working conditions and rates of pay; and the corporation's interest in local communities.[92] Although not all of these matters will influence any one particular public of a corporation, those which are of influence will often diminish or negate the effect of information relating to D's offence.[93] Consider the public of consumers. Their image of D will be much less affected by awareness of D's offence than by such matters as the quality and price of D's products and services. Furthermore, the range of activities in which the large modern business corporation is involved tends to dissipate the prestige-lowering effect of publicity about an offence. The prestige and status of individual offenders are not insulated by the same coverage of impressive achievements and good works.

The position is similar where adverse publicity attempts to persuade consumers not to buy products which are 'innocent'. Information about D's offence will compete for attention with consumer attitudes toward price, quality, and product desirability which are constantly revived by commercial advertising. However, this difficulty would not arise to the same extent if monetary loss is inflicted by means of a ban on advertising.

[91] Messner, *Industrial Advertising* 43. See also Bristol (ed.), *Developing the Corporate Image* 6-8, 36.

[92] See Bristol (ed.), *op. cit.* 210.

[93] See Arnold, *op. cit.* 193-4; Borden, *Advertising Management* (rev. ed.) ch. 9; Christenson and McWilliams, *Voice of the People* 99, 107 (Lippmann's stereotypes); Grunewald and Bass (eds.), *Public Policy and Modern Corporation* 356; the discussion of 'cognitive dissonance' in Kassarjian and Robertson, *Perspectives in Consumer Behaviour* 171; Lane, *Public Opinion* 53-4; Ross, *op. cit.* 168; and Weissman (ed.), *The Social Responsibilities of Corporate Management* 15.

Unlike adverse publicity, a ban on advertising reduces the exposure of a product or service and therefore is likely to lower the competitive influence of the favourable characteristics displayed by that product or service.

(b) *Methods of Persuasion*

Publicity sanctions designed to lower prestige or inflict a large monetary loss either face the problem that effective methods of persuasion have yet to be devised, or require methods which exist but are unlikely to be regarded as acceptable.

We may take as our starting point the following five principles of effective commercial advertising given by Lucas and Britt in their text, *Advertising Psychology and Research*:[94]

(i) The advertisement should relate to some sphere of self-interest.
(ii) There should be an unusual device to attract attention.
(iii) The message of the advertisement should be simple.[95]
(iv) The advertisement should appeal to feelings and emotions—appeal to reason or logic is insufficient.[96]
(v) The advertisement should make it abundantly clear to those persons exposed to it what they are supposed to do.

Can these principles be applied where a publicity sanction is used to lower corporate prestige? No doubt the first four principles could be applied successfully with but a little ingenuity. Advertisements headed 'The Truth about D' would be possible, and it is easy to imagine the use of simple emotive appeals to such areas of self-interest as health, curiosity and quality.[97] Although such methods of persuasion are not inconceivable, a more acceptable approach, and one not dependent upon the employment of advertising or publicity experts, would be simply to set out the details of D's offence in the manner of many existing publicity sanctions.[98] Unfortunately such a flat lifeless account of a corporation's conviction is of little popular appeal, and is reminiscent of 'tombstone' advertising, an outdated form of institutional advertising in which the integrity, faith, reliability and fidelity of a corporation is stressed.[99]

[94] 89.
[95] See Ogilvy, *Confessions of an Advertising Man* 110, 123-5; and the description of the advertisements used by Carl Byoir on behalf of the A & P chain stores, in Byoir, 'Paid Advertising — Best Aid to Public Relations' (1943) 203 *Printers Ink* 17.
[96] Length in itself is not objectionable. Ogilvy, *op. cit.* 108-10.
[97] Lucas and Britt, *Advertising Psychology and Research* 95-101. Lucas and Britt distinguish 'primary' and 'secondary' wants. Primary wants include ego-satisfaction, sex, leisure, social approval. Secondary wants include health, efficiency, quality, dependability, economy, curiosity and information.
[98] See the Black Marketing Act notice set out in n. 47 *supra*. Note also the judicial hesitance about publicity even in the context discussed by Austin, 'Antitrust Proscription and the Mass Media' (1968) 6 *Duke Law Journal* 1021.
[99] Bristol, *op. cit.* 174.

The fifth and last principle of effective commercial advertising formulated by Lucas and Britt, that advertising should indicate clearly what course of action is expected to follow, is more difficult to satisfy. An advertisement modelled upon the many publicity sanctions which have consisted essentially of a statement that D has committed an offence, would violate this fifth principle by leaving readers and viewers to draw their own conclusions as to what they should do.[1] Thus, to diminish D's corporate prestige, the relevant publicity should direct that something is to be done about D. But what should this be? Publicity directing persons not to buy D's products or services would be inappropriate since such a direction clearly would relate to inducing monetary loss and not to lowering prestige. The appropriate instruction is that D should be less highly regarded. However, an instruction of this nature is likely to be of limited effect since it requires an attitude change which is novel and which goes beyond the demands of most commercial advertising.[2] In this respect the following comparisons made by Lazarsfeld and Merton are instructive:

> Advertising is typically directed toward the canalizing of preexisting behaviour patterns or attitudes. It seldom seeks to instil new attitudes or to create significantly new behaviour patterns. 'Advertising pays' because it generally deals with a simple psychological situation. For Americans who have been socialised in the use of a toothbrush, it makes relatively little difference which brand of toothbrush they use. Once the gross pattern of behaviour or the generic attitude has been established, it can be canalized in one direction or another. Resistance is slight. But mass propaganda typically meets a more complex situation. It may seek objectives which are at odds with deep-lying attitudes. It may seek to reshape rather than to canalize current systems of values. And the successes of advertising may only highlight the failures of propaganda. Much of the current propaganda which is aimed at abolishing deepseated ethnic and racial prejudices, for example, seems to have had little effectiveness.[3]

Can Lucas and Britt's five principles of commercial advertising be applied satisfactorily where publicity is used for the purpose of inflicting monetary loss, as opposed to lowering corporate prestige? The principal problem is that an instruction not to buy D's products or services is even more demanding than an instruction to have less respect for D. We are asked not merely to change or form an attitude toward D, but to change

[1] See also Hovland, 'Effects of the Mass Media of Communication' in Lindzey (ed.), *Handbook of Social Psychology* ii. 1062, 1068, where there are mentioned several studies suggesting that messages which are not explicitly stated are likely to be lost upon the less intelligent members of the audience.

[2] In an interesting article Wiebe, 'Merchandizing Commodities and Citizenship on Television' (1951) 15 *Public Opinion Quarterly* 679, 686, suggests that a documentary radio program upon juvenile delinquency was successful in changing attitudes, if not in arousing action. However, unlike publicity of the nature likely to be used for the purpose of imposing a sanction, the radio programme in question was 'memorable' and its impact was 'vivid and compelling'.

[3] 'Requisite Conditions for Propaganda Success', in Christenson and McWilliams, *Voice of the People* 340, 341-2. See also Cutlipp and Center, *Effective Public Relations* (3rd ed.) 87; Hovland, *op. cit.*

a consumer behaviour pattern. The change required is different from that involved in merely switching brands as a result of commercial advertising since the reasons given as an inducement to change do not relate to areas of immediate self-interest.[4] We are not told to buy other products because they are superior or lower in price. Instead the instruction is to stop buying D's product because D has committed an offence. Except where D's offence relates to health, safety, or consumer or investor fraud, the appeal made calls for a personal sacrifice in the interest of some cause, which if actually stated, would often be remote.[5] However, the element of sacrifice could be concealed by using an advertising ban in place of adverse publicity. The same concealment would result from adverse publicity which depicts D's products in an unpleasant way, but clearly such an approach is unacceptable.[6]

(c) *Nature of Corporations and Corporate Criminal Responsibility*

Effective persuasion of the general public may also be difficult because of the impersonal nature of corporations and the peculiar concept of entity criminal responsibility. There is no need to dwell upon the impersonal nature of corporations or past preoccupations with anthropomorphism.[7] Greater difficulty stems from the nature of entity responsibility.

Four characteristics of entity responsibility create problems of persuasion. First, D may be criminally responsible for the conduct of employees lower in the corporate hierarchy than directors or high-ranking officers.[8] Although such conduct must be within the scope of X's employment, it will often seem remote from D's control centre. Contrast the impression which would exist where D's directors have been involved in a conspiracy to obtain money from the government by false pretences with that where the conspirators are only D's salesmen. Second, corporate criminal responsibility is a species of strict responsibility. D is held responsible for the conduct of its officers or employees irrespective of knowledge or negligence on the part of those manning the control centre.

[4] See n. 97 *supra*. Note also Clinard, *op. cit.* 93: 'The behaviour of many persons was often different when the discussion skipped from the general objectives of price and rationing control to actual specifics of everyday life'.

[5] Appeals for some personal sacrifice are likely to be successful only in times of national emergency. See the description of the Kate Smith bond selling program in Hovland, *op. cit.* 1072-3; and Wiebe, *op. cit.* 682-4.

[6] In the U.S.A. advertisements frequently depict cigarettes and rats as being unpleasant objects, but this form of advertising does not concern the use of the criminal law against a particular offender. See text to n. 13 *infra*. Some competitors use unpleasant advertising in order to overcome their commercial opposition. Ross, *op. cit.* 80. Some commercial advertisements unintentionally create unpleasant associations. Lucas and Britt, *op. cit.* 76-8.

[7] On the impersonal nature of corporations see Arens and Lasswell, *op. cit.* 121-2; Dershowitz, *op. cit.* 287, n. 37.
287, n. 37.

[8] This is more likely in the U.S.A. where no distinction is drawn between primary and vicarious corporate criminal responsibility. However, in Australian jurisdictions, where that distinction is drawn, the statement in the text is true in cases of vicarious responsibility. On these points see the references in n. 14 *supra*.

Consequently, in situations where it is apparent that D has taken reasonable care to avoid or prevent X's conduct, publicity may even result in sympathy. This obstacle would not exist where knowledge or negligence on the part of the control centre is proven, but since such proof is not required for corporate responsibility it will often be lacking. The difficulty mentioned here is even more acute when the offence committed itself imposes strict responsibility. Thirdly, in many cases some guilty individual employees are convicted as well as D. The convictions of individual persons may easily divert attention from the conviction of the corporation.[9] Further, if all guilty individual officers and employees are located and convicted, D's conviction may seem pointless. Finally, corporations can be held criminally responsible not only for the conduct of employees, but also for the conduct of agents, and independent contractors.[10] The justification for such attenuated forms of corporate responsibility will not always be readily appreciated, even by the relatively well-informed.

The difficulties above could be minimised by omitting mention of X's position in the corporate hierarchy, the absence of proof of knowledge of negligence, the fact that individual employees have also been convicted, or the remote nexus between D and say, a guilty independent contractor. Details of this nature rarely have been required for past publicity sanctions. However, such an approach is misleading and should be avoided. From this standpoint, a ban upon advertising would seem even less acceptable since a mere statement that D has committed an offence does at least create a greater chance that the existence of the above extenuating circumstances will be suspected.

(d) *Type of Offence*

Many offences committed by corporations are not of popular concern either because they fall outside the normal areas of self-interest, or because they do not fall into the category of well known offences such as murder or theft. Antitrust offences provide the usual examples.[11] There is the hope that the barriers in the path of persuasion might be broken down by some approach which attempts to explain the importance of the legislation which D has violated. A model might be found in Bentham's recommendations to a legislator anxious to win acceptance of legislation where public opinion is contrary, feeble, or neutral. For Bentham a

[9] This probably happened in the electrical equipment conspiracy cases referred to in n. 72 *supra*. Dershowitz, *op. cit.* 289, n. 37, describes a survey of newspapers which revealed that attention was focussed almost exclusively upon the individual guilty executives.

[10] Fisse, 'Vicarious Responsibility for the Conduct of Independent Contractors' [1968] *Criminal Law Review* 537, 605.

[11] See Cheit, *op. cit.* 151; Kadish, *op. cit.* However, see Flynn, 'Criminal Sanctions Under State and Federal Antitrust Laws' (1967) 45 *Texas Law Review* 1301, 1315-23.

legislator in that position should not stress the infamy or ignominy of the conduct. Instead appeal should be made to the reason of the people in the following manner:

> [The reasons] should be such as may serve to indicate the *particular* way in which the practice in question is thought liable to do mischief; and by that means point out the analogy there is between that practice, and those other practices, more obviously, but perhaps not more intensely mischievous, to which the people are already disposed to annex their disapprobation. Such reasons, if reasons are to be given, should be simple and significant, that they may instruct—energetic, that they may strike—short, that they may be remembered. Take the following as an example in the case of smuggling: *Whosoever deals with smugglers, let him be infamous. He who buys uncustomed goods, defrauds the public of the value of the duty. By him the public purse suffers as much as if he had stolen the same sum out of the public treasury. He who defrauds the public purse, defrauds every member of the community.*[12]

Bentham's approach might well be adopted for publicity sanctions imposed in respect of offences concerning those aspects of health and safety which are not commonly appreciated, or, as suggested by the passage above, revenue laws. However, not all offences are so readily described. The more novel or complicated the relevant regulatory measures are, usually the more difficult it will be to find an appropriate analogy. Where simple analogies are most necessary they are unlikely to be available. Or, if an analogy be found, it is likely to suffer from an undesirable level of distortion. Horizontal price fixing is not larceny or obtaining by a false pretence. Simple analogies are probably acceptable if used by a legislator when explaining the general purport of legislation, but when used in close association with a publicity sanction directed against particular offenders important questions of fairness arise.[13] The challenge upon grounds of fairness will be even stronger where D's offence involves complicated or disputed facts, or where the concept of corporate criminal responsibility causes the difficulties described earlier.

Distorted explanations of novel or difficult regulatory measures therefore should not appear as an integral part of publicity sanctions directed against corporate offenders. Some exceptions may be necessary during

[12] Bowring (ed.), *op. cit.* 465.

[13] See Arnold, *op. cit.* ch. 6. However, Bowring (ed.), *op. cit.* 465, made clear his dislike of untruths with the following reference to the smuggling example given in the text above:

'I say the public purse—I do not say the public simply. Far from the pen of the legislator be that stale sophistry of declaiming moralizers, which consists in giving to one species of misbehaviour the name and reproach of another species of a higher class, confounding in men's minds the characters of vice and virtue. Pure from all taint of falsehood should the legislator keep his pen; nor think to promote the cause of utility and truth by means which only tyranny and imposture can stand in need of. In what I have said above, there is nothing but what is rigorously and simply true. But it were not true to say that a theft upon the public were as mischievous as a theft upon an individual: from this there results no alarm, and the more the loss is divided, the lighter it falls upon each.'

times of national emergency. The N.R.A. blue eagle campaign stressed the importance of complicated economic recovery programmes by focussing attention upon a simple emblem, and this simple emblem was used for the purpose of imposing sanctions upon particular corporations. By contrast, the publicity sanctions authorised under the Australian Black Marketing Act were much more dependent upon the government explaining the evils of profiteering. Any misrepresentation or distortion present in those sanctions arose from their emotive content and not from any attempt to convey the importance of profiteering by means of badges of loyalty or simple analogies.[14]

5. COUNTER-PUBLICITY

The impact of a publicity sanction may be avoided or evaded by D in several ways. Counter-publicity, dissolution,[15] change of location, changing the name of the corporation or its products,[16] and product diversification, are possibilities. Counter-publicity is likely to be the most popular method of evasion or avoidance for the reason that usually it will be the least expensive, particularly in the case of large corporations. Furthermore, many forms of publicity sanctions will be seen as attacks requiring public retaliation rather than quiet retreat. For these reasons this section is devoted exclusively to counter-publicity.

Examples of counter-publicity measures introduce a discussion of the methods of persuasion available to corporate offenders in a publicity contest, and the capacity of counter-publicity to convert a publicity sanction originally aimed at lowering corporate prestige or inducing governmental intervention into a sanction which imposes a monetary loss.

(a) *Examples of Counter-Publicity*

In the U.S.A. the very history of modern corporate public relations began when government criticism and the assaults of Upton Sinclair and other muck rakers provoked response.[17] Numerous public relations campaigns have since been conducted by corporations in order to counter the effects of adverse publicity. The Standard Oil Trust and the great railroad combinations published in newspapers throughout the U.S.A.

[14] These methods of persuasion were used only during debate in parliament and in newspaper descriptions of the legislation. *E.g.* Dr. Evatt referred to black marketing as being 'little short of treason'. See n. 46 *supra.*

It is true that the words 'black marketing offence', as used in the publicity sanctions under the Act, could apply to offences involving the many complexities of the National Security (Obscurity?) Regulations. However, most offences presumably were of a simple nature.

[15] See Note, 'Corporate Dissolution and the Anti-Trust Laws' (1954) 21 *University of Chicago Law Review* 480.

[16] For example, D might rename a subsidiary in trouble so that the risk of connection is slight, or D might adopt a name similar to that used by a competitor. *Cf. Consumers' Reports,* October 1968, 515 (confusion over Goodyear's 'hatful of similar-sounding names for different tyres').

[17] Cutlipp and Center, *op. cit.* 34 ff.

'huge advertisements attacking with envenomed bitterness the Administration's Policy'.[18] The infamous Carl Byoir and his associates launched major campaigns on behalf of the A. & P. chain stores in respect of unfavourable tax laws and proposed anti-trust suits,[19] and also on behalf of the Eastern railroads in respect of possible legislation favourable to trucking companies.[20] Public relations guidance enabled McKesson and Robbins Inc., a well known pharmaceutical corporation, to make a very quick recovery from the major scandal which resulted when its president, Coster, was identified as one Musica, a notorious swindler.[21]

The efforts made by Carl Byoir on behalf of the A. & P. chain stores indicate how extreme and forceful counter-publicity can become. Byoir made extensive use of full page advertisements, window posters, and propaganda sheets in grocery bags. Persuasion was attempted by means of *suppressio veri, suggestio falsi,* by identifying the Department of Justice and the Attorney-General as 'the anti-trust lawyers from Washington', and by claiming that an increase in food prices would be the result of governmental action.[22] In some campaigns for the A. & P. company and for other clients Byoir even created seemingly independent organisations for the purpose of distributing favourable publicity.[23] This so-called 'third party' technique has been used frequently in the U.S.A., as in the case recently of the 'Tobacco Industry Research Committee'.[24]

Public relations campaigns also have been used in England and Australia although the methods used have not been as dubious as those of Byoir. In England the Tate and Lyle 'Mr Cube' campaign against the

[18] T. Roosevelt, *op. cit.* 720.

[19] See Ross, *op. cit.* 118-9; and n. 22 *infra.*

[20] Note 'Appeals to the Electorate by Private Businesses: Injury to Competitors and the Right to Petition' (1960) 70 *Yale Law Journal* 135 (dealing with the antitrust case which arose from Byoir's campaign: *Noerr Motor Freight, Inc.* v. *Eastern R.R. Presidents Conference* (1960) 362 U.S. 947). See also Ross, *op. cit.* 119 ff.

[21] The counter-publicity campaign is well described by Baldwin and Black, 'McKesson and Robbins: A Study in Confidence' (1940) 4 *Public Opinion Quarterly* 305.

For further examples see Childs, *Public Opinion* 33; Ross, *The Image Merchants;* Truman, *The Governmental Process* 232-8; Rourke, 'Law Enforcement Through Publicity' (1957) 24 *University of Chicago Law Review* 225, 236; 'U.S. Interior Department's phosphate content figures for Amway products are not correct!', an advertisement by the Amway Corporation in *The Ann Arbor News,* 11 October 1970, 44.

[22] Begeman, 'Psychological Warfare: A & P Brand' (1949) 121 *New Republic* 11; Byoir, *op. cit.* 17.

On *suppressio veri, suggestio falsi,* and other ploys of the propagandist see Christenson and McWilliams, *Voice of the People* 331 ff.

[23] See n. 19 and n. 20 *supra.*

[24] Ross, *op. cit.* 106. For earlier examples see Truman, *The Governmental Process* 233-4.

Australia may have an equivalent of the 'Tobacco Industry Research Committee'. See Playford, 'Smoke on the Campus', *Nation,* 21 February 1970, 6.

Labour Party proposal to nationalize sugar-refining is notable.[25] In Australia the field of public relations is a relatively new one, but there have been a number of campaigns. The most conspicuous has been that conducted by Marrickville Margarine.[26] A less conspicuous example is the recent attempt of the Motor, Marine and General Insurance Company to overcome reports of defective car repairs under insurance claims by means of numerous television advertisements to the effect that the company should be judged upon its low insurance premiums and good overall record.[27]

Public relations campaigns of the type described above have not always been successful. However, the successes, and the enthusiasm and self-interest of those who profess public relations, indicate that counter-publicity will be likely in the event of severe publicity sanctions.[28] Certainly, there is much scope for counter-publicity. D could claim that its conviction will cause a result unfavourable to the general public. An example is provided by Byoir's advertisements that anti-trust action against the A. & P. chain stores would result in increased food prices. D may choose instead to stress its past achievements and its value to society. In some cases the claim could be made that D's conviction should not be taken seriously because of questions of strict responsibility, or because defects in its products have now been remedied. D might also decide to blame guilty or even innocent employees, or to allege discriminatory prosecution.

(b) *Methods of Persuasion*

Corporate offenders enjoy considerable advantages in any publicity contest conducted before the general public, since the methods of persuasion available are more effective than those which are likely to be used by the court or other agency which imposes a publicity sanction. An

[25] Wilson, 'Techniques of Pressure — Anti-Nationalization Propaganda in Britain' (1957), 15 *Public Opinion Quarterly* 225. See also Stewart, *British Pressure Groups* 110, where it is mentioned that the Post Office rebuked the Road Haulage Association for using anti-nationalization slogans on its mail.

[26] See the report in (1966) 3 *Public Relations Australia*, No. 6, 3. Numerous advertisements were placed in newspapers throughout Australia, particularly during September 1966, and materials were circulated by mail to a more limited public.

[27] In Adelaide numerous advertisements appeared in May and June 1970 on Channel 10.

For further examples see Walker, *Communicators* 219, 352; *Sydney Morning Herald*, 1 September 1962, 6 (Rothmans). During the pilots' strike in late 1966 Qantas used large newspaper advertisements to tell its story. These advertisements appeared between 18 November and 22 December.

[28] Where the publicity sanctions are not severe, it is unlikely that counter-publicity would be used. In one instance in the U.S.A. D refrained from using counter-publicity when it was ascertained by survey that the vast majority of the public did not know of the adverse publicity to which D had been subjected. Letter to author dated 16 March 1970 from Patricia A. O'Neill, Director of Communications, Opinion Research Corporation. See also Burton, *Corporate Public Relations* 58. Furthermore, some corporations will be reluctant to encourage an attitude of 'where there's smoke there's fire', or to otherwise increase the amount of attention paid to the adverse publicity.

initial advantage is that D can stress that its products or services should be bought or that it should still be held in high esteem, and thus no significant behaviour or attitude change is demanded.[29]

A second and more important advantage is that D will be able to rely upon simple emotive slogans or phrases which would be rejected for use by official agencies on the grounds of distortion or vulgarity.[30] This is evident from the methods of Carl Byoir. The point is also well demonstrated by the following description of propaganda methods in D. B. Truman's work, *The Governmental Process*:

> The propagandist dealing with a complicated or subtle matter may simplify it in a few phrases or a slogan, so that a layman will grasp the point and feel that he is master of the subject. This technique commonly occurs in group propaganda concerning the complex fields of public finance and government regulation of industry. The subtleties of both these fields were dramatically simplified in the slogan 'What Helps Business Helps You' widely used by the Chamber of Commerce and other groups in the 1930s. Similar complexities are buried by the leftist slogan 'Production for Use and Not for Profit'.[31]

Truman also refers to the following captivating approach used by private electric corporations in their struggle against government utilities. Advertisements depicted umpires participating in a game of football, the referee carrying the ball and a field umpire blocking a player. The captain appealed to the 'rules of the game' and to 'fair play' by using the following wording: 'You wouldn't stand for that sort of thing on a football field—but it happens every day in the electric light and power business. Government not only regulates the electric power companies—but is in competition with them at the same time.'[32]

The methods described by Truman, and those used by Byoir, are too extreme for use by official agencies.[33] But even if they were used, the simple phrases and slogans could easily be matched. A competition between phrases and slogans is likely to leave public opinion confused, particularly if the subject matter of D's offence is complicated or where it is otherwise difficult to ascertain which side is telling the truth.[34] Unlike the usual position where false claims are made about a product in commercial advertising, there would be no consumer proving ground for misleading counter-publicity.

[29] See text to n. 2 and n. 4 *supra*.
[30] On distortion see text to n. 13 *supra*.
[31] Truman, *op. cit.* 227-8.
[32] *Ibid.* 232. See also Lane, *op. cit.* 174; Ross, *op. cit.* 269-70; Golby, 'The Use of Metaphor in Persuasion' (1966) 7 *Advertising Quarterly* 41.
[33] For a discussion of the advantages possessed by private interest groups in matters of publicity see Childs, *Public Opinion* 248.
[34] Cutlipp and Center, *op. cit.* 483; Kelley, *Professional Public Relations and Political Power* 232. The situation described occurred recently in South Australia during the Chowilla and Dartmouth dam debate. See also Truman, *op. cit.* 245-6.

Apart from the above advantages D would also have the opportunity of increasing the effectiveness of its counter-publicity by using favourable publicity in advance of any publicity sanctions. Propaganda is most effective when it encounters no counter-propaganda or specific knowledge of the subject.[35] A skilful campaign based upon existing psychological studies could build up considerable resistance to later publicity sanctions.[36]

The methods of persuasion available to D in using counter-publicity therefore seem likely to obstruct the impact of publicity sanctions. What restraints are possible or desirable? A code of ethics for the public relations profession may help to prevent the abuses found in many of Byoir's campaigns,[37] but inevitably such a code would be breached and might not even apply to those corporations which employ their own public relations personnel. The present restraints imposed by the law of contempt and the tort of defamation could easily be skirted.[38] For example, there would not be a contempt if D conducted an extensive campaign when proceedings are not yet pending,[39] and even when proceedings are pending it would seem lawful for D to continue its commercial advertising and to advertise its achievements and value to society, particularly if such advertising had been in use previously. Furthermore, the fountain of justice would scarcely be poisoned if D were to argue publicly at any stage that the relevant legislation is unsound or should be amended, or that the basis of corporate criminal responsibility or strict responsibility is unsound.[40]

[35] Burton, *op. cit.* 95; Truman, *op. cit.* 240; 'Corporate Images: Are They Real?' (1961) 277 *Printers Ink* 80 (*re* G. E. and the electrical equipment conspiracy); Note, 'Controlling Press and Radio Influence on Trials' (1950) 63 *Harvard Law Review* 840, 843. See also n. 93 *supra.*

[36] See Steiner and Fishbein (eds), *Current Studies in Social Psychology* 167, 186; Hovland, *op. cit.* 1097. Note that D would have the advantage of the time between conviction and the time by which an appeal must be made. See *e.g.* Food and Drugs Act 1910 (Tas.), s. 58. Further advantages are the greater opportunities available to D to use repetition and an appeal to herd instinct. For recent examples of advance counter-publicity see the description of the environmental control advertisements of the major U.S. oil companies—*Time,* 17 August 1970, 62; and the account of Valley Milk's activities in 'Milk', a Victorian Milk Board advertisement in the Melbourne *Age,* 8 July 1970, 6.

[37] See Cutlipp and Center, *op. cit.* 484 ff.

[38] However, consider the possibility of D being placed under a bond.

[39] *James v. Robinson* (1963) 37 A.L.J.R. 151. But see Smith and Hogan, *Criminal Law* (2nd ed.) 526-7.

[40] Is any prejudice created by D's counter-publicity as serious as that which is *adverse* to D, or, in civil cases, which operates to the possible disadvantage of another party? Further, most corporate offences are not tried before juries. See *Vine Products Ltd v. MacKenzie & Co., Ltd* [1965] 3 All E.R. 58; but remember *Re Truth and Sportsman Ltd* (1961) 61 S.R. (N.S.W.) 484.

As regards scandalizing the court, consider the limitations upon this form of contempt expressed in *Fletcher* (1935) 52 C.L.R. 248; *Brett* [1950] V.L.R. 226; and *R. v. Commissioner of Police of the Metropolis, ex p. Blackburn* [1968] 2 All E.R. 319.

See generally Smith and Hogan, *Criminal Law* (2nd ed.) 524 ff; and Cowen, 'Some Observations on the Law of Criminal Contempt' (1965) 7 *University of Western Australia Law Review* 1.

There remains the possibility of using a publicity sanction which is designed to prevent the use of counter-publicity, or enacting a provision which actually bans counter-publicity, at least in its more exaggerated or distorted forms. A ban upon advertising would by its very nature restrict the use of counter-publicity. D would not be able to increase its level of commercial advertising in order to counter the loss of sales resulting from the advertising ban, and even institutional advertising would probably fall within the scope of the ban. But should D be stopped from criticising the regulatory measures by which it has been ensnared, or the basis of corporate or strict criminal responsibility? The same question arises where the desirability of legislation aimed directly at banning the use of counter-publicity is mooted.

Attempts to keep the flow of publicity pure and clean by banning criticism are probably unacceptable. The forum of ideas loses too many speakers.[41] Yet it may be argued that if it is possible to control false and misleading commercial advertising or to ban advertising for the purpose of imposing a publicity sanction, it is also possible to control the use of counter-publicity. A strong reply to this argument has been made in the U.S.A. Under the First Amendment the 'right to be wrong' exists in respect of 'public issues' but does not extend to commercial advertising.[42] Public issues are to be kept open to debate and therefore all comments, even from 'third party' organisations formed to disguise the source of the comment, are permissible.[43] Commercial advertisements relate to products rather than ideas, and the importance of debate is very much less. The line between products and ideas may be very difficult to draw in some cases,[44] but if anything this is a reason for not introducing restrictions upon the use of counter-publicity. It should be noted that a distinction between products and ideas would need to be made if a publicity sanction takes the form of a ban upon advertising—the ban should not extend to discussion of ideas.

(c) *Publicity Sanctions, The Fine, and Counter-Publicity*

Where D utilises counter-publicity it incurs costs. These costs may take the form of either expenditure for a publicity campaign itself, or for improvements in personnel and equipment in order to provide a basis for counter-publicity. Thus where a publicity sanction provokes the

[41] Comment, 'Developments in the Law — Deceptive Advertising' (1967) 80 *Harvard Law Review* 1005, 1027-38. However, see Frankfurter and Greene, *The Labor Injunction* 104; Lerner, *Ideas are Weapons* 22-3; Lucas, *The Principles of Politics* 308-11; Riesman, 'Democracy and Defamation' (1942) 42 *Columbia Law Review* 727, 775 and 1282, 1318; and Brett, 'Free Speech, Supreme Court Style' (1968) 46 *Texas Law Review* 668.

[42] See Comment, *op. cit.* 1029-30. For a further discussion see Emerson, *The System of Freedom of Expression* 414-7.

[43] *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference* (1960) 362 U.S. 947. See also Note, 'Appeals to the Electorate by Private Businesses: Injury to Competitors and the Right to Petition' (1960) 70 *Yale Law Journal* 135, 148-50.

[44] See Comment, *op. cit.* 1028, 1029 and 1038.

use of counter-publicity, D will suffer a monetary loss which may be equivalent to or even greater than that which would eventuate from a fine.[45] This effect of counter-publicity may mean that a publicity sanction which is imposed originally for the purpose of lowering prestige or inducing government intervention, may develop into a sanction which produces substantially only a monetary loss. The implications of this result are important. For reasons given earlier, it may be desirable not to use publicity for the purpose of inflicting a monetary loss. Yet if lowering corporate prestige or other purposes are pursued, the pursuit may be in vain. Since counter-publicity is initiated solely by D and is not subject to any significant restraints, the ultimate purpose of the publicity sanction will lie beyond the control of the court or other sanctioning agency.

There is however an important difference between the effect of a fine and the effect of counter-publicity. Where D is fined it has incurred a monetary loss which is irretrievable,[46] and any measures taken by D to reduce the chance of future violations will mean an additional monetary loss. Where D is exposed to a publicity sanction instead of a fine, a monetary loss incurred in reducing the chance of future violations will not necessarily constitute an additional loss. If D makes use of remedial measures for the purpose of counter-publicity virtue will in fact be rewarded and not penalized as in the situation where D has been fined. A vision of the blue eagle appears. This feature of counter-publicity is taken up again in the concluding section of this article.[47]

6. UNCERTAINTY, FISCAL LOSS, AND GENERAL DISADVANTAGES

The foregoing two sections have shown that publicity sanctions are handicapped by problems of persuasion and by the availability of counter-publicity. Publicity sanctions are also subject to a number of other disadvantages, and these are now discussed under the headings of uncertainty, fiscal loss, and general disadvantages.

(a) *Uncertainty*

A sanction which is implemented by means of publicity clearly is a sanction which is indefinite in impact. Unlike the fine, no certain penalty is imposed at the time of the conviction; sentence is determined later by

[45] The costs of counter-publicity, however, may constitute a tax deduction, but see Note, 'Public Policy and Federal Income Tax Deductions' (1951) 51 *Columbia Law Review* 752; Note '"Ordinary and Necessary Legal Expenses", The Federal Tax and State Criminal Law', (1958) 25 *University of Chicago Law Review* 513; Note, 'Deductibility of Business Expenses and the Frustration of Public Policy' (1952) 38 *Virginia Law Review* 771.

[46] Except to the extent that D can pass fines on to consumers.

[47] On this desirable aspect of counter-publicity see Bowring (ed.), *op. cit.* 464; Ross, *op. cit.* iv. 22-3, 57-8 and 268.

the capricious jury of public or governmental opinion. Furthermore, the sentence may be varied by D's use of counter-publicity. Consequently control of the quantum of a publicity sanction is removed from the hands of a court, and legislative upper and lower limits upon quantum are difficult to set. In these respects, the fine is much the superior sanction.

Publicity sanctions are also uncertain because their impact will often vary according to the characteristics and circumstances of particular offenders. Some corporations will fear loss of corporate prestige more than others.[48] On one hand a corporation may be made particularly sensitive to loss of prestige by the persuasion of its own public relations departments. On the other hand the view may be held that no publicity is bad publicity or, in respect of monetary loss, some corporations will stand to lose more from a publicity sanction than others. For example, D's products may be branded and therefore attract more notice than anonymous products such as nuts and bolts. D would be more fortunate where its products bear names similar to those used by competitors. Confusion would be particularly likely in the case of a name which has passed into the public domain as the generic term for a product,[49] or where a product name has been imitated. We might refrain from buying Bio-A when the object of our disaffection should be Bio-B.

The factors described above will be difficult to ascertain with precision and, if precision be attempted, the complexity of sentencing is increased considerably. By contrast, the fine is much more certain. Although the impact of a fine may vary according to wealth, or be reduced where D compensates by increasing the price of its products, it is at least comparatively easy to take possible variations into consideration. In order to balance variations in wealth, fines could be based upon a percentage of D's average annual turnover for the past four or five years.[50] The passing of fines on to consumers could be discouraged by an approach which requires the payment of a provisional fine, the final amount to be determined according to a percentage of D's annual turnover for say two years after conviction.[51] Publicity sanctions do not offer similar opportunities for achieving an even impact.

The uncertain impact of publicity sanctions is of further significance in respect of general deterrence. General deterrence reputedly works best when the punishment inflicted upon offenders is evident to those who are to be deterred. Secret punishment is wasted. In the case of publicity

[48] There is a good discussion in Rourke, 'Law Enforcement Through Publicity' (1957) 24 *University of Chicago Law Review* 225, 240-2.

[49] *E.g.* jello, cellophane, alfoil, electrolux. Drugs create the same difficulty. See Comment, 'Developments in the Law — Deceptive Advertising', *op. cit.* 1104-5. Consider also co-operative trademarks as in the case of 'Sunkist' orange juice and 'Homestyle' bread (New Zealand).

[50] See Davids, *op. cit.* and Dershowitz, *op. cit.*

[51] Turnover rather than profits because profit levels are more readily manipulated.

sanctions the only portion of the punishment clearly evident is the publicity which is used to initiate the adverse reaction, and this is not even apparent where D suffers an advertising ban.[52] The actual impact of publicity sanctions will often be unknown. Corporate prestige is a subtle asset susceptible to only the most inexact measurement, and adverse reaction to D's products or governmental intervention frequently will be viewed as the result of forces other than the publicity sanction imposed upon D.[53] The fine, of course, provides a much less equivocal method of indicating the loss suffered. However publicity sanctions are superior to the fine where, as a result of the unknown impact, prospective offenders overestimate the loss which D has suffered. Secret punishment is not necessarily wasted.[54]

(b) *Fiscal Loss*

Publicity sanctions, unlike the fine, suffer from the disadvantage that they do not generate funds for official purposes.[55] Consequently, the enforcement effort, which itself is vital to deterrence, may suffer. Furthermore, there would not be created any fund from which the victims of D's offence can be compensated.[56] Providing such a fund is an important possible function of the fine, particularly in the context of consumer protection where civil remedies available to individual consumers often are inadequate.

(c) *General Disadvantages*

Publicity sanctions, depending upon their form, are subject to a number of more general disadvantages. Adverse publicity directed to the public at large may be distasteful or produce anxieties.[57] D's competitors might capitalize upon D's misfortune in their advertising and thereby derive an unfair advantage.[58] Adverse publicity against D may also affect innocent

[52] Unless, of course, D complains publicly about the sanction, or the conviction and penalty are reported by the news media.

[53] *Cf.* Wilson, *op. cit.*

[54] Rourke, *op. cit.* 225-38.

[55] A point which would have disturbed Thurman Arnold. See Grunewald and Bass, *op. cit.* 77; 'Congressional approval of the antitrust programme was in large measure due to the tremendous publicity resulting from the indictments—plus Arnold's unabashed demonstration that for every dollar appropriated to the [antitrust division], two or three dollars flowed into the Treasury in fines received from indicted defendants'.

[56] This is stressed by Dershowitz, *op. cit.*

[57] Lauterbach, *Men, Motives and Money* (2nd ed.) 84; Comment, 'Developments in the Law—Deceptive Advertising', *op. cit.* 1013-6.

[58] Roosevelt, *op. cit.* 236-7; Lemov, *op. cit.* 79; Gaguine, 'The Federal Alcohol Administration' (1939) 7 *George Washington Law Review* 844, 864-5. However, 'one bad apple' may affect competitors too.

Borden, *Advertising Management* (rev. ed.) 162; Riley (ed.), *The Corporation and its Publics* 47. See also Note, 'Legal Responsibility for Extra-Legal Censure' (1962) 62 *Columbia Law Review* 475.

The possibility of competitors taking advantage of D's misfortune also exists where D has only been fined, but the adverse publicity must first be generated by the competitors: they cannot simply refer to an official publication which calls for public reaction.

dealers and distributors, and even innocent competitors. For example, Bio-B may be confused with Bio-A and Bio-C, in which event a large number of innocent parties, including competitors and their dealers and distributors, could easily be injured. Further disadvantages arise from the chance that newspapers and other media may refuse to publish the required notices or statements,[59] from the risk that the use of illegal methods will be encouraged as a result of making those methods known,[60] and, in the case of publicity sanctions aimed at 'innocent' products, from the possible need to discourage consumers from buying items which may be sound and perhaps even superior to those offered by competitors.[61]

7. EVALUATION

Publicity Sanctions and Deterrence

(i) TOWARDS A 'LIMITED PUBLICITY SANCTION'

Do publicity sanctions have an important role to play in respect of deterrence? The usual answer is no. The treatment of this topic in Leigh's recent work, *The Criminal Liability of Corporations in English Law,* reflects the conventional pessimism. After citing several examples of formal publicity sanctions Leigh states that

> [this type of sanction] has become less useful in the light of more wide-spread business operations, and perhaps, the increased size of newspapers. A very real problem lies in bringing home the fact of conviction to the public in the context of a dynamic rather than a relatively static community . . .
>
> As a general proposition, publicity, and the stigma of conviction are likely to prove useful with respect to regulatory legislation, the purpose of which is to ensure adherence to proper standards, particularly with respect to foodstuffs, drugs, and other articles of consumption. Otherwise it is likely to go unnoticed. Yet to be effective, the stigma would have to be such that the corporation's clientele were much less ready to deal with it.[62]

In support of Leigh's position there must be added the problems of persuasion which arise where publicity sanctions are used,[63] the possible use of counter-publicity,[64] and the catalogue of disadvantages set out in the preceding section.

[59] Compulsory publication would be necessary as in present and past publicity sanctions. On the prospect of a government newspaper or publication see Berelson and Janowitz, *Public Opinion and Communication* (2nd ed.) 226-7; Mayer, *The Press in Australia* 251-2.

[60] Chamberlain, Dowling and Hays, *The Judicial Function in Federal Administrative Agencies* 138-9; Clinard, *op. cit.* 85; Hawkins, *op. cit.* 559, n. 35.

[61] In the case of a ban on advertising, would D be able to advertise a reduction in the price of consumer goods?

[62] Leigh, *op. cit.* 159-60.

[63] See text, section 4.

[64] See text, section 5.

At first glance the case against the use of publicity sanctions seems strong, except in respect of a limited range of situations. However this impression is probably false. An initial point is that an advertising ban could be used to inflict a substantial monetary loss, and since the problem of attracting public attention does not arise, the range of products which could be affected may easily extend much beyond foodstuffs, drugs, and other articles of consumption.[65] There are also forms of government intervention which produce monetary loss and which may be activated without widespread publication. An example is black-listing in respect of government contracts.[66]

A point of much greater importance is that Leigh's position is based upon the express assumption that the sole purpose of a publicity sanction is to inflict a monetary loss. Yet, as has been stated earlier, there is little need to use publicity for a purpose which can readily be achieved by using a fine. Instead, advantage should be taken of deterrent effects which are possessed by publicity but not by the fine. Publicity sanctions therefore should be aimed at lowering prestige or at inducing those forms of government intervention which are feared for reasons other than monetary loss.[67] Now if publicity is to be used only for these purposes there are two consequences of note. First, a publicity sanction, whether in the form of adverse publicity or an advertising ban, should not be used to inflict monetary loss even in the case of foodstuffs, drugs and other articles of consumption. However, monetary loss will be inevitable if it is necessary to warn consumers of defects, and this loss should be taken into account in assessing the quantum of any fine to be imposed. Secondly, if publicity is used to lower prestige or to induce government intervention it is much less obvious that widespread publication and attention is required. A much more limited class than the general public would probably suffice. Government intervention may need no more than transmitting information to a particular department.[68] Sufficient loss of prestige may well be inflicted by publicity directed only to business executives and 'opinion leaders' at relatively high levels in the social structure.[69]

[65] There are, however, a number of disadvantages associated with the use of an advertising ban. See text, section 3(b), section 4(c), section 5(b), but consider text, section 4(a) and (b).

[66] See text, section 2.

[67] See text, section 2.

[68] This could be the case in respect of increased enforcement.

[69] On 'opinion leaders' see Katz, 'The Two-Step Flow of Communication: An Up-to-date Report on an Hypothesis', in Proshansky and Seidenberg (eds.), *Basic Studies in Social Psychology* 196. 'Opinion leaders' exist at all levels in the social structure and are not much above followers in their level of interest. It is clear from the text that I have in mind a limited range of 'opinion leaders' and followers.

For convenience of discussion a publicity sanction aimed at a limited class *and used for the purpose of lowering prestige or inducing government intervention*[70] may be labelled a 'limited publicity sanction'.[71]

(ii) LIMITED PUBLICITY SANCTIONS, PROBLEMS OF PERSUASION, AND COUNTER-PUBLICITY

If publicity is directed at a well-informed group then problems of persuasion are less likely to arise and counter-publicity will be more limited in effect. For example, business executives and 'opinion leaders' are less likely to be confused by entity responsibility and complicated offences than the general public. Emotive and distorted counter-publicity of the type used by Carl Byoir and described by D. B. Truman will encounter greater resistance from the well-educated and well-informed. Such an audience is likely to be more interested than the general public in learning whether D has remedied the cause of its offence, although it may be necessary to indicate that remedial measures are important. If D is forced to apply remedial measures in order to found a counter-publicity campaign clearly the publicity sanction imposed has been far from futile.[72] Nonetheless, it cannot be suggested that the difficulties presented by problems of persuasion and counter-publicity will simply disappear. It should be realised that many business executives may be united in opposition to some offences, in which event publicity would be more fruitfully directed to 'opinion leaders' or politicians. Moreover, some types of regulatory measures may be so complicated or esoteric as to receive the attention of only those with highly specialized interests.

(iii) DISADVANTAGES OF A LIMITED PUBLICITY SANCTION

What disadvantages arise if a limited publicity sanction is used? Are not all publicity sanctions uncertain in impact, and subject to a number of general disadvantages? Do publicity sanctions generate funds for enforcement or for distribution to injured victims?[73]

The principal difficulty is uncertainty. All publicity sanctions are indefinite in impact, a characteristic which removes accuracy from sentencing and which may lead prospective offenders to underestimate the law's force. There seems no way in which to overcome this problem, but it is minimized if a fine is used to inflict a definite monetary loss and publicity is reserved for the special additional effects of lowering prestige

[70] Monetary loss can also be induced by publicity of limited range, particularly in the case of governmental intervention.

[71] Professor Schwartz, *supra*, has indicated to me that the National Commission on Reform of Federal Criminal Laws would reject any suggestion that publicity sanctions be limited *expressly* in a statute to opinion leaders or other limited classes. Such limits should, in his view, be left to the discretion of the sentencing agency.

[72] See text, section 5(c).

[73] See text, section 5(b).

and inducing government intervention.[74] It should also be remembered that, where prospective offenders overestimate the punitive effect of a publicity sanction imposed upon D, uncertainty will be an advantage.

The problem of fiscal loss is more easily overcome. If D is subjected to both a fine and a limited publicity sanction funds will be generated for enforcement and other purposes although presumably a fine imposed in conjunction with a publicity sanction would produce less money than a fine imposed alone. But what general disadvantages exist where a limited publicity sanction is used? Several spring to mind. Illegal methods may be publicised and thereby become more widespread.[75] Compulsory publication of notices and statements is unlikely to be viewed favourably by the news media or private publishers except possibly in times of national emergency. Competitors may gain an unfair windfall by making use of D's misfortune in their own commercial advertising.[76] Indeed, a limited publicity sanction seems subject to all the general disadvantages which are possible in the case of a publicity sanction aimed at inflicting monetary loss,[77] except that 'innocent' products are much less likely to suffer. For example, D's good product Bio-B is more likely to enjoy continued high sales if, instead of a request to stop buying Bio-B, we are asked only to have less regard for D because it has violated employee safety laws in one of its factories.[78]

(iv) LIMITED PUBLICITY SANCTIONS AND SUPPLEMENTARY PURPOSES[79]

Will a limited publicity sanction achieve the supplementary purposes of warning, educating or moralizing, and notifying prospective offenders of the penalties imposed upon D? Notification to prospective offenders would result from publicity directed to business executives, but warning and educating or moralizing would create more difficulty. A warning to the general public would not necessarily be provided by publicity directed at business executives and 'opinion leaders', and educating and moralizing might also be confined to a limited front. Where a warning should be given to the general public usually it will be necessary to use a special form of publicity distinct from the publicity sanction itself.[80] However, special forms of publicity may be unnecessary to achieve a desirable level of educating or moralizing. Adequate enforcement of regulatory measures may not require extensive popular support.[81] A sufficient level

[74] However, if a fine is imposed will this distract attention from the requirement that we must think less of D? See Bowring (ed.), *op. cit.* 460-1.
[75] See text to n. 60, *supra.*
[76] See text to n. 58, *supra.*
[77] See text, section 5(c).
[78] D's products are more likely to be affected if those products carry the corporate name, as where D is the 'Bio Corporation'.
[79] See text, section 2.
[80] See text, section 3(d)(ii).
[81] Ball and Friedman, *op. cit.*

of educating and moralizing might well result from publicity directed to business executives who are after all the persons in the best position to prevent corporate offences. If it is desirable to describe novel or complicated regulatory measures to the general public, the simplified and distorted explanations necessary are best contained in a programme of education rather than in a sanction which relates to a particular offender.[82]

(v) THE FORM OF A LIMITED PUBLICITY SANCTION

If a publicity sanction is to be aimed at business executives and 'opinion leaders' what form should be adopted? Newspapers, including the *Financial Review* or the *Wall Street Journal* would be suitable,[83] and use could also be made of magazines and trade journals. There are a large number of media suitable for widespread dissemination at the level desired for a limited publicity sanction. Publication would be at D's expense, and would need to be compulsory.[84] The notices or statements to be published could be prepared by the court or other sanctioning agency and should contain a reasonably full account of D's offence and the aims of the legislation involved. It should be made clear that a loss of respect for D is appropriate, and any request, express or implied, that D's products not be bought should be avoided since the infliction of a monetary loss is not desired. For the purpose of channelling possible counter-publicity in a desirable direction D's plans for preventing a repetition of its offence should be indicated, or if D has made no plans, the importance of remedial measures should be stated.[85]

These suggestions are not free from difficulty. First, as has been mentioned earlier, compulsory publication will not be viewed favourably by private media interests. This problem is avoided only by using a government publication, a possibility considered below. Second, care would be needed to avoid lowering the courts too far into the public arena. In order to avoid the impression of direct involvement in matters of public debate, it would seem desirable for some body other than the court of conviction to compose and publicize the requisite notices and statements. What appears to be required is an official and more proper version of Byoir's 'third-party' technique.[86] A number of possible agencies might be used for this purpose, and the court could retain substantial control of sentencing if final approval of the notice to be published were necessary.

[82] See text, section 4(d).

[83] Note that a newspaper account may arouse interest in more specialised treatments of the topic. See Berelson and Janowitz, *Public Opinion and Communication* 354-5. On the effect of newspapers on 'opinion leaders' see Katz, *op. cit.* 206-7.

[84] See the examples given in section 1.

[85] See text, section 5(c).

[86] See text, section 5(a).

Should government gazettes be used either in place of newspapers and the other media above, or as a supplementary medium? Gazettes possess several advantages. Questions of refusal to publish do not arise and information is readily recorded for use by government departments and by politicians. The recording of information for official purposes could extend to a description of the measures taken or planned by D to prevent any repetition of its offence, provided that an attempt is made by the court or other sanctioning agency to set this information out in its judgment.[87] By these means the official record would be more useful and, as a result of the greater risk of government intervention, there is the hypothesis that deterrence will be increased. A further advantage of the gazettes is that they allow the courts to remain at a discreet distance from the forum of public debate, assuming that the notice or statement is so worded that it appears as a comment from a government source rather than as a judicial utterance. The principal disadvantage of a government gazette is of course that it is a barren journal not commonly read by business executives or a wide range of 'opinion leaders'. It provides a useful medium for reaching official agencies and politicians, but a limited publicity sanction also requires publicity in newspapers and other media.

Is there some superior medium which alone will enable sufficient publicity to be directed toward business executives, 'opinion leaders', and official persons? No such medium appears to exist at present but, apart from the possibility of a government newspaper,[88] inspiration could be taken from a proposal of Patrick Colquhoun in the early nineteenth century. Colquhoun suggested that a Police Gazette be instituted for the purpose of assisting the detection of crime and for disseminating moral principles.[89] This gazette was to contain, inter alia, details of crimes committed, descriptions of stolen articles, rewards offered, accounts of the life and fate of notorious criminals, short abstracts of chosen statutes with commentaries indicating the advantages of observance and describing the penalties attaching to violation, and short essays of a moralizing nature. Colquhoun's idea might be adapted for the purpose of combatting corporate crime in the twentieth century. Why not a 'Corporation Gazette' published by an official agency and which contains descriptions of corporate offences, penalties imposed, and the aims of the legislation involved? This gazette could also perform the task, so often neglected in the past, of publicizing new regulatory measures and suggesting methods of preventing the commission of offences within the corporate structure.

[87] See text, section 3(c).

[88] See n. 59.

[89] Radzinowicz, *A History of English Criminal Law* iii. 296-8. Colquhoun also advocated that appropriate themes be made available to ballad singers for propagation, *ibid.* 275.

The journal could be funded by compulsory subscriptions from corporations and their directors and executives, and could either be sold or distributed free of charge to government departments, politicians, newspaper editors, members of the university community, and other persons who are interested. In order to compete for attention with newspapers and other private publications an imaginative editor might well incorporate many items of interest particularly to the business community.[90] The possibilities include information upon exporting, overseas investment, taxation problems, developments in the law relating to certain fields such as restrictive trade practices, and many government contracts and tenders might profitably be advertised in a 'Corporation Gazette' as well as in a government gazette.[91]

8. CONCLUSION

Publicity sanctions which are directed at lowering prestige or inducing governmental intervention rather than inflicting a monetary loss have deterrent effects which are not shared by conviction and fine alone. Because publicity sanctions of this nature do not require widespread public reaction but depend more upon the reactions of business executives, official persons, and 'opinion leaders', the conventional pessimism surrounding their use is probably unjustified. There is no need to persuade the general public that D's products should not be purchased, and indeed such an approach would be undesirable given that the fine is a much more certain and ready method of inflicting a monetary loss. Moreover the problems of persuasion and the chances for counter-publicity which arise in the case of publicity sanctions directed at the general public are of much less significance in the case of a limited publicity sanction.

If a limited publicity sanction is to be used there are a number of requirements. The media should be newspapers, magazines, government gazettes, and possibly a special 'Corporation Gazette'. The restrictions upon media which exist in many present publicity sanctions would be inappropriate.[92] The content of publicity notices should stress D's wrongdoing and wherever possible should avoid the impression that D's products are unfit to buy.[93] An instruction 'Do not buy' would be fitting only where it is considered necessary to warn consumers of defects. The notices should also indicate whether D has taken, or plans to take, remedial measures. Finally, a limited publicity sanction should be used in conjunction with the fine. A fine will impose a certain monetary loss,

[90] Note that newspapers could still be used to arouse interest in the more specialized reports to be found in the Corporation Gazette. See n. 83, *supra*.

[91] A good cartoonist would help. See the excellent cartoon on the electrical equipment cases by Herblock of the Washington Post, reproduced in Kefauver, *In a Few Hands* 82.

[92] Past and present publicity sanctions have been limited as to media. See text, section 1.

[93] See text, section 2, section 3(a).

and this impact, together with the impact of the publicity sanction itself,[94] will be brought to the attention of prospective offenders in the business community.

But are not publicity sanctions articles of faith? If a limited publicity sanction is used will anybody be watching? Will this type of sanction in fact produce a sufficiently potent deterrent threat to make the effort worthwhile? Confident answers cannot be given. Publicity is not a black and white art. Furthermore, where one stands will depend very largely upon personal conceptions of the future shape of corporate criminal responsibility.[95] Publicity sanctions will probably be regarded as pointless by those who believe that entity responsibility is too indirect and diffused and that emphasis should be placed upon devising better methods of locating and prosecuting guilty individual officers and employees. For those who dislike tinkering with the internal affairs of business corporations new methods of imposing individual responsibility or achieving corporate reformation and rehabilitation will very often be anathema, and publicity sanctions may be seen as a more palatable method of decreasing the incidence of corporate crime.

There remains the position of those who favour a system of corporate criminal responsibility wherein the aim of deterrence is replaced by that of rehabilitation or reformation. Will the advocates of a forward-looking approach favour publicity sanctions? Glimpses of such an approach are discernible in the treatment of publicity sanctions which has been given here. Publicity may exert pressures which thrust in the direction of reformation or restructuring. These pressures exist where a publicity sanction is aimed at inducing certain forms of government intervention. For example, the sanction may indicate the need for new industry-wide safety standards, or for an official administrator to control D's affairs pending the implementation of corrective measures. Another pressure toward reformation exists where D finds it necessary to base a counter-publicity campaign upon the fact that remedial action has been taken.[96]

Clearly it is fortuitous whether publicity sanctions result in reformation or rehabilitation. These consequences are merely uncertain by-products of a deterrence-oriented approach. Yet fortuity and uncertainty may be advantageous. The attempt at reformation or rehabilitation is much less overt than in a direct forward-looking approach and is therefore less likely to attract the cry that business corporations should be left alone.

[94] See text to n. 69 *supra*.
[95] See introduction.
[96] But if a limited publicity sanction is used is counter-publicity likely? See n. 28 *supra*. My own guess is that in many cases counter-publicity would be used, particularly where some form of government intervention is in the offing. The counter-publicity, however, would be directed at a more limited public than in the case of a widespread publicity sanction.

In the long run would the facilitation of entry into a brave new world of business regulation be seen as a more important function of publicity sanctions than deterrence?

University of California,
Hastings College of the Law,
San Francisco, Calif., March 20, 1972.

Mr. Robert H. Joost,
U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

Dear Mr. Joost: Implicit in my letter of January 31 was the assurance of other suggestions to follow. As the work on my casebook has now been completed, there is a momentary breathing spell.

One of the most disturbing aspects of the Model Penal Code is the seemingly deliberate design to avoid true definitions. As mentioned in my article a true definition of a screwdriver would be in some such form as this: A screwdriver is a tool for driving or withdrawing screws by turning them. This includes the three requisites of a true definition: (1) the term, (2) the genus, and (3) the differentia. A definition following the plan of the Model Penal Code would be in some such form as this: One who is driving or withdrawing a screw by turning it, is using a screwdriver. This gives the idea in a general way but does not tell what kind of thing a screwdriver is. The explanation for the avoidance of true definitions was, in substance, that the more general approach gives the judges more leeway in their development of the law. But there is reason to question whether a criminal statute, which is purposely drafted to give the judges leeway, is sufficiently specific to avoid the challenge of "void for vagueness." In any event a criminal code should make use of true definitions where this can easily be done.

It is important to emphasize the suggestion made in my memo to Senator McClellan on June 22, 1971. Each section of a code should be accurate as it stands. It is never satisfactory to say: "Of course the section does not really mean what it says because it is modified by the provision of section so-and-so." If necessary the reference to the modifying section should be expressly stated, although frequently this will not be necessary.

The Code would gain much by inclusion of the ancient concept of malice, carefully defined for each application. Combining these suggestions for Chapter 16, we might have the following:

§ 1601. Homicide.

(1) Homicide is the killing of one human being by another.

(2) Criminal homicide is homicide committed without justification or excuse.

(3) The grade of criminal homicide is murder, manslaughter or negligent homicide.

§ 1602. Murder.

(1) Murder, a Class A felony, is criminal homicide committed with malice.

(2) Criminal homicide is committed with malice if, without mitigation,

(The following statement could be adapted from § 1601 of the Study Draft:)

Abandonment of the very useful concept, malice, may be mentioned in connection with section 1705, Criminal Mischief. The section obviously does not mean what it says because willfully damaging property of another may be justified under Chapter 6. And if so, we have justifiable criminal mischief which borders on absurdity. My suggestion would be along this line:

§ 1705. Malicious Mischief.

(1) Malicious mischief is the malicious tampering with or damaging the tangible property of another.

(2) Harm to the tangible property of another is malicious if it is done without justification, excuse or mitigation and takes the form of:

(a) Willfully tampering so as to endanger person or property;

(b) Willfully damaging; or

(c) Recklessly damaging by fire, explosives, or other dangerous means listed in section 1704(1).

Sincerely yours,

ROLLIN M. PERKINS.

NATIONAL ASSOCIATION OF MANUFACTURERS,
March 20, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures.

DEAR SENATOR MCCLELLAN: On behalf of the National Association of Manufacturers, I am submitting, herewith, a statement regarding the final report of the National Commission on Reform of Federal Criminal Laws now the subject of hearings and consideration by your Subcommittee.

It will be appreciated if this statement can be incorporated in the record of your hearings and I trust the views expressed may prove useful to your Subcommittee in its consideration of this important matter.

Respectfully submitted.

Lambert H. Miller,
Senior Vice President and General Counsel.

STATEMENT OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
TO THE
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE
SENATE COMMITTEE ON THE JUDICIARY
ON THE
FINAL REPORT OF THE NATIONAL COMMISSION
ON REFORM OF FEDERAL CRIMINAL LAWS

MARCH 20, 1972

This statement is submitted on behalf of the National Association of Manufacturers with respect to sections 402, 403, 1006, 1204, 1551, 1772, 3007 and 3502 of the Final Report of the National Commission on Reform of Federal Criminal Laws, "Proposed New Federal Criminal Code (Title 18, United States Code)" (hereinafter referred to as "the Report"). Although explanations in the Report tend to minimize the effect of these provisions, we submit that in some respects they constitute significant extensions of the existing criminal law which we believe are both unwise and unwarranted by experience to date.

We recognize the need for effective criminal sanctions for acts in violation of federal law where corporations and organizations are involved, and recognize that in some cases sanctions against both the organization and individuals may be appropriate. However, we would point out that the provisions contained in chapter 4 would apply to prosecutions under any Act of Congress (except the Uniform Code of Military Justice, District of Columbia Code and Canal Zone Code) whether defined in this Code or outside the Code (§101(2)). The provisions would thus be potentially applicable to a wide variety of subjects, including such diverse fields as antitrust, internal revenue, labor relations, securities regulation, civil rights, consumer rights and environmental protection. In many of these field different

standards may be called for as to what conduct should subject a corporation or an individual employee to penal sanctions. Existing statutes reflect this distinction, in that for each offense Congress has defined corporate and individual liability in a manner consistent with the nature and severity of the offense and the goals to be achieved. The Report would change this approach, applying in broad-brush fashion the same definitions of accountability and liability to all statutory offenses.

The corporate and organizational liability sections (402, 403, 409) are said to be merely "codification[s] of present case law with minor variations" (see comment to §§402 and 403 of the Study Draft, p.31). However, it appears that the standards embodied in these sections have been developed primarily in cases involving only a narrow range of offenses, whereas the proposed standards would now be applicable to the full array of common law offenses, as well as to all other statutory offenses involving violations of business conduct. We strongly urge Congress to reject the proposed standards or to sharply limit their applicability. In our judgment the much studied and widely accepted approach of the Model Penal Code, which restricts corporate criminal liability to a rather narrow range of circumstances outside those specifically provided for by other statutes should not be departed from absent a clear showing of need and justification. Such showing has not been made by the Commission in the Report.

We are also concerned by some of the provisions in the Report which are wholly new to the criminal law. For example, the Report would make default in supervision of corporate activities an offense (§403(4)). In certain situations it is possible such a provision would be necessary.

However, Congress should consider that question in the context of the particular offense whenever the problem arises. Inclusion of this provision in a statute of such broad potential application as the proposed Code is a dangerous experiment of uncertain consequences. Another far-reaching provision would empower a judge to deprive a person of his chosen profession for up to five years as punishment for a business offense. These and others will be discussed below. Again our view is not that these are undesirable in every case but that they should not be authorized for any and all criminal offenses.

Another principal difficulty we have with the Report is the lack of specificity of many of the provisions. The proposed standards define criminal liability. In criminal statutes it is imperative that the meaning and scope be unmistakable. Unfortunately, standards which would apply to any person "who controls the corporation or is responsibly involved in forming its policy" or "a person responsible for supervising relevant activities" are far too vague to give adequate guidance to those who might be affected.

Many of our concerns go to the underlying philosophy of the relevant sections of the Report, but we would also like to indicate some of our specific objections to the wording of these provisions.

1. We strongly urge rejection of the alternative language offered by the minority of the Commission for §402(1)(a). This alternative language is shown in brackets below the language recommended by the majority of the Commission as follows: A corporation may be convicted of: (a) any offense committed by an agent of the corporation within the scope of his employment on the basis of conduct authorized, requested or commanded, by any of the

following or a combination of them: [(a) any offense committed in furtherance of its affairs on the basis of conduct done, authorize, requested, commanded, ratified or recklessly tolerated in violation of a duty to maintain effective supervision of corporate affairs, by any of the following or a combination of them: . . . .] (Emphasis added)

Punishing active behavior is one thing, but making passive conduct such as "reckless toleration" an offense seems far removed. The majority of the Commission rejected the bracketed language above, recognizing that no reason exists for making the standards for corporate crime broader or more vague than the standards for other crimes. The Comment to the section makes this explicit as follows:

> "Subsection (1)(a) in effect identifies the persons in management whose complicity is required before the corporation may be convicted of a felony. It is premised on the view that vicarious liability of corporations should be close to ordinary accomplice liability. Evidentiary considerations peculiar to corporate conduct should not lead to the adoption of substantially different standards of substantive liability. When such persons are involved, the offense must have been committed within the scope of the agent's employment, rather than only in furtherance of the corporation's affairs, and actual complicity of management is required, rather than ratification of the agent's conduct or reckless toleration of the conduct in violation of a duty to maintain effective supervision of corporate affairs. The broader base for liability set forth in the bracketed alternative reflects the view of some members of the Commission that the criminal liability of corporations poses issues quite different from ordinary accomplice liability of individuals. The diffusion of responsibilities necessitates more flexible attribution of criminality to artificial entities not subject to grave penalties like imprisonment." (Emphasis added)

We strongly suggest that the Commission's majority view is much preferable to the minority view. The minority language would not furnish "flexibility" but only vagueness and uncertainty of what conduct is

prohibited and by whom. The minority has shown no reason for departing in the area of corporate criminal standards from the well-established principle that a criminal statute must inform the public as to what conduct is proscribed. Standards such as "ratified" and "recklessly tolerated" do not furnish this requisite notice.

2. One of the categories of individuals named in section 402 is "any person, whether or not an officer of the corporation who . . . is responsibly involved in forming its policy." This is much too vague a description to form the basis for a criminal sanction. Individuals and organizations should be told exactly what (and whose) conduct is criminal. The proposed definition provides no guidance and could be construed as furnishing a basis for prosecuting a corporation as a result of actions of individuals over whom the corporation has minimal control. For example, is a lawyer who is retained by a corporation "responsibly involved in forming its policy?" Is a banker who has extended credit to a corporation in an amount several times the magnitude of its equity "responsibly involved" in forming policy? If such persons were held to be within the scope of section 402(1)(a)(iii), how could the corporation effectively police their actions? These and similar questions should be resolved before enactment of section 402.

3. Section 402(1)(c) provides that "a corporation may be convicted of any misdemeanor committed by an agent of corporation within the scope of his employment." A corporation should not be made absolutely liable for all misdemeanors committed by its agents unless there is a clear need for such broad sanction, and such need has not been demonstrated. If the provision is retained, at the very least Congress should reduce the

severity of offenses for which the corporation can be absolutely liable from a misdemeanor to an infraction.

4. Section 402(2) precludes the defense by a corporation "that an individual upon whose conduct liability of the corporation for an offense is based <u>has been acquitted, has not been prosecuted or convicted or has been convicted of a different offense</u>, or is immune from prosecution, or is otherwise not subject to justice." In our view, it would be unwise to codify the peculiar judicial doctrine of a few federal circuits that acquittal of the only individuals involved is no defense for the corporation. This rule only encourages juries to compromise their verdicts when they are sympathetic toward the individuals involved but want to find someone (or some organization) criminally liable.

5. We submit that a new section 402(3) should be added, providing a defense to prosecution under sections 402(1)(a) or (b) if the corporation proves by a preponderance of the evidence that the offense charged was not caused by the failure to exercise due diligence on the part of the persons indicated in sections 402(1)(a)(i)-(iv). Such a defense should be provided because the language of section 402 is so broad that it is not clear that persons acting reasonably and with due diligence can escape its ambit.

We believe that an organization which has in good faith sought to prevent unlawful conduct on the part of its agents, taken reasonable steps to comply with the law, and appropriately disavowed the unlawful conduct of its agents should not be held criminally liable for offenses requiring culpable intent or a state of mind tantamount thereto. The honest effort of an organization to comply with the law should adequately vindicate the interest of Government in obedience to law, except in those cases of regu-

latory measures where both individual and collective responsibility arise independently of intent.

6. Section 403(4) creates the new standard of "Default in Supervision." It provides that "a person responsible for supervising relevant activities of an organization is guilty of an offense if he manifests his assent to the commission of an offense for which the organization may be convicted by his willful default in supervision within the range of that responsibility which contributes to the occurrence of an offense for which the organization may be convicted."

This section obviously reflects the view that a supervisory employee in an organization who acquiesces in the commission of an offense by a subordinate is in some sense an accomplice. But we can see no reason for treating such individuals differently from other individuals accused of being accomplices or co-conspirators. Why should those citizens engaged in business be held to a higher accountability than other citizens?

Section 401 defines "accomplices," setting forth the circumstances under which a person may be considered guilty of an offense committed by another person. If there are certain offenses involving organizations for which Congress deems it necessary to impose higher duties than those in section 401, Congress should do this on an individual basis, tailoring the higher standard to the substantive offense involved. In this way, the persons to be held responsible could be designated with some particularity, and the standard of care to be required could be defined in understandable terms.

Section 403(4) as proposed in the Report is too vague for a criminal statute. The scope of coverage of the section could vary drastically with the meaning assigned such critical phrases as "a person responsible for

supervising relevant activities;" "manifests his assent to the commission of an offense;" "willful default in supervision;" "within the range of that responsibility;" and "contribute to the occurrence of an offense." For example, how many supervisory levels are covered by this provision? May the president of the corporation be found guilty as a result of acts by a truck driver?

7. Section 3007 provides a new sanction in the case of organizational offenses. According to that provision, when an organization is convicted of an offense, the court may, in addition to or in lieu of imposing other authorized sanctions, require the corporation "to give notice of its conviction to the persons or class of persons ostensibly harmed by the offense, by mail or by advertising in designated areas or by designated media, or otherwise." An alternative offered by the minority of the Commission would empower the court to similarly require "appropriate publicity . . . to the class or classes of persons or sector of the public interested in or affected by the conviction."

Although the sanction of giving notice by advertising or by publicity might be appropriate in instances where a clear need is established (such as notifying purchasers of defective or otherwise dangerous products), it is objectionable in provisions of such broad and non-specific application as section 3007. Moreover, no limits are placed on the time during which the notice or publicity must be given, the number of advertisements which could be required, or their cost.

If the penalties provided by a specific statute are thought inadequate to bring about compliance, the proper course is to increase the penalty. But requiring convicted defendants to declare their sins in public

is a regressive proposal, similar to the penalties of humiliation used in colonial America. In our view, the problem underlying corporate criminal sanctions is not that new and different sanctions are needed but that the ones on the books need prompt, energetic and innovative enforcement.

The publicity sanction permitted by the alternative provision would be particularly onerous for organizations which depend heavily on good public relations. However, not all organizations are so dependent; there are many organizations that might not be bothered by this sanction at all. Thus, a unique situation is presented where the organizations generaly doing a good job, but who are consumer-oriented, would be hurt the most while those not dependent on good public relations would be hurt the least. Such a general sanction is unwise and should not be promulgated in the Code.

8. Another new sanction for corporate crime is contained in section 3502, which provides that "an executive officer or other manager of an organization convicted of an offense committed in furtherance of the affairs of the organization may, as part of the sentence be disqualified from exercising similar functions in the same or other organizations for a period not exceeding five years, if the court finds the scope or willfulness of his illegal actions makes it dangerous for such functions to be entrusted to him."

In certain extraordinary circumstances, such as the banking offenses specified in the FDIC Act or the serious crimes which can disqualify a person from holding federal office (§3501), this drastic sanction might be appropriate. But no evidence is advanced to support the application of this sanction to business offenses. At a minimum, demonstration of a high degree of recidivism by the individual convicted should be a prerequisite to the imposition

of such a severe sanction as this. Its inclusion in its present form in a general provision such as section 3501, intended for widespread use, is unwarranted. This is particularly true in view of the broad language permitting a person to be disqualified from "exercising similar functions in the same or other organizations." A person found guilty of some offense such as default of supervision could thus be effectively deprived of the means of a livelihood for up to five years.

The provision is unnecessarily broad in other respects as well. The phrase "or other manager" could be interpreted to include every individual in a supervisory capacity in a corporation.

These provisions do not have the specificity required in criminal statutes.

9. Section 1006 sets forth the general scheme of criminal sanctions and is intended to govern the use of sanctions to enforce a "penal regulation" (defined as "any requirement of a statute, regulation, rule or order which is enforceable by criminal sanctions, forfeiture or civil penalty"). Section 1006(2)(b) provides that "a person who willfully violates a penal regulation is guilty of a Class B misdemeanor." Section 1006(2)(c) provides that a person is guilty of a Class A misdemeanor if he "flouts regulatory authority by willful and persistent disobedience of penal regulations."

Persons found guilty of Class A misdemeanors are subjected by section 3201 to a potential maximum sentence of one year's imprisonment [alternative, 6 months]; Class B misdemeanors, 30 days' imprisonment.

We seriously question the encouragement of the general use of the criminal sanction of imprisonment to enforce all regulatory standards. In our view, Congress should continue to consider the harsh sanction of

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imprisonment only in the context of the particular regulatory offense. Therefore, there is no need for such a general provision as this one. It can only have the effect of suppressing further independent consideration by Congress of sanctions for particular regulatory offenses.

Sections 1006(2)(b) and (c) appear to be inconsistent with the "Declaration of Policy" stated in the Comment:

> "When penal sanctions are employed for regulatory offenses, consideration with respect to fair treatment of human beings, as well as the substantive aims of the regulatory statute must enter into legislative, judicial, and administrative decisions with regard to sanctions. It is the policy of the United States to prefer non-penal sanctions over penal sanctions to secure compliance with regulatory law unless violation of regulation manifests disregard for the welfare of others or of the authority of government . . . ."

Thirty days in jail for the single violation of a regulation or up to one year in prison for the violation of two or more regulations does not seem to be the type of "fair treatment" which is referred to in the Declaration.

As the Comment indicates, many existing regulatory offenses have been drafted without regard for fundamental principles of criminal law. If this is so, we do not believe consistency among such laws can suddenly be achieved by declaring higher penal sanctions as the norm for all regulatory offenses. We strongly urge that the sanction of imprisonment should be reserved to those violations for which Congress explicitly deems imprisonment appropriate. We fear that encouragement of "incorporation by reference" will detract from the independent consideration of such harsh penalties.

10. Section 1204 of the Report dealing with International Transactions proposes a constructive change in existing penalties. The section limits felony exposure to those situations in which the violation of a list

of specified statutes is accomplished either:

> "with intent to conceal a transaction from a government agency authorized to administer the statute or with knowledge that his unlawful conduct substantially impairs or perverts the administration of the statute or any government function."

Five international trade statutes are encompassed within section 1204, one of which is 22 U.S.C. §287c(b), which implements a United Nations quarantine. Under the law as presently in effect, for example, if an exporter to a U.N.-quarantined nation fails to make a presentation of an "original" license with the required notations thereon "in ink" he could be subject to a 10-year prison term. The proposed Criminal Code would change this by applying the felony penalty only where deception and other substantial obstructions of the regulatory scheme are involved.

We agree with the reevaluation of penalties for violations of the specific statutes listed in Section 1204 and urge that those statutes be amended to reflect the changes suggested. We question, however, the technique employed in the Report of drafting criminal legislation in a form that incorporates other statutes in toto by reference. If the statutes mentioned in Section 1204 are to be included in a criminal code we believe it would be far better to spell out in detail in the code itself the exact language of the conduct which is declared criminal and at the same time repeal the other laws. This action would insure a full and fair consideration of the proposed legislation in the context of a criminal statute and in the light of modern conditions.

11. The comment in the Final Report on Section 1551, entitled

"Strikebreaking," states: "This provision would incorporate into the proposed Code 18 U.S.C. §1231, which proscribes the transportation in interstate or foreign commerce of persons employed as strikebreakers, but explicitly exempts common carriers."

We believe, however, for reasons set forth below, that this provision would do a great deal more than indicated -- that it would broaden and extend the existing provision and would make a criminal offense of conduct that would not violate the present law. In addition, by extending and reenacting this section, it could create serious problems regarding the authority of states and other local jurisdictions to preserve the peace and protect their citizens against assault and other violence occurring in connection with labor disputes.

The present law provides:

> "Section 1231. Transportation of strikebreakers.
>
> "Whoever willfully transports in interstate or foreign commerce any person who is employed or is to be employed for the purpose of obstructing or interfering by force or threats with (1) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor, or (2) the exercise by employees of any of the rights of self-organization or collective bargaining; or
>
> "Whoever is knowingly transported or travels in interstate or foreign commerce for any of the purposes enumerated in this section . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than two years, or both.
>
> "This section shall not apply to common carriers."

The proposed new section would provide:

> "Section 1551. Strikebreaking.
>
> "(1) Offense. A person is guilty of a Class A misdemeanor

if he intentionally, by force or threat of force, obstructs or interferes with:

(a) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor; or

(b) the exercise by employees of any of the rights of self-organization or collective bargaining.

"(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a) or (h) of section 201."

It will be noted that an offense under the present law requires (1) that one person transports another person and (2) that the transported person "is employed or is to be employed for the purpose" forbidden in the statute. The forbidden purpose is obstructing or interfering by force or threats with peaceful picketing by employees during a labor dispute or the exercise by employees of the rights of self-organization or collective bargaining. These purposes are retained verbatim in the proposed new section, but the first two elements above are omitted. Accordingly, the new section would require no plan or concerted action or employment for the forbidden purposes. A single person who interferes by force or threat of force could be guilty of an offense.

Preemption of state laws relating to labor relations has been the subject of many decisions in the Supreme Court and the result has been that federal law has largely preempted the field. Thus far, however, the Supreme Court has recognized the paramount interest of the states in maintaining the peace and protecting their citizens against assaults and violence occurring in connection with labor disputes. Thus the Court has stated:

"The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern . . . .

> The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction . . . . Of course the States may control violence. They may make arrests and invoke their criminal law to the hilt."
> UAW v. Wisconsin Employment Relations Board, 351 U.S. 266 at 274, 275, 276; 100 L.ed. 1162 (1956).

We recognize that if section 206 of the proposed new Federal Criminal Code is adopted, section 1551 would "not, in itself, prevent any state or local government from exercising jurisdiction to enforce its own laws applicable to the conduct in question." However, this broadened and reenacted section 1551 would not operate "in itself." It would almost inevitably be construed in the context of other federal labor laws and labor policies and might be construed to preempt the field and preclude the states from exercising their police power over violence in labor disputes. In any event, it could raise serious enough questions to delay and discourage state action in this area. Moreover, under section 708 of the proposed new Federal Criminal Code, state proceedings, even if not precluded by preemption, might be barred under many circumstances by prior federal proceedings under section 1551. The conditions under which such prior federal proceedings would constitute a bar are stated in broad general terms which furnish ample technical grounds for challenging subsequent state proceedings and thus again could tend to delay and discourage state proceedings in cases involving violence.

No need has been shown for extending and reenacting this section of the present law. In the absence of such showing, we submit, the risk and consequences referred to above furnish good reason to reject proposed section 1551 and to leave the law on this subject in its present state.

12. Section 1772, Securities Violations, is unobjectionable to the extent it simply codifies existing law, although the same comments regarding "incorporation by reference" that are made concerning section 1204 are equally applicable here. However, the proposal in the Report goes well beyond codification in its proposals for new offenses and by adding additional penalties through the interaction of this section with section 3301 of the Report.

Section 1772 declares that "A person is guilty of a Class C felony if he knowingly does anything declared to be unlawful" in certain sections (a total of six) of the 1933 Securities Act, the Trust Indenture Act, and the 1934 Securities Act, and then the Report shows Rule 10b-5 of the Securities and Exchange Commission in brackets. The Report explains that the reference to Rule 10b-5 is in brackets "because it is contemplated that Congress would enact the rule into statute with its own section number." The reasoning, in the words of the Report, is "that felonies should be explicitly enacted by the Congress."

It is difficult to understand how the quality of the Federal Criminal Law would be improved by codifying into a criminal statute a body of law which has been developed and is constantly developing on a case-by-case basis in the civil courts. This is the situation regarding Rule 10b-5 and the obvious difficulty of defining the area to be covered because of this situation may well explain why the Commission left to Congress the impossible task of framing language to fit so nebulous a concept. Quite properly the proposed Code states that one of its principal purposes is to define criminal offenses in such a way as "to give fair warning of what is prohibited," Section 102(b). It is painfully evident, however, that predictability and certainty of out-

come are not the hallmarks of most 10b-5 charges, particularly when the court is confronted with questions of materiality, relevance and causation and generally makes a determination primarily on the basis of what under all the facts appears to be fair. With the exception of the hardcore situations for which liability would be definite and certain under anyone's rules, such warnings as10b-5 gives are illusory at best and certainly fail any test based upon any standard of "fair warning."

On any reasonable basis, those lawyers who are knowledgeable in the corporate and securities law fields will view the proposal to elevate Rule 10b-5 to statutory status as a clear-cut addition of new criminal law. Under no reasonable interpretation could this be considered as codification of existing criminal law.

We should also make special note of the particular impact in the securities area of the interaction of section 3301 with the provisions of section 1772.

Section 3301 provides:

> " . . . any person who has been convicted of an offense through which he derived pecuniary gain . . . may be sentenced to a fine which does not exceed twice the gain so derived . . . ."

Thus even if section 1772 is not extended to cover 10b-5 the violator is subject to new and substantial penalties under the proposed Code in addition to the penalty specially provided for in section 1772 and the civil penalties under existing law.

Here, as in section 1204, if the subject matter is to be included in the Code we suggest that the device of incorporation by reference be avoided and that the specific activity which is to be considered criminal be fully and carefully spelled out. In addition, we urge the rejection of any effort to include the concept of Rule 10b-5 in a criminal statute.

MENS REA AND THE CORPORATION

A Study of the Model Penal Code Position on Corporate Criminal Liability*

Gerhard O. W. Mueller†

Introduction[1]

Many weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these weeds is a hybrid of vicarious liability, absolute liability, an inkling of *mens rea*—though a rather degenerated *mens rea*—, a few genes from tort law and a few from the law of business associations. This weed is called *corporate criminal liability* (*herba responsibilitas corporationis M.*, for those who prefer the botanical term). Nobody bred it, nobody cultivated it, nobody planted it. It just grew. To be quite sure, it has not done much harm; at least nobody has established any harmful results stemming from its mere existence, so that some may well wish to conclude upon its usefulness. Has it done any good? Again, nobody knows, though the farmers of the law have formed many opinions, all resting on rather educated agronomic conjecture.

When a few years back the American Law Institute decided to cultivate the criminal law acre, it was clear that something had to be done about *herba responsibilitas corporationis.* One would think that a dissection of one specimen of the plant for a complete analysis would have been in order. But such was not done, for lack of funds, I suppose. Instead, it was decided to uproot the plants and to re-plant them in an orderly fashion, the tall specimens on the left, the short ones on the right, those with blue blossoms up front, those with red blossoms way in the back, and those with white

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* This article is one of a series of studies on *mens rea*, research for which is presently being aided by funds derived from gifts to the University of Michigan by William W. Cook. My appreciation is due to the Dean and Faculty of the School of Law, University of Michigan, for their interest in the *mens rea* studies. No one but the author, however, assumes responsibility for the views here expressed.

No attempt is made in this paper to continue, or elaborate on, the conceptualistic exercises which mark much of the past literature on the subject. Nor will I list and re-interpret the leading cases. These have been dissected and discussed in other articles with greater care and scrutiny than the judicial thought usually given decision in the field of corporate criminal liability warrants. The reader is cautioned to consult the appended literature.

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1. Section 2.07 of the Model Penal Code of the American Law Institute, which is here discussed, deals with the criminal liability of private corporations as well as unincorporated associations. My remarks are restricted to the former. I do not propose to express any opinion as to the principles which ought to govern the criminal liability of unincorporated associations.

blossoms in the middle. All specimens of the plant are now assembled on a rather neat little plot, designated section 2.07.[2]

Would it have been better to plow all these herbs under and to forget about them? Only an agronomist of the radical school or a stupid peasant would have resorted to such a crude and unscientific method. At least, the wise agrarian would subject the plant to a thorough inspection first.

Well then, how good and useful for human use and consumption is this one-century-old hybrid plant? Let us begin with the observation that most other peoples do not grow it, do not even permit it to vegetate, certainly do not eat it and most certainly would not swallow it whole. That may be a matter of taste. After all, we do not eat rotten eggs which, as some travellers report, the Chinese cherish, and on the Continent it took the clubs of Frederick's corporals to make the peasants grow our delightful potatoes and to make the burghers eat them.

The reader may permit me now to leave the farm and turn the agrarian discussion into a utilitarian one which can best be continued in the laboratory of human and legal experience.

Our Present Law—The Result of Leaps without Looks

The present state of law of corporate criminal liability is not complicated.[3] Nor is its brief history at all obscure. From the position that a corporation can not possibly incur criminal liability because, not being a natural person, it can not (1) have a *mens rea*, (2) be indicted nor tried in person—there being no appearance by attorney in the old days—, (3) be punished corporally,[4] and (4) criminal acts of a corporation would be *ultra vires* and thus void,[5] the law has rapidly moved to the stand that a corporation can be guilty of most, if not all, crimes.[6] While some cases took the restrictive position that corporations can not be guilty of crimes which are *inherently human*, such as bigamy, perjury, rape or murder,[7] by ever widening statutory interpretations and analyses the group of these *impossible* crimes has been narrowed constantly. While I can not imagine a case in which a corporation could be found guilty as a principal in the first degree of bigamy, adultery or fornication, it certainly has now been established that a corporation may be

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2. "What is attempted here is to produce some order in an area which has developed in a rather disorderly way, and to state some general principles around which a rational formulation can be constructed." American Law Institute, 33rd Annual Meeting, Proceedings 172 (1956), remark by the subject reporter; hereinafter referred to as Proceedings.

3. This does not imply that it is rational.

4. See 1 Blackstone, Commentaries 476, and citations at 1 Burdick, Law of Crimes 223 (1946).

5. Pollock, First Book on Jurisprudence 126 (6th ed. 1929).

6. Edgerton, *Corporate Criminal Responsibility*, 36 Yale L.J. 827, 842 (1927).

7. See United States v. John Kelso Co., 86 F. Supp. 304, 306 (N.D. Calif. 1898); New York Central R. Co. v. United States, 212 U.S. 481, 494 (1909).

guilty of manslaughter.[8] There is no logical reason why a corporation should not equally be able to incur criminal liability for murder, although the weight of the dicta denies this possibility.[9] Why should not a corporation be guilty of murder where, for instance, a corporate resolution sends the corporation's workmen to a dangerous place of work without protection, all officers secreting from these workmen the fact that even a brief exposure to the particular work hazards will be fatal, as was the case in the notorious *Hawk's Nest* venture in West Virginia, where wholesale death was attributable to silicosis?[10] Most corporate prosecutions, however, were for offenses of an economic or regulatory nature, such as illegal sales, violation of employment laws, blue sky laws, anti-trust laws, food and drug laws, road traffic laws, etc.[11]

On the whole, courts have been liberal enough in interpreting penal statutes to include in their coverage corporations together with natural persons.[12] But the nature of the punishment, ordinarily fitted for natural persons only, has provided a most persistent conceptual-technical barrier against corporate liability.[13] In turn, this difficult barrier to expansion of corporate criminal liability was overcome by legislation in a great number of states.[14]

While the law of corporate criminal liability is easy to understand or, for any given jurisdiction, easy to ascertain, the rationale of corporate criminal liability is all but clear. It is safe to say that, for the most part, the law has proceeded without rationale whatsoever—particularly in the area of regulatory and absolute liability offenses. It simply rests on an assumption that such liability is a necessary and useful thing. Where the courts did try to rationalize, especially with respect to *mens rea* offenses,

> "the penal liability of corporations has been based on analogies from private law, *e.g.*, the fact that corporations can be sued for malicious prosecution. That ground is hazardous, to say the least. The penal liability is also rested on the ground that criminal acts which 'from the

8. See the celebrated cases of State v. Lehigh Valley Ry. Co., 90 N.J.L. 372, 103 Atl. 685 (1917); 92 N.J.L. 261, 106 Atl. 23 (1918); 94 N.J.L. 171, 111 Atl. 257 (1920); *cf.* People v. Rochester Ry. & Light Co., 195 N.Y. 102, 88 N.E. 22, 16 Ann. Cas. 837 (1909); *contra*, Commonwealth v. Illinois Cent. R.R., 152 Ky. 320, 153 S.W. 459, 21 L.R.A. (N.S.) 998 (1913); Rex v. Cory Bros., 136 L.T.R. 735 (1927).

9. Note, 37 YALE L.J. 118 (1927), adversely criticizing English case that holds corporation not guilty of homicide.

10. Jones v. Rinehart & Dennis Co., 113 W. Va. 414 (1933) is the only case arising out of the Hawk's Nest affair which reached the appellate level. See SKIDMORE, HAWK'S NEST AFFAIR (1941).—In view of the dicta contained in State v. Baltimore and Ohio Ry. Co., 15 W. Va. 362, 380 (1879), it is downright surprising that no murder indictment against the corporation was sought.

11. BURDICK, *op. cit. supra* note 4, at 176.

12. EDGERTON, *op. cit. supra* note 6, at 830.

13. BURDICK, *op. cit. supra* note 4, at 229; EDGERTON, *op. cit. supra* note 6, at 830.

14. *E.g.*, New York Penal Law § 1932. Note, 48 COLUM. L. REV. 794 (1948).

very necessity of the case must be performed by human agency * * * in given circumstances become the acts of the company' . . . Haulage Co., Ltd., 30 C.C.A. 31 (1944). Do they become the acts of the company as a matter of fact or as an evaluation that makes sense when applied to human beings? Or are these acts 'imputed to' a fictitious entity in the belief that it is just to do that and that the imposition of such liability has beneficent effects?"[15]

Answers to such embarrassing questions rarely are suggested in the cases, and scientific data is lacking. This is particularly amazing in view of the fact that the wealth of corporate interests could hardly be expended on any more fruitful and profitable economic-legal inquiry.[16]

THE POSITION OF THE MODEL PENAL CODE—ANOTHER LEAP WITHOUT A LOOK

The criminal "liability of corporations, unincorporated associations and persons acting or under duty to act, in their behalf," may be found in section 2.07 of the Model Penal Code, Tentative Draft Nos. 4 and 5.[17] The penalties to be imposed upon corporations are stated in section 6.04.[18]

According to its draftsman, "these sections attempt no revolutionary change in the existing law of the subject."[19]

The Code subjects corporations to criminal liability for all *violations*, within the meaning of section 1.04, Tentative Draft No. 4, Model Penal Code, whether included in the Code or not, and for all other offenses to be specially listed in the Code and all those outside the Code for which it plainly appears that the legislature meant to include corporations. (Subs. 1(a)) Also included are all crimes of omission of duty imposed upon the corporation by law (subs. 1(b)) and all other offenses, the commission of which "was authorized, requested, commanded or performed by the board of directors or by a high managerial agent acting within the scope of his office or employment in behalf of the corporation."[20]

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15. HALL, CRIMINAL LAW AND PROCEDURE 594 (1949).

16. This brief summary of existing law must suffice for the present. Further and more detailed analysis may be found in context below.

17. Due to lack of time, § 2.07 of Tentative Draft No. 4, at 22-24, could not be discussed at the 1955 32nd annual meeting of the American Law Institute. Therefore, this section was reprinted in Tentative Draft No. 5, at 67-69, and discussed at the 1956 33rd annual meeting. Proceedings 170-196. The comment may be found only in T.D. 4, at 146-155. Both the black letter rule and the comment are reprinted in WECHSLER, 1956 SUPPLEMENT TO MICHAEL AND WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 157-162 (1956).

18. T.D. 4, at 40; comment at 202; T.D. 5, at 70. Proceedings 196-207. This section contemplates fines, suspension of the corporate charter and civil proceedings by the district attorney, acting with or without order of the criminal court, for revocation of the charter. § 6.04 will not be discussed in this paper.

19. Proceedings 171.

20. Subsection (1)(c), as amended prior to presentation before the 1956 annual meeting.

This subsection constitutes a considerable improvement over the present law of most states in that it ends the guesswork as to whether or not a corporation can be guilty of a given crime. Moreover, in its subsection 1(c) it contains a splendid attempt at rationalizing corporate criminal liability by the natural person analogy, *i.e.*, the corporation is similar to a human being when we regard its management as its brain, capable of entertaining the requisite criminal intent, so that corporate criminal liability follows management guilt. But it is noteworthy that the extreme rule of law as it exists in a number of states has not been changed as to all crimes included in subsection 1(c), according to which the perhaps unauthorized act of a workman may well subject the corporation to criminal liability, as long as the workman acted "within the scope of his employment in behalf of the corporation."

Subsection 2 concerns itself primarily with the definitions of the terms *agent* and *high managerial agent.*[21] In its paragraph (a), subsection 2 restates the majority rule of our law that a legislative purpose to impose liability on a corporation shall be presumed for all absolute liability offenses, absent a plain legislative indication to the contrary.

Subsection 3 deals with the criminal liability of unincorporated associations. Its coverage is analogous to the liability imposed on corporations, but, fortunately, somewhat more restricted.[22]

Subsection 4, without question the most controversial part of section 2.07, provides for the shifting of the burden of proof of due diligence upon the corporation, but subject to several rather important exceptions. It reads:

> "In any prosecution of a corporation . . . for the commission of an offense included within the terms of subsection (1)(a) . . . of this section,[23] *other than an offense for which absolute liability has been imposed*,[24] it shall be a defense if the defendant proves by a preponderance of the evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission."

Subsection 4 concludes with the rather controversial sentence—about which much will have to be said below—

21. Note that the term agent includes both a high managerial agent and a mere operative or laborer.

22. As stated above, this essay will not concern itself with the liability of unincorporated associations and partnerships. These problems are so complicated and novel that extensive separate treatment is necessary.

23. Note that apparently the orthodox rules of establishing a breach of law by the prosecution remain unaltered as to offenses of an omissive nature (subs. (1)(b)) and as to offenses authorized, requested, commanded or performed by management in behalf of the corporation (subs. (1)(c)).

24. In such a case, then, the exercise of due diligence on the part of management is no defense to the corporation, and whether the actual perpetrator, *e.g.*, a workman, has acted with or without *mens rea* is irrelevant.

"This paragraph shall not apply if it is inconsistent with the legislative purpose in defining the particular offense."

Subsection 5 restates the so far uncontroversial principle[25] that a person who engages in a criminal act in behalf of a corporation also incurs personal criminal liability.

If we were to concede that corporate criminal liability is a useful thing, we would have to admit that, with certain exceptions, to be discussed below, section 2.07 of the Model Penal Code is a pretty clean-cut piece of legislative draftsmanship. Were we dealing with a *Restatement* of the criminal law of America, much of the black letter rule would be commendable and most of it would be acceptable.[26] But we are dealing with a *Model Code*, the aim of which it is to improve upon existing law without violence to existing fundamental doctrine.[27] The subject reporter and council have decided that any abolition of corporate criminal liability would do violence to existing doctrine.[28] I am sure that such a judgment represents much deep thought. But the members of the American Law Institute have not been appraised of the reasoning process behind the decision. Is it not true that "the present state of the law of corporate criminal responsibility . . . in its origin is a comparatively recent branch of the law of criminal liability?"[29] This fact alone is grounds enough to contemplate a thorough re-examination with a possible policy switch in mind. It is my considered opinion that at this time a policy switch would not come too late *if* its necessity should be established.

The comments to section 2.07 recognize that "often, perhaps typically, criminal penalties [directed against corporate bodies] added to . . . regulatory legislation have been hastily and inadequately considered."[30] "The modern development . . . has proceeded largely without reference to any intelligible body of principle and the field is characterized by the absence of articulate analysis of the objectives thought to be obtainable by imposing fines on corporate bodies."[31]

Whatever could be said in favor of corporate criminal liability had to be expressed cautiously in terms of conjecture and belief. Perhaps the boldest statement is the sentence which attempts to justify corporate criminal

25. But see KUSANOW, *op. cit. infra* in context, n. 63.

26. Concededly the Code goes beyond existing law. Upon Professor Williams' question (Proceedings 180), the subject reporter answered: "I think it is very probable that including all violations presumptively within this broad area of respondeat superior, the draft is somewhat broader than existing case law." Proceedings 181.

27. The subject reporter wished to make it clear from the outset that these sections do not in any sense represent a restatement of existing law. Proceedings 172.

28. "The attitude of this draft is that on balance it is proper, and there is utility in recognizing the conception of corporate criminal responsibility for all offenses." Proceedings 174.

29. Proceedings 172.

30. T.D. 4, 148.

31. T.D. 4, 146.

liability in the regulatory field: "In many cases . . . such penal provisions [subjecting corporations to criminal liability] form an integral part of the regulatory policy and are based on considerable *pragmatic experience indicating their usefulness*[!]"[32] Other statements are far less positive, *e.g.*, "affirmative considerations . . . tend to justify the recognition of corporate criminal liability for the commission of . . . regulatory offenses";[33] and "the great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate regulatory policy."[34] "It is not clear just what conclusions are to be drawn from the cited cases."[35] "It would be hoped," the subject reporter finally said, "that more could be pointed to in justification of placing the pecuniary burdens of criminal fines on the innocent than the difficulties of proving the guilt of the culpable individual."[36] This, I respectfully submit, is not the ground upon which to perpetuate and enlarge corporate criminal liability!

During the 1956 debates on the section Professor Glanville Williams, without question the leading English criminal law scholar, appeared as the voice of caution. "It seems to me," he said, "that the judges have not always looked where they are going."[37] He called the law which section 2.07 seeks to restate "an example of this kind of juristic logic, of this new-fashion in criminal development being pursued without really looking where you are going."[38] Professor Williams stated two examples:

> "This corporate liability has been applied to public corporations, so that when an officer of the railway executive was guilty of cruelty to sheep, a stiff fine was imposed on the railroad executive, which presumably may mean that passenger fares tend to go up in order to meet the fine.
>
> And when the Yorkshire Electric Board was guilty of some technical breach of regulation, the Chief Justice imposed a fine I think of £20,000 or $60,000 on the Yorkshire Electric Board, which I suppose means that electric rates go up in Yorkshire more than in other parts of the country."[39]

Professor Williams' examples of public corporations were especially skillfully selected, for in the case of competitive private corporations, *e.g.*, a soap manufacturing company, one could argue that the fine visited upon the corporation will result in actual pecuniary detriment to the corporation in

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32. T.D. 4, 147, emphasis and exclamation mark mine.
33. T.D. 4, 147.
34. T.D. 4, 149.
35. T.D. 4, 149, referring to cases of corporate convictions and individual acquittals.
36. T.D. 4, 150.
37. Proceedings 179.
38. Proceedings 179.
39. Proceedings 179.

that it puts it into a disadvantageous position competitively, since the soap company can not simply raise the price of a bar of soap in order to recoup the loss it sustained through imposition of a fine. It must consider the market. Without pursuing this thought further at this point, it will be well to make the observation that two points were well taken by Professor Williams:

(1) The law has developed the concept of corporate criminal liability without rhyme or reason, proceeding by a hit and miss method, unsupported by economic or sociological data. Moreover, instances are easily imaginable which completely disprove the popular belief in the efficacy of corporate criminal liability by suggesting its utter futility.

(2) The Model Penal Code section dealing with corporate criminal liability rests on the basis of conjecture, and whatever modification it suggests likewise rests on conjecture and is unsupported by scientific data.

Professor Williams' *caveat*, although that of a most experienced and renowned scholar, likewise does not rest on scientific data, simply because none is available at this time. But the very source of this *caveat* entitles it to weighty consideration. But there is a second *caveat*. This is the experience of other countries, as it was available for consideration, though not utilized, through comparative law research. The comments to section 2.07 do not contain a single word about the civil law in point.[40] Is it not noteworthy that corporate criminal liability has been rejected in practically every civil law country?

Civil Law of Corporate Criminal Liability

Apart from a few temporary and partial exceptions the maxim that *societas delinquere non potest* is still firmly recognized in the civil law.[41] Only the natural person acting for the corporation can incur criminal guilt. Everybody who acts for a corporation knows that he can not escape criminal liability by shifting the blame to the body corporate. Courts can not, as our juries are inclined to do,[42] convict the corporation alone so that the individual defendant may escape punishment. Such a law is deterrence practiced at its best, nay, it is deterrence, whereas the punishment of the body corporate with the possible sub rosa acquittal of the truly responsible individual defendant, and the resulting exaction of a fine from the corporation, *i.e.*, from the ordinarily ignorant and innocent shareholders and consumers of the corporation's products, has no semblance to principles of penal law but simply amounts to the exaction of a contingency tax.

The doctrine *societas delinquere non potest*, although of ancient origin,

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40. I must concede that the only comparative discussion in an American legal periodical is not very helpful. See Hacker, *The Penal Ability and Responsibility of the Corporate Bodies*, 14 J. Crim. L., C. & P.S. 91 (1923).

41. A corporation can not do wrong.

42. Illustrative cases are discussed at T.D. 4, 148-150.

had been widely ignored in the Europe of the Middle Ages and as late as the 18th Century—when it stood virtually unchallenged in the common law—until Savigny and Feuerbach re-established it firmly in the early 19th Century. Since then it has remained unshaken in practice except for wartime economic legislation of limited applicability which has been retained in a few regulatory statutes to this day. But even in these instances the law rests largely on the original meaning of vicarious liability by ordinarily permitting exculpation of the corporation through a showing of due diligence on the part of the corporation, acting through its shareholders or management.[43]

France:

French law has adhered to the principle of penal immunity of corporate bodies, *personnes morales*, mainly as a matter of principle. The courts reason that corporate criminal liability is irreconcilable with the guilt principle, *i.e.*, the doctrine of *mens rea*, which is the true basis of all criminal law. Consequently, corporate criminal liability would be ineffectual as a deterrent, because deterrence addressed to no mind at all is a hollow phrase. However, in recent years the belief has spread that where ethico-legal considerations of guilt are of minor or no importance at all, namely in the law of penal-economic regulation, it is both consistent with the basic principle of criminal law and utilitarian to subject corporations to criminal liability. *Défense sociale*, *i.e.*, protection of the public safety and order, has become the slogan justification for, and connotation of, this form of liability.[44] The fear that no other means are available to check the growing activities, lawful as well as unlawful, of corporate bodies, has dictated several important pieces of legislation imposing corporate criminal liability, especially immediately preceding and during World War II. Such corporate crimes concern tax fraud,[45] foreign investment violations[46] and foreign exchange violations.[47]

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43. For foreign literature on corporate criminal liability see the valuable comparative study by JESCHECK, DIE STRAFRECHTLICHE VERANTWORTLICHKEIT DER PERSONENVERBAENDE, 65 Z.S.R.W. 210 (1953), the perusal of which is especially acknowledged; see also articles by BRUNS, UEBER DIE ORGAN-UND VERTRETERHAFTUNG IM STRAFRECHT, 9 J.Z. 12 (1954); DONNEDIEU DE VABRES, LES LIMITES DE LA RESPONSABILITÉ PÉNALE DES PERSONNES MORALES, 21 Rev. Int. Dr. Pén. 339 (1950). Other current and classic literature is listed at SCHOENKE—SCHROEDER, STRAFGESETZBUCH KOMMENTAR 180 (7th ed. 1954). Among the older and now largely outdated literature are: v. LILIENTHAL, DIE STRAFBARKEIT JURISTISCHER PERSONEN, in 5 VERGLEICHENDE DARSTELLUNG DES DEUTSCHEN UND AUSLAENDISCHEN STRAFRECHTS, ALLGEMEINER TEIL 87 (1908) and MESTRE, LES PERSONNES MORALES ET LE PROBLÉME DE LEUR RESPONSABILITÉ PÉNALE (1899).

44. For general discussion of the French point of view see DONNEDIEU DE VABRES, *op. cit. supra* and *id.*, TRAITÉ DE DROIT CRIMINEL 148-153 (3rd ed. 1947).

45. *Décret relatif a la lutte contre la fraude fiscale* § 8 (J. off. 12-13 Nov. 1938, p. 12915).

46. *Décret relatif aux avoirs à l'étranger* § 4 (J. off. 17 Sept. 1939, p. 11535).

47. *Ordonnance relative aux billets de banque et aux effets publics à court terme* § 12 (J. off. 3 juin 1945, p. 3193).

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The latter punishes the corporation for acts done by managerial officers acting within the scope of their employment and in the interest of the corporation. The Price Regulation Law of 1945 provides for termination of the business privilege as punishment against violating corporations and also for the imposition of fines upon both the corporation and its management, as well as for confiscation of the products.[48]

A post-war measure of some significance is an ordinance of May 5, 1945, which decrees confiscation as punishment for publishing establishments which had collaborated with the enemy. A significant clause of this law provides for the compensation of all those shareholders who can establish their personal innocence:

> "Toutefois, s'aqissant de sociétés pourront bénéficier d'une indemnisation . . . ceux de ses membres qui n'y aurront exercé, depuis le commission de l'infraction, au cune fonction de direction ou d'administration et qui se, seront opposés ou auront tenté de s'opposer à l'exercice de l'activité criminelle de la personne morale ou qui auront été dans l'impossibilité absolue de la faire."[49]

This compensation remedy is commonly regarded as a model legislative device for exempting the innocent shareholder from the sweep of corporate criminal liability. In the other few instances where French law utilizes corporate criminal liability an exculpation of the innocent shareholder or even the corporation *quae* management is not used.

These few statutes must be regarded as odd exceptions to the otherwise firmly entrenched rule that corporations can not be subjected to criminal liability. The trend among the writers and legislators, of which I spoke earlier, has definitely been checked by the persistent and conservative stand of the *Cours de Cassation* to the effect that ordinarily corporations are not even criminally liable in the area of regulatory laws, where Anglo-American courts had the least difficulty extending criminal liability to corporations.[50]

In passing it should be mentioned that Belgian law, closely akin to that of neighboring France, is likewise opposed to corporate criminal liability and admits of only few and partial exceptions.[51]

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48. *Ordonnance relative aux prix* §§ 49.2 and 56.3 (j. off. 8 juill. 1945, p. 4516).

49. *Ordonnance relative à la poursuite des enterprises de presse, d' édition d' information et de publicité coupables de collaboration avec l' enemi* §§ 9 and 10.2, with quote from the latter (J. off. 6 mai 1945, p. 2571).

50. See classic decisions Cass., 10. 20. 1904, No. 428, Dall. Pér. 1907 I 496; and Cass. 8. 9. 1917, No. 189, Rec. Sirey 1921 I 282; negligent homicide through failure to maintain railroad tracks. Three older decisions, discussed by Jescheck, *op. cit. supra*, n. 43, at 220, are out of line and *contra*, as are two decisions of 1918 and 1943, dealing with alcoholic beverages violations. *Ibid.*

51. See Constant, *La Responsabilité Pénale des Personnes Morales et de leur Organes en Droit Belge*, 22 Rev. Int. Dr. Pén. 597 (1952).

Germany:

The German point of view is not unlike the French. The German Supreme Court has constantly rejected an extension of criminal liability to corporations,[52] except where the legislature has expressly so provided.[53] Current German law knows only two instances of corporate criminal liability.[54] A few older statutes of corporate criminal liability are no longer in force.[55]

The German Internal Revenue Code provides for the assessment of fines and costs against corporations for tax violations committed within the enterprise. The guilt of a natural person need not be ascertained in such cases.[56] This is a coterminous liability of the corporation together with the responsible high managerial agent or officer. It has been explained by the fiscal interest to recover the fine for the violation of a fiscal nature.[57] The Economic Penal Law of 1949 introduced a further instance of corporate criminal liability,[58] which is now embodied in section 5 of the Economic Penal Law of 1954.[59] This section provides:

"If an act for which this law imposes a penalty or fine is committed within any enterprise, a fine up to DM 50,000.—[$12,000.—] may be imposed upon the owner or manager, and if the owner or manager is a body corporate, then upon such body corporate, provided that the

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52. See the powerful dicta at 16 R.G.St. 121, at 123; 28 R.G.St. 103, at 105; 34 R.G.St. 374, at 377-378; 44 R.G.St. 122, at 125; 47 R.G.St. 90, at 91-92; 57 R.G.St. 101, at 104.

53. An exception is the Cartell Court decision of 2. 27. 1929, [1929] Kartellrundschau 213, in which the old Cartell Ordinance of 11. 2. 1923, § 17, was used to punish a corporation for a "conscious violation," even though the text of the ordinance did not expressly subject the corporation itself to liability. This seems to be the only exception. It is also the only case in which this law was ever applied.

54. I am not including Military Government Laws which have introduced corporate criminal liability for foreign exchange offenses with all the rigors of the Anglo-American doctrine of corporate criminal liability. See Mil. Gov. Law 53, art. Xa. Allied High Commission Law 14, art. 5.7. Among German jurists and courts the theory of these laws was commonly rejected and, in actual application, a gradual process of interpretation has ameliorated their alien aspects so that they now appear reconcilable with continental doctrine. For detailed discussion see Jescheck, *op. cit. supra* note 43, at 217-218 and 225, and Supreme Court decision 5 B.G.H.St. 28, applying the Berlin version of Law 53, *supra*.

55. The former German foreign exchange statute, *Dev.Ges* 1938, § 74, provided for a fine to be imposed upon a business enterprise for commission of a foreign exchange violation within the enterprise, unless the owners could establish that they exercised due care to prevent violations.

56. *Reichsabgabeordnung* § 393, and see § 416. SCHOENKE—SCHROEDER, *op. cit. supra* note 43, at 180. Compare Jescheck, *op. cit. supra* note 43, at 215.

57. JESCHECK, *op. cit. supra* note 43, at 215.

58. *Wirtschaftsstrafgesetz* (Economic Penal Law) of 7. 26. 1949, Wi.G.Bl. 193, as amended 3. 25. 1952, B.G.Bl. I, p. 188 and 12. 17. 1952, B.G.Bl. I, p. 805, §§ 23, 24. These sections had precursers in §§ 1 and 2 of the former Price Ordinance (*Preisstrafverordnung*) of 1939 and § 4.2 of the former Consumers Regulation Ordinance (*Verbrauchsregelungsstrafverordnung*) of 1941.

59. *Wirtschaftsstrafgesetz* 1954, B.G.Bl. I, p. 175.

owner or manager or his representative has neglected his supervisory duty intentionally or negligently and the violation is a result of such neglect."

This section operates with a presumption of supervisory negligence on the part of the shareholders or management of a corporation, but it provides for exculpation in all cases where the shareholders or managerial agents can establish that the violation (ordinarily price regulation violations) occurred despite the exercise of due care. In such cases the corporation is relieved of criminal liability and only the guilty individual is subjected to punishment. The policy of this law provides an incentive for supervisory diligence. Such an incentive is totally lacking in laws imposing punishment upon the corporation despite the exercise of due care on the part of ownership or management.[60]

These few exceptions to the maxim *societas delinquere non potest* can hardly be said to constitute a repudiation of the maxim.[61] On the whole, German lawyers have found no cause to be dissatisfied with the penal immunity of corporations.[62]

Japan:

An eminent Japanese jurist, the late Supreme Court Justice and Professor Hyoichiro Kusano, has assured us recently that "no [Japanese] book treating of criminal law in general acknowledges the capacity of offence of a corporation."[63] However, the Japanese distinguish the moral-tainted "capacity of offence" from the moral-free "penal ability." The practical distinction seems to be roughly that of imputability of orthodox crimes, requiring *mens rea*, the former, and of regulatory offenses, *mala prohibita*, the latter. Thus, Japanese law does not admit of the liability of a corporation for ordinary crimes, but has created a few statutory exceptions, similar to those of French and German law, already discussed.

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60. Note that the forfeiture of unauthorized earnings may nevertheless be ordered against the corporation, since it is the beneficiary of a price violation. In this case, however, we are not dealing with a penal provision. *Id.*, § 8.

61. How strong the feeling for retention of corporate criminal immunity really is was evidenced at the 40th annual meeting of the German Bar, at Hamburg, Germany, in 1953. The papers presented, the subsequent debates and the final votes are an overwhelming endorsement of the principle. See *Berichte, Der 40. Deutsche Juristentag*, 8 J.Z. 609, 613-614 (1953).

62. But dissatisfaction exists in a number of instances where the law punishes only persons of a certain status, *e.g.*, a merchant, the owner of a motor vehicle, the bankruptcy creditor, etc. In such cases a managerial agent acting in behalf of the corporation can not be punished since he lacks the necessary status, such being only in the corporation which, of course, can not incur liability itself for doctrinal reasons of *societas delinquere non potest*. The current law reform is interested in remedying this defect. See BRUNS, *op. cit. supra* note 43.

63. Kusano, *The Punishment of Corporations*, 1 JAP. ANN. LAW & POL. 82, 88 (1952), citing authorities. My discussion of Japanese law is based on Kusano's article.

Under the Law Concerning Violations of Tax Laws or Ordinances, Law No. 52 of 1900, article 1, a corporation may be fined for statutory violations on the part of its representatives, servants or other persons engaged by it and in the course of their employment. This law was patterned after prior ordinances providing for vicarious liability of the master for the acts of his servants.

Another instance is article 12 of the Foreign Exchange Law, Law No. 83 of 1941, which threatens punishment to both the corporation and its acting agent for any statutory violation.[64] It appears that this dual punishment has not met with the approval of most Japanese criminal law scholars. Moreover, vicarious liability is not favored, so that under both laws only the liability of the corporation for the crimes of its managerial agents finds approval. This somewhat inconsistent stand is explained by the hypothesis that corporation and governing body must be treated as identical, since it is the governing body which carries on the corporate business. The fact that the governing body in reality is a group separate and distinct from the group of the owners—shareholders is explained by reasoning that this relation is a monistic one of representation (no vicarious, but only direct liability), rather than one of substitution or surrogation (vicarious liability).

Through this reasoning, as throughout Judge Kusano's article, there speaks a firm belief in the necessity of a *mens rea* for all criminality, including corporate criminality, and a conviction that a belief in the effectiveness of absolute, vicarious and corporate liability for crime is naive.

The Philippines:

Both Germany and Japan have been exposed to experience with the Anglo-American concept of corporate criminal liability. Such exposures have found little or no response. The Philippines had an even greater experience with the principles of Anglo-American criminal law. Yet, here too corporate criminal liability found no welcome. In 1932 it could be said by a Philippino jurist "that both our procedural and substantive laws do not countenance corporate criminal liability."[65] *West Coast Life Insurance Co. v. Hurd* then was the only case in point and it rejected corporate criminal liability for a rather Anglo-American reason, namely that the Code of Criminal Procedure provides for the institution of criminal proceedings by arrest, of which a corporation is obviously incapable.[66] While there was perhaps a tendency to follow the Anglo-American development toward corporate criminal liability,[67] the rule is clear today and without exception that only natural persons may be prosecuted criminally.[68] But a corporate

64. See also Foreign Investment Law, No. 17, of 1932, art. 5.
65. Sagalongos, *Corporate Criminal Liability*, 11 PHIL. L.J. 263, 276 (1932).
66. 27 Phil. Rep. 401 (1914).
67. SAGALONGOS, *op. cit. supra* note 65.
68. PADILLA, CRIMINAL LAW, REVISED PENAL CODE ANNOTATED 232-233 (1951).

officer acting criminally in behalf of the corporation will incur criminal liability.[69]

For the purpose of this discussion it must suffice to refer to these few civil law countries. But it is noteworthy that the laws of all other civil law countries do not differ materially.[69a] This holds true even for the "peoples

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69. People v. Campos (C.A.) 40 O.G. (125) No. 18, 7.

69a. (A) (1) *Austria:* I HORROW, GRUNDRISS DES OESTERREICHISCHEN STRAFRECHTS, ALLGEMEINER TEIL 91 (1947); GAMPP UND KIMMEL, LEHRBUCH DES OESTERREICHISCHEN STRAFRECHTS 7 (6th ed. 1945); I MALANIUK, LEHRBUCH DES STRAFRECHTS 83 (1947).

(2) *Italy:* Article 27 of the Italian constitution provides: "*La responsabilità penale è personale.*" This quite clearly excludes corporate criminal liability and has been so interpreted. See BETTIOL, DIRITTO PENALE, PARTE GENERALE 172 *et seq.* (2nd ed. 1950).

(3) *Latin American Countries:* For the law of Latin American countries see Kielwein's study in *Mitteilungsblatt der Fachgruppe Strafrecht in der Gesellschaft fuer Rechtsvergleichung, Heft 4*, 89 *et seq.* (1952). Cuban and Mexican law know sanctions against corporations but likewise do not employ criminal penalties.

(4) *Scandinavian Countries:* The 5th Criminal Law Conference of Scandinavian Countries, 1951, rejected the introduction of any corporate criminal liability. Unfortunately, the proceedings of this conference were not printed at the usual place, the *Nordisk Tidskrift for Kriminalvidenskab* and, thus, are not publicly available.

(5) *Spain:* See section 14 of the Penal Code of 1945, and compare secs. 15 and 265. See I CUELLO, DERECHO PENAL 257-269 (8th ed. 1947).

(6) *Switzerland:* HAFTER, LEHRBUCH DES SCHWEIZERISCHEN STRAFRECHTS, ALLGEMEINER TEIL 172 *et seq.* (2nd ed. 1946). Subsidiary monetary liability of corporations for criminal acts of corporate officers may be found in the area of fiscal and economic penal law. PFENNINGER, DAS SCHWEIZERISCHE STRAFRECHT, in 2 MEZGER—SCHOENKE—JESCHECK, DAS AUSLAENDISCHE STRAFRECHT DER GEGENWART 149, 214 (1957).

(B) (1) The 6th International Penal Law Conference, Rome 1953, recommended an expansion of sanctions against corporations in the area of economic violations, following Dutch and Swiss examples. See Heinitz, *Bericht ueber den 6. Internationalen* STRAFRECHTSKONGRESS, Rom, 1953. 66 Z.Str.W. 22, 24-25 (1954). "*III ème Question, 3° (b) La répression des infractions demande une certaine extension de la notion d'auteur et des formes de participation, ainsi que la faculté d'appliquer des sanctions pénales à des personnes morales.*"

(2) The Second Congress of the Society for Comparative Law, Berlin, 1952, took a firm stand against any corporate criminal liability.

Consult the following articles or monographs with comparative references:

(C) (1) Jescheck, *Zur Frage der Straftaten von Personenverbaenden*, 6 Oeff. Verw. 539 (1953).

(2) BUSCH, GRUNDLAGEN DER STRAFRECHTLICHEN VERANTWORTLICHKEIT DER PERSONENVERBAENDE (1953).

(3) Heinitz, "*Empfiehlt es sich die Strafbarkeit der juristischen Personenverbaende gesetzlich vorzusehen?*", *Gutachten fuer den 40. Deutschen Juristentag, Tuebingen, 1953. 40.* DEUTSCHER JURISTENTAG, VERHANDLUNGEN 65 (1953). And see the addresses and debates of the 40th *Deutsche Juristentag, id.*, El-E88.

(4) Siegert, *Haftung fuer fremde Schuld im Steuer- und Wirtschaftsstrafrecht*, 6 N. J. W. 527 (1953).

(5) Blau, *Zur kriminellen Strafbarkeit juristischer Personen*, 8 M. D. R. 466 (1954).

Von Weber seems to be the only European scholar who currently gives serious consideration to an introduction of corporate criminal liability. See his articles *Die Sonderstrafe*, 29 D. Ri. Z. 153 (1951); *Zum S.R.R. Urteil des Bundesverfassungsgerichtes*, 8 J. Z. 293 (1953); *Ueber die Strafbarkeit juristischer Personen* (1954), Goltd. Arch. 237.

republics," all of which now operate under new penal codes. Two examples will indicate this:

Yugoslavia:

Yugoslav law adheres to the maxim *societas delinquere non potest* for virtually all offenses, including the large number of economic crimes of part XIX of the Penal Code of 1951. Only "a responsible person within a state-owned co-operative or other corporate enterprise or in an association" who is competent for the execution of the business can become a criminal defendant.[70] An exception exists in the Law of Violations of 1951 which in section 7 introduced fines as corporate penalties for foreign exchange, customs, tax and similar violations.[71] The jurisdiction for such violations rests in administrative agencies. Thus, corporate liability appears not as criminal but as an administrative liability.

Czechoslovakia:

Czechoslovakian law is marked by a rigorous adherence to the principle of corporate criminal immunity. Section 136 of the Penal Code of 1950 provides that only natural persons can become guilty of crime. Not even the finance, foreign exchange and other regulatory penal laws contain any exception to the principle.[72]

It would be as naive to conclude upon the futility of corporate criminal liability because the civilians do not have it, as it would be to conclude upon its utility because we have it. The point I wish to make is simply this: We are not dealing with a subject on which the laws of all countries are in agreement. A substantial portion of the world rejects corporate criminal liability after more thought and contemplation than has ever been given to the subject in this country. That is a noteworthy fact. On principle it can make no difference that the U.S.A. have more corporate bodies than, *e.g.*, Germany or France. I doubt whether England has more corporations than Germany, yet, the former operates with corporate criminal liability, the latter without it. Thus, before we leap again, we ought to ascertain the economic effects ensuing from either rule of law and then make our decision. Truly, such an inquiry would require much expenditure of time and money. *Ad hoc*, therefore, the least we can do is to analyze the wholesome rationale of criminal liability of our law in the hope that it may shed some light on the utility or futility of subjecting corporations to criminal liability.

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70. Munda, *Das Strafrecht Jugoslaviens*, in 1 MEZGER—SCHOENKE—JESCHECK, DAS AUSLAENDISCHE STRAFRECHT DER GEGENWART 367, 430 (1955).

71. *Id.*, at 457.

72. Schmied, *Das tschechoslovakische Strafrecht*, in 2 MEZGER—SCHOENKE—JESCHECK, DAS AUSLAENDISCHE STRAFRECHT DER GEGENWART 359, 413 (1957).

The common law is a creation by individuals for individuals. Organized aggregations of private individuals had little influence on its making. They were neither subjects nor objects of the law to any material extent. In fact, when centuries after the incept the private body corporate made its appearance on the scene, the machinery of the common law was perplexed. The common law of crimes addressed itself just as much to the individual personality as did the common law of private wrongs and rights. As said by Hale:

> "Man is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath a capacity to obey: The consent of the will is that, which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so regularly where there is no will to commit an offence, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offences."[73]

Hawkins began his TREATISE OF THE PLEAS OF THE CROWN with these words:

> "The guilt of offending against any law whatsoever, necessarily supposing a wilfull disobedience, can never justly be imputed to those who are either incapable of understanding it, or of conforming themselves to it."[74]

But it was Coke who phrased the now famous maxim expressive of what always had been the rule of the common law of crimes:

> "*Actus non facit reum nisi mens sit rea.*"[75]

It is clear, then, that the common law—as it then was and still is in the restricted sphere of its application—after connecting an individual with a harmful result by the application of ordinary rules of causation, inquires into the *factum* of this individual's responsibility by attempting to establish whether the harm attributable to the individual rested on his conduct. Such conduct can be active or omissive, but in any event, its primary ingredient is the outward appearance of conduct, *i.e.*, the physical movement where the law commanded physical rest, or the physical rest, where the law commanded physical movement. However, the early common law judges were sophisticated enough to perceive that the mere outward ap-

73. 1 HALE, PLEAS OF THE CROWN 14-15 (1736, of mss. composed prior to 1680).
74. 1 HAWKINS, PLEAS OF THE CROWN 1 (1787).
75. 3 COKE, INSTITUTES 107 (1797).

pearance of conduct is not indicative of true conduct. The physical movement of an epileptic during a fit is an appearance of conduct, but no true conduct, since conduct is willed by the exercise of the mind. Thus, conduct consists of mental self-direction and physical movement.

But Coke, Hale and Hawkins had more than that in mind when they talked of "guilt," "capacity to obey," "wilfull disobedience" and "*actus reus*" and "*mens rea.*" Mental self-direction and physical movement do not tell us whether a defendant meant to be wilfully disobedient, whether he had the capacity to obey, whether his mind was tainted with guilt for an act which in fact amounts to a violation of the legal mandate, whether his mind was evil, etc. The conduct consisting of mental self-direction and physical movement could well be the product of a diseased or otherwise incapacitated mind, in which case no rational law would stamp the offender guilty. Moreover, it would be utterly futile to practice deterrence on such an offender, since the insane or blank mind is not perceptive to threats and does not react rationally to pains. And certainly the threat of punishment for an insane mind can hardly be justified as an inducement to all citizens to practice mental hygiene—even if the potential lunatic knew how to ward off the evil forces which might lead him to insanity which, in turn, might lead him to unlawful conduct. Thus, even where a diseased mind is capable of entertaining mental self-direction—and in many instances a diseased mind may well not be so capable—conduct often falls short of being unlawful, despite technical breach of the law, namely because of a lack of capacity to entertain a *mens rea*.

But even the person not laboring under any of the recognized incapacities may well bring about a proscribed harm without incurring guilt. Conduct attributable to superior force, duress and coercion, while imputable to the defendant by the application of colorless rules of causation, nevertheless will not subject the actor to criminal liability because, although the actor willed the harmful result (in the sense of mental self-direction), there was little, too little, room for choice in his decision. Thus, while the actor willed his conduct, he did not will any wrongdoing. And so where an innocent mistake of fact has induced a defendant to conduct himself in a proscribed manner, the common law judges and lawyers realized that the infliction of punishment upon the actor who acted without moral guilt—not having chosen to do any harm or being ignorant of any harm—would be as inequitable as futile.

Such, in brief, was the state of the common law prior to the date on which the private corporation made its entry into the history of the common law. It was a law nicely adjusted to deal with the individual culprit, both actual and potential. It was a law both just and utilitarian. It was a rational law because it recognized that only the just can also be utilitarian.

The sole objective of the criminal law was and is to promote peaceful existence by coercing the actual or potential wrongdoer to compliance with the set standards of society through the threat or application of sanctions,

which are actual deterrent influences acting upon the minds of potential or actual wrongdoers.

The common law of torts, in part—a very small part—has the same objective. But the primary function of tort law is different. It is not to deter, but to compensate. Tort law distributes the loss of a harmful occurrence. The loss must be borne by the person to whom the harmful occurrence is attributable. Causation, thus, is the primary means for imputing liability in tort, while *mens rea* plays only a minor and steadily diminishing role.

> "*Moral culpability is of secondary importance in tort law—immoral conduct is simply one of various ways by which individuals suffer economic damage.* But in penal law . . . the immorality of the actor's conduct is essential—whereas pecuniary damage is entirely irrelevant."[76]

Reconciling Corporate Criminal Liability and Mens Rea

Corporate criminal liability managed to sandwich itself into these juridical doctrines and considerations. Several difficulties had to be overcome. Some of these were procedural and were overcome with comparative ease, as already mentioned. Others were substantive, and some of these have not been overcome to this day. Among these are the two most important (1), the conceptual question whether a corporation can engage in conduct at all, *i.e.*, whether it is capable of mental self-direction and physical movement, and (2), the more difficult question, whether its activities can at all be tainted by moral-legal wrongfulness, *i.e.*, whether it can entertain a *mens rea*. Since *mens rea* presupposes mental self-direction (actually evidenced by physical movement), the answers to the two questions must be identical in part. The second answer is the more difficult since it must embody an ethico-legal element. Preliminarily, suffice it to say that a corporation must of course be able to act (mental self-direction and physical movement), else the whole theory of incorporation would make no sense whatsoever. As soon as the corporation appoints "its" primary agents, the board of directors, "it" acts. When "it" hires "its" operatives, "it" acts. When "it" manufactures, "it" acts, and when "it" ships "its" products to the market, "it" acts again. But the answer is not quite so simple. Since the difficulty of reconciling the imposition of psycho-ethical legal guilt, blameworthiness, upon a brainless, soulless entity with the mandate of our law that all criminal liability must rest on personal conscious wrongdoing has proved to be the more difficult question, and since, if *properly* answered, the answer to this

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76. Hall, Principles of Criminal Law 203 (1947). Blackstone must be regarded as the father of this thought within the sphere of the common law. 4 Blackstone, Commentaries 5. Blackstone's analysis, though rather general, was strong enough to survive the severe attacks of Bentham, Austin and later (often misguided) utilitarians. To Hall belongs the credit of not only salvaging but also of organizing Blackstone's analysis for future constructive use. See Hall, *op. cit. supra*, ch. 7.

question can also resolve all doubts about the ability of an entity to act at all, I propose to discuss this question next.

The advocates of absolute criminal liability have had no difficulty in imposing criminal liability upon the corporation. He whc does not believe in *mens rea* can not find it to be a stumbling block ever. Thus, by ignoring the problem, they have solved it.[77] Most courts, it must be conceded, have not considered the problem at all, but simply have imposed liability upon an *offending* corporation on the authority of previously adjudicated cases, most of which can be traced back to a few ancient English cases of vicarious—but non-corporate—liability for maintaining a nuisance.[78] The growth of corporate criminal liability was fostered by analogies from the law of torts. Many courts simply failed to appreciate any material difference between the two bodies of law.[79] Thus, the question now confronts us squarely: is it possible to reconcile the principle of psycho-ethical guilt with a theory of corporate criminal liability? Yes, upon one well recognized line of reasoning:[80]

If by the threat of a sanction we can coerce the corporate owners, shareholders, to be meticulously careful in the selection and supervision of the managerial agents, *i.e.*, the board of directors, then any imposition of a fine upon the corporation, resulting in loss to the shareholders, is punishment for the shareholders' recklessness or lack of concern. This is entirely consistent with the guilt principle of our criminal law. But this reasoning rests on some mighty big assumptions: (1) that the shareholders, or any individual shareholders, in fact had the power to select and supervise the board of directors, (2) that the breach of the law did not occur despite such meticulous selection and supervision, (3) that the loss through fine is not passed on to the consumer, (4) that the criminal act is in fact the act of a member of the board of directors (within the limits of the recognized rules of accessoryship), etc.

Thus, here we are faced with the first cliff. It is this cliff which we call vicarious liability, *i.e.*, the imposition of the burden of punishment upon a *possibly* innocent person for the criminal act and intent (if any) of one who is appointed, or has assumed to act in behalf of, the legally responsible person. That such vicarious liability may well amount to absolute liability, namely when in fact the shareholder has no power of control, is readily apparent. This could be shrugged off by arguing that

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77. See my discussion of the matter in *Mens Rea and the Law Without It*, 58 W. VA. L. REV. 34 (1955).

78. To be discussed elsewhere shortly.

79. See Mueller, *Tort, Crime and the Primitive*, 46 J. CRIM. L., C. & P.S. 303 (1955).

80. But note that the answer to the question does not give any indication about the *usefulness* of corporate criminal liability in the first place. Thus, the question whether it would not be better to punish a responsible individual instead, a purely utilitarian question, remains unanswered.

> "[w]hoever becomes active within a political or economic association must be deemed to consent to having this possibility withdrawn or curtailed if the association misuses its position of power,"

as did the German criminal law scholar von Weber.[81] Such a theory, however, does little more than add a legal gamble to the economic gamble which already inheres in most, if not all, stock market ventures of the investing citizen.

To repeat, it is only in cases where the shareholder has a power of control over the board of directors that vicarious criminal liability (for the criminal acts of members of the board, within rules of accessoryship), the most typical form of corporate criminal liability, is consonant with the guilt principle, which is the basis of the common law of crimes.

Assuming that we have successfully circumnavigated the first cliff, *i.e.*, that the typical corporate sanction acts *in terrorem* against nonchalant or careless shareholders, we are swiftly approaching the second cliff. If "the corporation," as an entity apart from its owners (shareholders), commits crimes for which it binds the shareholders, how then does it commit these crimes in the first place? Of whose *actus reus*, of whose *mens rea*, can we talk as corporate? It is noteworthy that the common law has long ceased thinking in terms of vicarious liability every time a corporation is said to breach the law and is convicted. On the fiction of control through the shareholders, we are no longer worried about them and their ultimate loss through the imposition of the fine upon the corporation—for the shareholders really bear the brunt of most corporate convictions. As a matter of convenience and expediency the law thinks of the corporation as the operating concern in terms of a man-like phenomenon. The *corporation* thinks, acts and becomes liable. How does the corporation think and act? Through those uppermost responsible because entrusted by the corporate owners (shareholders) with its management. Logically, therefore, the corporation can become liable only for the acts of shareholder-elected officers, *i.e.*, the board of directors, acting jointly, or the individual members of the board acting separately within their proper spheres.[82]

But section 2.07 (1)(c) is entirely right in extending the scope of liability to include the offenses of other high managerial agents. Not the mode of acquisition of a corporate office, but the scope of trust and power is the proper criterion. It is entirely proper to argue that all high managerial agents theoretically are equally well known to the shareholders, are part of the corporation's inner circle and are, therefore, equally within the spotlight of scrutiny. We conjecture that if a non-elected high managerial agent shows signs of dereliction, the shareholders will, or ought to, exert pressure in order to cause his removal from a position of command, or at least to

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81. Von Weber, *Die Sonderstrafe*, 29 D. Ri. Z. 153, 156 (1951).

82. A student note in the Harvard Law Review proposed this rationale many years ago. See note, 27 Harv. L. Rev. 589 (1914), relying on note, 21 Harv. L. Rev. 535 (1908).

restrain him from wrongdoing. Thus, we can call all those officers, whether elected or appointed, who direct, supervise and manage the corporation within its business sphere and policy-wise, the "inner circle." They are the *mens*, the mind or brain, of the corporation. It is this *mens* which is capable of mental self-direction and, because of its human nature, single or composite, there is no reason in the world why this *mens* should not also be capable of harboring a *mens rea*. At least in part, the inner circle may well also be the hands of the man-like phenomenon, the corporation, though more often and more properly the part of the hands is played by the operatives of the corporation.[83]

Thus, it is now this "inner circle" which stands for the corporation for the purpose of the application of the doctrine of criminal liability. The acts of the members of this group, as a matter of policy, convenience and logic, are acts of the corporation which may subject the corporation to criminal liability. The Code is entirely right in recognizing that not only the direct acts of members of this group may create corporate criminal liability, but also acts authorized, requested or commanded by these officers.[84] Likening a corporation to a natural person for the purpose of criminal law administration is not an outgrowth of the "psychological tendency toward personification," as Machen suggested,[85] but is a rational interpretation of the theory of the corporate fiction for purposes of the application of a rational theory of corporate criminal liability on the basis of the guilt—deterrence orientation of the common law of crimes.

Objectionable Extensions in Section 2.07

As far as discussed in the previous section, the Code is entirely in keeping with orthodox principles of criminal liability. But when the Code goes further, as it does in section 2.07 (1)(a), and extends criminal liability of the corporation to independent acts of inferior employees, *i.e.*, not those who are members of the inner circle, it subjects the corporation to liability for acts which "it" (as represented by the inner circle) has not willed, not directed, not authorized. In such a case not only does the corporation lack *mens rea*, it even lacks mental self-direction. Here the hand has moved without order from the brain.[86] To impose liability for such a movement of the corporate hand would be analogous to subjecting an epileptic to criminal liability for the harm done by a motion of his hand, not willed, but solely the reflex of an epileptic fit. Returning to the corporate level, what the Code does in this situation amounts to the imposition of vicarious liability, resting on the assumption of a probability that the crime of the servant

83. Williams, Criminal Law—The General Part 677 *et seq.* (1953).

84. M.P.C. § 2.07 (1)(c).

85. Machen, *Corporate Personality*, 24 Harv. L. Rev. 253, 347 (1911).

86. It *so happens* that the "hand" is an entire human being with a distinct brain and a distinct body of his own. Thus, for his own personal wrong-doing he must account personally. A possible motive to benefit the corporation does not interest the law.

could have been prevented by the master through the exercise of due diligence. But this vicarious liability may well lack the *mens rea* of the real defendant, the corporation, as represented by its inner circle. As long as the probability assumption may be controverted, no injustice can be done, but when the *mens rea* of the inner circle is deemed irrelevant, as it is in many instances under a clause to be discussed below, we wind up with an actual case of absolute liability.

This is the second cliff in the corporate criminal liability of the Model Penal Code. Actually we have now reached the point of vicarious liability twice removed, for, the ingenious fiction by which we ignore the split personality of the corporation (shareholders—inner circle), just discussed, does not erase the truth to the effect that in fact and on principle the shareholders' penal suffering for management's criminal acts is already in the nature of vicarious liability. The chain now acquires an additional link: An inferior employee in whose hiring and supervision the shareholders had no part commits a crime within the scope of his employment and, he fancies, in behalf of the corporation—though perhaps actually only to enhance his standing—, perhaps contrary to management orders, whereby he binds the blameless inner circle, *i.e.*, the corporation as an *alter ego* of the shareholders, and ultimately the blameless shareholders will suffer the fine imposed upon the corporate defendant. This concept of vicarious liability twice removed is infinitely worse than the already cumbersome phenomenon of vicarious liability proper. Our law had a big enough stomach to swallow the first vicarious liability, *quaere* whether its stomach is large enough to gulp the second one without incurring a serious permanent stomach ache. This is not to say that the corporation ought not to become criminally liable for the acts of inferior employees under any circumstances. But if we adopt such a liability in the Model Penal Code, let us do so consistent with the guilt principle of our law. How can this be done? Wisely section 2.07 (4) provides in part:

> "In any prosecution of a corporation . . . for the commission of an offense . . . it shall be a defense if the defendant proves by a preponderance of the evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission."

Lack of an exculpatory clause of this nature would create a blanket absolute liability (in the nature of a twice removed vicarious liability) for corporations for every proscribed act or omission on the part of an operative, resulting in financial detriment either to the justifiably ignorant and innocent corporate owners or in a penalization of the consumer since, inevitably, as experience has it, recurring fines within an industry become part of the ordinary expense of producing and marketing the product or service, thus passing the fine on to the consumer. Therefore, this exculpation of sec-

tion 2.07 (4) ought to be the hard and fast rule without exception. The law's reward for due diligence is immunity, and punishment follows only wrong-doing or lack of due diligence where such was necessary. The imposition of punishment despite the exercise of due care, when the efforts were unsuccessful, creates frustration. If punishment follows as a matter of course upon every *discovered* technical breach of the law, no matter whether due care has been exercised or not, the managerial agents may well conclude that it is far more simple to let things take their own course, than it is to exercise care.

Had subsection (4) stopped where I ended my quote, the rule would be entirely in keeping with the principles of our criminal law.[87] But the subsection goes further, and what it grants with one hand, it takes away in part with the other. First of all, this subsection excludes from its coverage offenses "for which absolute liability has been imposed." I suppose that as long as we have section 2.05 with its sanction of absolute liability for violations in our Code, this clause has a justifiable place in section 2.07 (4), although I am vehemently opposed to the imposition of any absolute criminal liability.[88] But, more important, in the last sentence of section 2.07 (4) we read:

> "This paragraph shall not apply if it is inconsistent with the legislative purpose in defining the particular offense."

I am at a loss to see why this was necessary. If an offense is one of absolute liability, *i.e.*, no *mens rea* is required, then the exculpation clause is inapplicable, as we have just learned. If an offense is one of common law liability, *i.e.*, *mens rea* is required, then the exculpation clause is applicable. What is there in between the two that requires special exception? A corporate, or indeed any, offense can not be both one of common law liability, *i.e.*, require corporate *mens rea*, and yet disregard exculpation, because when we do disregard exculpation then we transmute the offense from one of common law liability to one of absolute liability.

It will not do to say that in this case we honor *mens rea* by requiring the *mens rea* of at least an operative,[89] because the *mens rea* of an operative can

87. The shifting of the presumption of *mens rea*, though opposed to common law principles, certainly is justified under the circumstances, has been found beneficial in many recent instances where the prosecution's normal burden of proof would frustrate the enforcement of the law and will not offend anybody in this case.

88. Utilitarian considerations (justice!) call for criminal liability upon showing of personal conscious wrong doing only. The pre-1850 common law judges certainly knew what they were doing when they insisted on *mens rea* for all offenses. The disregard of the *mens rea* requirement has been justified on supposedly utilitarian principles; but totally warped and misunderstood conceptions of utility have given rise to such ideas, as I hope to have demonstrated elsewhere. See note 77 *supra*.

89. Although we are not even specific enough on that! Professor Williams stated during the debates: "Now, nothing is provided as to whose *mens rea* must be proved where the offense is a violation. It seems to me in this case, if you are going to have this in, you ought

hardly be said to be the *mens rea* of the corporation, just like the unauthorized, independent act of an operative is no corporate act by any stretch of the imagination.[90] I concede that this form of criminal liability of the corporation for the unauthorized acts of an inferior operative has been used occasionally. However, this form of liability is not only wrong conceptually, but also useless, as it does not promote future lawful conduct on the part of the corporation. In other words, it is totally ineffectual as a deterrent. The unlawful act of an operative in violation of the commands, regulations, etc., of the corporation (inner circle) clearly is the independent crime of the operative, yet, the last sentence of subsection (4) withholds exculpation to the corporation in precisely such situations "if it is inconsistent with the legislative purpose in defining the particular offense."

Going further, by recognizing, or, rather, hypostatizing that there are corporate offenses which do require *mens rea* on the part of the corporation, yet which are not subject to the exculpation clause, the Code is giving the criminal judges the power to reclassify an offense from the former to the latter category, thus creating additional offenses of absolute liability at random whenever, in the judge's opinion, the exculpation appears "inconsistent with the legislative purpose in defining the particular offense." Whether or not the legislative purpose is ascertainable—and in most instances it surely is not—the result will be rather confusing to the system of extra-Code penal law of any given state, and will be highly detrimental for an additional reason: every such newly created offense of absolute criminal liability will (1) frustrate the enforcement of the statute, because penalty despite care will create nonchalance toward imposed duty, rather than diligence, with the result that (2) recurring fines become part of the ordinary operating expenses, increasing the cost of the product or service to the consumer.[91]

In justification of the objectionable sentence it may be argued that there may well be "cases in which the stringent application of the tort principle *respondeat superior* is justified even in the presence of apparently reasonable supervisory efforts and even though the burden of showing such reasonable efforts is on the defendant."[92] Perhaps, in such situations the corporation, it may be said, "stands to profit from criminal behavior on the part of subordinates, where, accordingly, there are strong temptations for sub rosa encouragement of such criminal behavior by management, and where despite that encouragement, the corporation could make an apparently convincing case of due diligence."[93]

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to bring in (c) and say that it must be the *mens rea* of the high manager of the corporation. But anyway, I suppose the real thought behind the violation part is that it is a crime of absolute liability, an offense of absolute liability, and so on, under (2)(a)." Proceedings 180.

90. See on this point WILLIAMS, *op. cit. supra* note 83, at ch. 22.

91. Debate on this point between the subject reporter and this author (name consistently misspelled as Buhler) may be found at Proceedings 183-185.

92. Quoting from a letter to this author, of Sept. 11, 1956.

93. *Ibid.*

The objection to this approach is very simple: It is a poor legal system indeed which is unable to differentiate between the law breaker and the innocent victim of circumstances so that it must punish both alike. Where profit to the corporation as the result of the unauthorized act of an operative is concerned, principles of equity can easily be applied to provide for restitution of the ill-gotten gain to the parties actually entitled thereto, or for forfeiture in lieu thereof. But when we talk about the imposition of punishment, then, rather than to punish the corporation in such cases, why not punish the operative for his own independent act, preferably with imprisonment—whenever at all feasible, and at least upon repetition of the offense—, rather than fine? Even where the corporation stands to profit from the crime of the employee, it is most unlikely that the employee can be induced to commit the crime for the benefit of the corporation under those circumstances. Here is one of the many instances where deterrence is bound to be effective and where it provides the only rationale of the threat and application of punishment. It seems to me, therefore, that direct liability with orthodox *mens rea* is bound to operate more effectively than corporate liability, absolute or vicarious and twice removed.

On the whole, I believe that the prevalence of sub rosa encouragement for violations by employees for the benefit of the corporation is grossly overestimated. In any event, before it can be argued that such sub rosa encouragement is so prevalent that the dragnet method of prosecution is justified, somebody will have to show that the assumption of such widespread sub rosa criminality is true. Nobody has done that yet.

Essentially, this is a matter going to the difficulty of proof in any criminal prosecution. Thus, the prosecutor is bound to encounter the same difficulties as in any other type of prosecution. The law requires that the prosecution establish honestly and with integrity that the defendant breached the law. Since time immemorial a certain type of investigator and prosecutor has resorted to methods of doubtful honesty and integrity, and, incidentally, also of doubtful efficacy. Should it be the policy of the law to sanction evil enforcement methods simply because of the ease of their application? The question was answered two thousand years ago: When Herod was unable to learn the identity of the babe he believed would become the King of the Jews and dangerous to him, "he sent forth and slew all the children that were in Bethlehem, and in all the coasts thereof, from two years old and under."[94] That Herod failed to accomplish his purpose nevertheless may be an irony not unparalleled in the zeal of legislators and prosecutors who rely on absolute liability in its direct or vicarious form.

The argument of the difficulty of proof of *mens rea* has been made in defense of all forms and instances of absolute liability, including the absolute liability in the vicarious form with which we are confronted. It is a basic premise that if crime can not be proved, conviction can not follow. Thus,

94. Mathews 2:16.

if *mens rea* on the part of the defendant corporation (= inner circle) can not be proved, there is no crime of which the corporation can be convicted. Granted, it may be difficult to prove a sub rosa understanding between management and employee—although this is a mere guess resting only on the constant repetition of this guess—is it any more difficult than the proof of *mens rea* on the part of a defendant charged with murder I?

> "It has not occurred to anyone to contend that *mens rea* should be eliminated from any common law offense because it is difficult to prove. . . . The fact that minor offenses are involved does not alter the prospects or methods of establishing *mens rea*."[95]

The argument of the difficulty of proof is the most desperate and uncertain justification of the last sentence of section 2.07 (4) which could possibly be made.

Here then is a real flaw in the text of section 2.07, and I must seriously urge that the draftsmen reconsider whether or not to retain the objectionable sentence. Without it section 2.07 (4) would make sense, with it, it is at best a mystery which baffles the imagination, at worst it is an "open-o-sesame" for further absolute liability in our penal law. This is not a question of having one more or one less technical sentence in our Model Penal Code, rather, the question of retaining or omitting this sentence will evidence whether the American Law Institute will put corporate criminal liability on the basis of *mens rea*, which is the very fundament of our Anglo-American criminal law, or whether it will follow Vishinsky's footsteps by substituting a nebulous causal relation for *mens rea* as the basis of the criminal law.[96]

Summary

(1) The common law has developed the method of imposing criminal liability upon corporations without any evidence of its effectiveness in the promotion of future lawful conduct by corporations.

(2) The reconcilability of corporate criminal liability and the common law principle of liability for ethico-legal wrong-doing has been a matter of conjecture.

(3) The Model Penal Code restates the principles of corporate criminal liability as developed during the last hundred years by the courts and sweepingly extends it to cover all violations by operatives, acting within the scope of their employment and in behalf of the corporation.

(4) In adopting and extending this rule, the Model Penal Code rests on the same conjecture which marks most precedents of corporate criminal liability and is devoid of economic-legal proof of the necessity for such liability.

(5) Law comparison shows that the civil law abhors the concept of cor-

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95. Hall, *op. cit. supra* note 76, at 306.
96. See Hogan, *Criticism of Lawbooks in the Soviet Union*, 61 Case & Com. 8 (1956).

porate criminal liability. In the few instances where it employs the concept, it ordinarily provides for exculpation upon showing of due diligence by the responsible high managerial agent.

(6) Civil law courts and scholars are convinced of the greater effectiveness of imposing personal liability upon the truly responsible individual who acts for the corporate entity.

(7) Corporate liability is a species of vicarious liability, imposing the burden of punishment for the acts of agents upon innocent principles, so that the only widely used form of corporate punishment, fine, will cause economic detriment to innocent shareholders (or consumers). If the utility of corporate criminal liability for the crimes authorized, requested, commanded or performed by the board of directors or individual members thereof is assumed, then

(8) the logical extension of this form of vicarious liability so as to include the acts of other high managerial agents is proper on principle;

(9) such liability, on the analogy of unlawful conduct of natural persons, is in keeping with the *mens rea* principle of the common law, since, by reason and experience, high corporate management is the brain center of the corporation. Such liability could well be effective as a deterrent.

(10) In providing for the exculpation of the corporation through a showing of due diligence to prevent the commission of crime, the Model Penal Code rests on commendable common law principles of *mens rea*.

(11) But in nullifying the exculpation provision whenever "it is inconsistent with the legislative purpose in defining the particular offense"—other than an offense for which absolute liability has already been imposed—the Model Penal Code deviates grossly from principles of utility, deterrence and *mens rea*, permits the imposition of additional absolute liability and invites a judicial development toward abolition of all *mens rea* requirements for corporate crimes.

(12) It is urged that an economic-legal inquiry into the supposed effectiveness of corporate criminal liability be undertaken before the Model Penal Code sanctions its use, and that, in any event, the *mens rea* requirements of the common law be rigidly adhered to.

Conclusion

A generation ago, Professor Joseph A. Francis concluded a similar article with these words:

> "Until and unless it is demonstrated that the social good demands that corporations be held responsible for crimes, there is no sound reason for so holding them. The mass of confusing dicta must be cleared away before they are enacted into bad laws. Special instances may demand that the legislature impute crimes to corporations, but the general principles of the law . . . will be our safest guides."[97]

97. Francis, *Criminal Responsibility of the Corporation*, 18 Ill. L. Rev. 305, 323 (1924).

Among these principles are the most important the theory of deterrence which addresses the threat of legal sanction to a guilty or potentially guilty mind, and the theory of *mens rea* without which deterrence is an empty phrase. If it be decided that corporate criminal liability is useful, then we will have no difficulty in imputing the evil (unlawful) act of "a corporation" to the entity *if* its mind was evil, and the corporate mind is that of one, several or all members of the inner circle of management. In the words of another author who spoke a generation ago:

> "It is suggested that *criminal* liability be imposed on those legal persons which are corporations *only for the acts of the human* beings who as primary representatives wield the powers of the groups upon which they are predicated."[98]

It seems that in Britain such admonitions and considerations had some effect upon the legislature, for, our good colleague John Llewellyn Edwards could write about this problem quite recently "that the legislature's increasing accent on personal responsibility portrays a welcome and significant attitude."[99] Response does not come so easily in America. For us, as for Mephistopheles, the word holds true:

> "Yu'll have to say it thrice."[100]

APPENDIX—LITERATURE

In addition to extensive discussions in the well known text books and treatises on the law of crimes and the law of corporations, the following periodical literature is noteworthy:

A. *Critical Analysis of the Corporate Entity Theory:*

(1) Machen, *Corporate Personality*, 24 Harv. L. Rev. 253, 347 (1911);
(2) Geldart, *Legal Personality*, 27 L.Q. Rev. 90 (1911);
(3) Wormser, *Piercing the Veil of Corporate Entity*, 12 Col. L. Rev. 496 (1912);
(4) Laski, *The Personality of Associations*, 29 Harv. L. Rev. 404 (1916);
(5) Canfield, *Scope and Limits of the Corporate Entity Theory*, 17 Col. L. Rev. 128 (1917).

B. *History of the Corporation and Its Liability:*

(1) Williston, *History of the Law of Business Corporations before 1800*, 2 Harv. L. Rev. 105, 149 (1888);
(2) Dewey, *The Historic Background of Corporate Legal Personality*, 35 Yale L.J. 655 (1926);
(3) Ullmann, *The Delictal Responsibility of Medieval Corporations*, 64 L.Q. Rev. 77 (1948).

C. *Of Historical Significance:*

(1) Lindley, *On the Principles which Govern the Criminal and Civil Responsibilities of Corporations*, 2 Jurid. Soc. Papers 31 (1858); for proceedings thereon see 1 Jur. Soc. J. & Rep. 334 (1857); 29 L.T.R. 25 (1857).

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98. Winn, *The Criminal Responsibility of Corporations*, 3 Camb. L.J. 398, 414 (1929).
99. Edwards, Mens Rea in Statutory Offences 243 (1955).
100. Goethe, Faust, Part I, Act I, Scene IV.

(2) Note, *The Criminal Responsibility of Directors*, 42 L.T. 160 (1866);
(3) Note, *Can Corporate Bodies be Guilty of Malice?*, 51 L.T. 96 (1871);
(4) Hamilton, *Indictment of Corporations*, 6 Crim. L. Mag. 317 (1885);
(5) Richberg, *The Imprisonment of Criminal Corporations*, 19 Green Bag 156 (1909).

D. *Critical Modern Literature on Corporate Criminal Liability:*

American—Articles:

(1) Canfield, *Corporate Responsibility for Crime*, 14 Col. L. Rev. 469 (1914);
(2) Hitchler, *The Criminal Responsibility of Corporations*, 27 Dick. L. Rev. 89, 119 (1923);
(3) Francis, *Criminal Responsibility of the Corporation*, 18 Ill. L. Rev. 305 (1924);
(4) Edgerton, *Corporate Criminal Responsibility*, 36 Yale L.J. 827 (1927);
(5) Lee, *Corporate Criminal Liability*, 28 Col. L. Rev. 1, 181 (1928).

American—Notes:

(1) Note, *Criminal Liability of Corporations*, 14 Col. L. Rev. 241 (1914);
(2) Note, *Corporations, Recent Treatment of the Corporate Fiction*, 13 Corn. L.Q. 99 (1927);
(3) Note, *Criminal Liability of Corporations for Acts of Their Agents*, 60 Harv. L. Rev. 283 (1946);
(4) Note, *Corporate Criminal Liability in New York*, 48 Col. L. Rev. 794 (1948).

See also:

Snyder, *Criminal Breach of Trust and Corporate Management*, 11 Miss. L.J. 123 (1938); Hildebrand, *Corporate Liability for Torts and Crimes*, 13 Tex. L. Rev. 253 (1935); Dangel, *Criminal Liability of Corporations*, 12 Law. Soc.J. 539 (1947).

British—Articles:

(1) Winn, *The Criminal Responsibility of Corporations*, 3 Camb. L.J. 398 (1929);
(2) Welsh, *The Criminal Liability of Corporations*, 62 L.Q. Rev. 345 (1946);
(3) Burrows, *The Responsibility of Corporations under Criminal Law*, 1 J. Crim. Sc. 1 (1948).

British—Notes:

(1) Note, *Companies and Criminal Responsibility*, 197 L.T. 115 (1944);
(2) Note, *Corporations—Mens Rea*, 60 Scot. L. Rev. 145 (1944);
(3) Note, *The Criminal Liability of Corporations* (Refresher Articles, Crime IIa and IIb), 196 L.J. 513, 527 (1946).

Brief comments on articles listed under D.

American scholarly writers are not agreed on the propriety of, and need for, corporate criminal liability. Canfield, *supra*, concedes the propriety of corporate criminal liability for absolute liability offenses only. Hitchler's article, *supra*, is mainly textual, but he seems to agree with the development in the courts. Francis, *supra*, is strictly opposed to corporate criminal liability, assigning as his reason that no one has shown (or perhaps will ever be able to show) that the social good demands such liability. Edgerton, *supra*, favors corporate criminal liability for reasons of deterrence. But by dismissing the importance of, and need for, *mens rea*, Edgerton is guilty of a grave inconsistency, for, how does deterrence operate but on the guilty or

potentially guilty mind of the addressee of the legal prohibition? He seems to identify *mens rea* with the vindication theory of punishment. Lee, *supra*, is in favor of corporate criminal liability, mainly on the rather doubtful tort analogy. This work is particularly noteworthy for its case analyses.

The English writers present a somewhat more consistent pattern. Nobody rejects corporate criminal liability outright. But the general acceptance of corporate criminal liability is limited to that form which is consistent with principles of *mens rea* and deterrence. Winn, *supra*, takes an interesting position which is more consonant with the views here propounded than is any of the other writers, *i.e.*, that where the crime can be said to have originated with the "primary representatives of the corporation," the entity should be liable, but not otherwise. However, Winn accepts this liability on principle without proof of its social and economic necessity. Welsh, *supra*, presented a textual discussion in which he agreed largely with Winn's restrictive "primary representative" criminal liability of the corporation. Burrows, lastly, accepts corporate criminal liability without major argument.

New York, N.Y., *April 4, 1972.*

Hon. John L. McClellan,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, Senate Office Building, Washington, D.C.

Dear Chairman McClellan: On behalf of the Special Committee on Consumer Affairs of the Association of the Bar of the City of New York, I enclose a copy of a Committee report on "The Proposed New Federal Criminal Code and Consumer Protection".

Yours truly,

Leon I. Jacobson,
Secretary, Special Committee on Consumer Affairs.

Association of the Bar of the City of New York Special Committee on Consumer Affairs

The Proposed New Federal Criminal Code and Consumer Protection

On January 7, 1971, the National Commission on Reform of Federal Criminal Laws submitted its final report proposing a new Federal Criminal Code.

Some of the provisions of the Code affecting consumer affairs present serious problems in our view. The code is largely based on the Model Penal Code and on thinking concerning state criminal codes. The principal difficulty with this approach is that, historically, federal law has developed "interstitially" to fill gaps created by lack of state authority or state action in dealing with various types of nationwide problems.

Indeed, the expansion of federal efforts has led to reliance by the states on federal action in some fields. This has not been the case in the field of consumer protection generally, where state and local agencies have been extremely active. However, it has been so to a significant extent in criminal law enforcement against hardcore consumer fraud, such as that practiced by fly-by-night enterprises or those who deliberately prey on the unsophisticated.

The chief weapon for action against those who fall in this category has been the mail fraud statute (18 U.S.C. § 1341),* which makes it a crime for any person to devise a scheme or artifice to defraud and to use the mails for the purpose of executing such scheme. It has been held repeatedly that it is enough if the conduct of the defendant normally would bring about the use of the mails for the purpose of executing the scheme, even if the mailings are by a third party.

The proposed new Federal Criminal Code seeks to replace all federal criminal laws pegging the definition of the offense to acts creating federal jurisdiction, such as the use of the mails. In line with this, it proposes to repeal the mail fraud statute as well as the related wire fraud statute (18 U.S.C., § 1343) and replace them with a generalized theft provision (Code § 1732).

Unfortunately laws against theft have been difficult for prosecutors to apply to consumer fraud. The focus of the offense is on loss of money by particular victims, rather than on the course of conduct or the intent of the defendant. The success or failure of the scheme and the amount of loss, totally irrelevant to the existance of an offense under the mail fraud statute, would become critical to the grading of the violation as a felony or misdemeanor under the proposed code (sec. 1735).

Further, section 1741 of the code would adopt a detailed series of definitions for theft and related offenses not contained in present statutes, which would exclude from coverage "falsifications as to matters having no pecuniary significance or puffing by statements unlikely to deceive ordinary persons in the group addressed."

No need for these restrictive definitions is shown in the comments to the code. Indeed, the "puffing" exemption, expressly provided in the statute for the

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*E.g., United States v. Zovluck, 274 F. Supp. 385 (S.D.N.Y. 1967) aff'd after conviction, Dkt. No. 32652 (2d Cir. 4/7/69); United States v. Armantrout, 411 F.2d 60 (2d Cir. 1969); United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966), cert. denied, 385 U.S. 1001 (1967); Friedman v. United States, 347 F.2d 967 (8th Cir. 1965); Williams v. United States, 368 F.2d 972 (10th Cir. 1966); Adams v. United States, 347 F.2d 665 (8th Cir. 1965).

first time, might be claimed to immunize false representations designed to deceive the unsophisticated simply because a majority of those in the group addressed (e.g., through the mass media) would be unlikely to be fooled by a deceptive sales pitch. This would be harmful both to consumers and to legitimate businessmen, who would be placed at a competitive disadvantage.

When the study draft of the proposed code was released, these definitions and the shift to a theft concept were unanimously disapproved in a joint report of this Committee and the Committees on Federal Legislation, Federal Courts and Trade Regulation. Report on Proposed Legislation to protect consumers, including Consumer Class Actions, 10 reports of Committees of the Association of the Bar concerned with Federal Legislation No. 1, p. 14, n. 13 (October 1971).

The weakening of consumer protection by abolition of the mail fraud statute and its replacement by a mere theft prohibition is especially unfortunate at a time when there is increased public concern with consumer protection.

Section 1617 of the code would create a new federal crime of "criminal coercion" which would cover a person who "with intent to compel another to engage in or refrain from conduct . . . threatens to . . . publicize an asserted fact *whether true or false*, tending to subject any person . . . to hatred, contempt or ridicule, or to impair another's credit or business repute; or . . . take or withhold official action as a public servant, or cause a public servant to take or withhold official action." (Emphasis added.)

Conceivably it could be claimed that for a local consumer protection organization to tell a seller that a public statement would be made attacking its practices unless changed, could constitute a federal crime if instrumentalities of interstate commerce was used. Similarly, if a tenant were to take pictures of rat or roach infestation, or cracking walls or ceillings, of an apartment and threaten to send them to the press unless the defects were fixed, this might conceivably be claimed to constitute a violation.

Under the code, it is an affirmative defense as to which the defendant has the burden of proof, that a purpose of the threat was to cause the party to desist from misbehavior or make good a wrong. This would mean that a jury would have to decide this vague question, with the burden being on the defendant, in order for ciminal liability to be avoided. The possibilities of a "chilling effect" on freedom of expression are evident.

Similar problems could arise under the broad definitions of "threat" in section 1741 of the proposed code.

If the mail fraud statute is not to be retained in its present form, because of the philosophical conception of the code that offenses pegged to specific bases of federal jurisdiction should be eliminated, consideration might be given to a new offense covering schemes to defraud where any acts giving rise to federal jurisdiction are committed. This would accord with the terminology used in the code, without weakening the protection of the consumer under the present mail fraud statute. Provisions could be considered in this context for allowing a judge to order restitution to victims as part of any judgment of conviction, or to permitting a preliminary injunction against mail fraud as is possible at present in cases of stock fraud.

Likewise, consideration should be given to amending the provisions of section 1617 to avoid making criminal (subject only to an affirmative defense the burden of proof as to which is on the defendant) legitimate activity which now occurs.

Respectfully submitted.

SPECIAL COMMITTEE ON CONSUMER AFFAIRS,
STEPHEN KASS, *Chairman*.

Mrs. Julia C. Algase; Edward Bransilver; Prof. David Caplovitz; Martin Cole; Albert W. Driver, Jr.; Carl Felsenfeld; Emilio P. Gautier; Richard A. Givens; Leon S. Harris; Leon Jacobson; Marva P. Jones; Mrs. Rhoda Karpatkin; Prof. Homer Kripke; James Lack; Hon. Richard S. Lane; Michael B. Maw; Caesar Perales; Edward A. Perell; James Prendergast; Bruce Ratner; Don Allen Resnikoff; Irving Scher; Prof. Philip G. Schrag; David Paget; Florence M. Rice.

STATE OF NEW YORK, WASHINGTON OFFICE,
Washington, D.C., June 5, 1972.

ROBERT H. JOOST, Esq.,
Assistant Counsel, Committee on the Judiciary,
New Senate Office Building, Washington, D.C.

DEAR BOB: Pursuant to your recent request, I enclose herewith a copy of Assembly bill No. 9203-A, pertaining to corroboration in prosecutions for sex offenses.

The bill is now Chapter 373 of the Laws of 1972.

Also enclosed is Governor Rockefeller's Approval Memorandum.

Best regards.

Sincerely,

STEVE.

Enclosures.

STATE OF NEW YORK

CAL. No. 231, 9203-A—IN ASSEMBLY, FEBRUARY 3, 1972

Introduced by Mr. SUCHIN—Multi-Sponsored by—Messrs. DiCARLO, KELLEHER, LEASURE, BETROS, WEMPLE, MARGIOTTA, FLACK, LOPRESTO, McFARLAND, FARRELL, RICCIO, HECHT, KREMER, HOCHBERG, KOPPELL, S. POSNER, STELLA, NINE, KRAF, CHANANAU, MONDELLO, MERCORELLA, JONAS, SCHMIDT, MITCHELL, KELLY, ROSENBERG, ESPOSITO, MARSHALL, HENDERSON, McFARLAND, STEINGUT, BLUMENTHAL—read once and referred to the Committee on Codes—reported from said committee with amendments, ordered reprinted as amended and placed on the order of second reading

AN ACT to amend the penal law, in relation to corroboration in prosecution for sex offenses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 130.15 of the penal law is hereby amended to read as follows:

§ 130.15 Sex offenses; corroboration.

1. A person shall not be convicted of any offense defined in this article, or of an attempt to commit the same, *except as provided in subdivision three,* solely on the [uncorroborated] testimony of the alleged victim[. This section shall not apply to the offense of sexual abuse in the third degree.], *unsupported by other evidence tending to:*

Explanation—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

(a) Establish that an attempt was made to engage the alleged victim in sexual intercourse, deviate sexual intercourse, or sexual contact, as the case may be, at the time of the alleged occurrence; and

(b) Establish lack of consent of the alleged victim, where such is an element of the offense.

2. Where lack of consent is not an element of the offense, or where lack of consent is an element of the offense and results from incapacity to consent because of the alleged victim's age, then in addition to the requirements of corroboration prescribed in subdivision one, the corroborative evidence shall not be sufficient to sustain a conviction unless it tends to connect the defendant with the commission of the offense or attempted offense.

3. This section shall not apply to the offense of sexual abuse in the third degree, or an attempt to commit the same, where lack of consent results from lack of express or implied acquiescence in the actor's conduct, but a person shall not be convicted of sexual abuse in the third degree, or an attempt to commit the same, based on that type of lack of consent, upon testimony of the alleged victim as to conduct that constitues any other offense defined in this article, or an attempt to commit the same, unsupported by other evidence sufficient pursuant to subdivision one or subdivision two to sustain a conviction of an offense defined in this article other than sexual abuse in the third degree.

4. A conviction by verdict of an offense defined in this article, or of an attempt to commit the same, based upon corroborative evidence meeting the requirements of subdivision one or subdivision two is not rendered improper because the evi-

dence was not sufficient under subdivision one or subdivision two to support a conviction for some other offense defined in this article, or of an attempt to commit the same, which according to the alleged victim's testimony or other proof may have been committed.

5. This section does not apply to a conviction for any offense defined in any provision of law outside this article. Unless expressly provided by statute, the the requirements of corroboration prescribed in this section do not become applicable in a prosecution for any such offense because commission of or intent to commit an offense defined in this article was an element or integral part of such other offense, or because the two offenses were alleged or proved to have been committed in the course of the same criminal transaction, as that term is defined in subdivision two of section 40.10 of the criminal procedure law, or because evidence of the commission of an offense defined in this article was otherwise admitted in evidence in the prosecution for such other offense.

6. For purposes of this section, the other party to the alleged act of sexual intercourse, deviate sexual intercourse, or sexual contact is deemed the alleged victim.

§ 2. Section 255.30 of such law, as amended by chapter seven hundred ninety-one of the laws of nineteen hundred sixty-seven, is hereby amended to read as follows:

§ 255.30 Adultery and incest; corroboration.

1. A person shall not be convicted of adultery [or incest] or of an attempt to commit [either such crime] *adultery solely* upon the [uncorroborated] testimony of the other party to the adulterous [or incestuous] act or attempted act[.], *unsupported by other evidence tending to establish that the defendant attempted to engage with the other party in sexual intercourse, and that the defendant or the other party had a living spouse at the time of the adulterous act or attempted act.*

2. A person shall not be convicted of incest or of an attempt to commit incest solely upon the testimony of the other party to the incestuous act or attempted act, unsupported by other evidence tending to establish that the defendant married the other party, or attempted to engage in sexual intercourse with the other party, and that the defendant was a relative of the other party of a kind specified in section 255.25.

§ 3. Such law is hereby amended by adding thereto a new section, to be section 260.11, to read as follows:

§ 260.11 Endangering the welfare of child; corroboration.

A person shall not be convicted of endangering the welfare of a child, or of an attempt to commit the same, upon the testimony of the alleged victim as to conduct that constitutes an offense or an attempt to commit an offense defined in article 130, without additional evidence sufficient pursuant to section 130.15 to sustain a conviction of an offense defined in article 130, or of an attempt to commit the same.

§ 4. This act shall take effect on the thirtieth day after it shall have become a law.

STATE OF NEW YORK, EXECUTIVE CHAMBER,
Albany, N.Y., May 22, 1972.

Memorandum filed with Assembly Bill Number 9203–A, entitled: "AN ACT to amend the penal law, in relation to corroboration in prosecutions for sex offenses"

APPROVED

Few crimes are more contemptible than forcible rape. Yet, under our present State law, few crimes are more difficult to prove or so rarely proven.

Under New York's present statute covering sexual offenses, it is not enough for an actual rape victim to attest to this fact. In order to convict the assailant, proof, other than the victim's testimony, has to be produced corroborating three elements: the assailant's identity, that penetration occurred and that force was applied.

Given the furtive nature of the crime, outside corroboration as to such matters as penetration and identity is nearly impossible to obtain. This is borne out by the fact that in a recent, typical year, only 18 rape convictions were obtained in the courts of New York, versus thousands of complaints. Indeed, only New York and Iowa, among all the states, demand this rigid and unrealistic corroboration of rape. In fact, this is the only crime that does require such corroboration.

This bill modifies the extent of corroborative evidence required to sustain a criminal conviction for rape or other sexual offenses. Under the bill, it will not be necessary to produce corroborating evidence of the assailant's identity and of penetration. The complainant will still be required, however, to produce corroborating evidence that force had been used and penetration attempted.

The common defense of the existing, almost unprovable requirement for outside corroboration is that it reduces the possibility of one person falsely accusing another of rape, for whatever purpose. This is a legitimate concern. I am satisfied that this bill enables more effective prosecution of sexual criminals and, by requiring corroboration of force, still provides safeguards against false accusation of rape.

The bill further eliminates the wholly illogical content of the present law which says, in effect, that if the charge of sexual assault is not proved, neither can incidental charges, such as bodily assault or possession of a weapon, be proved. Under this bill, these incidental charges may be considered separately on their merits, even should the rape charges fail, a clear victory for logic.

This bill brings reality and reason, now sorely lacking, to the laws covering sexual crimes in this State. In this era of alarming crime rates, particularly violent crime against one's person, this legislation will go far to protect particularly women and children in our society from the heinous offense of rape and other sexual crimes.

Those public protectors whose hands have been tied by the unreal demands of the present law, all support this bill, including the State District Attorneys Association, the Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York, the Committee on State Legislation of the New York County Lawyers' Association, the New York State Sheriffs' Association and the Division of State Police.

The bill is approved.

(Signed) Nelson A. Rockefeller.

Following is an opinion of the New York State Court of Appeals of July 7, 1972, in which the majority criticized New York's unusually stringent corroboration rules:

State of New York Court of Appeals

Date Filed: July 7, 1972.
Date Received: July 17, 1972.

[3. No. 146. 72]

The People &c., Respondent, vs. Melvin Linzy, a/k/a Melvin Linear, Appellant.

Opinion

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Scileppi, J.:

Complainant, a 17-year-old school girl, willingly, but apparently unwittingly, accepted a "lift" from a male stranger in the early evening on October 13, 1968. By her own testimony, she refers to a two-hour stay with her assailant before and after an act of forcible intercourse at some secluded spot near her home. when finally released, she ran home and reported the incident to her mother who, in turn, notified the State Police.

There is no real doubt that the record affords sufficient corroboration that intercourse was committed by forcible compulsion. The complainant's mother testified to her daughter's bloodied mouth, bruised lips, disheveled appearance and apparent emotional distress. Independent medical proof of the complainant's condition shortly after the incident occurred, verified that coitus had taken place and that the complainant had been physically abused (see e.g. *People* v. *Masse*, 5 N Y 2d 217; *People* v. *Deitsch*, 237 N. Y. 300; *People* v. *Marshall*, 5 A. D 2d 352, affd. 6 N Y 2d 823); and a mass of fine lacerations about the back and "vegetable matter" compatible with leaves and small branches, tangled in the complainant's pubic hair is corroborative of the fact that the complainant had been dragged along and assaulted on the open ground.

Because the law requires that the victim's testimony be corroborated in each of the three material elements of the offense (*People* v. *Page*, 162 N. Y. 272; *People* v. *Downs*, 236 N. Y. 306; *People* v. *Masse*, 5 N Y 2d 217, *supra;* see also Penal Law, § 130.15)—force or lack of consent, penetration and identity—there must further be some independent showing that it was the defendant who committed the crime before the conviction will be sustained (Penal Law, § 130.15; *People* v. *Masse*, 5 N Y 2d 217, *supra; People* v. *Page*, 162 N. Y. 272, 274–275, *supra; People* v. *Croes*, 285 N. Y. 279; *People* v. *Marshall*, 5 A D 2d 352, affd. 6 N Y 2d 823, *supra*).

Defendant has never admitted to having intercourse with the complainant, and at the trial offered an alibi as to his whereabouts on the night in question. No independent testimony has been introduced to corroborate the identity of the alleged rapist; and while real evidence might suffice (see *People* v. *Marshall*, 5 A.D. 2d 352, 353, affd. 6 NY 2d 823, *supra*), the only evidence which would place the defendant at the scene of the crime is that of the complainant, set forth along with a vidid description of the defendant, his car—the one allegedly used to transport the victim to the scene of the crime—and a ring said to have been worn by the attacker and identified to one confiscated from the defendant at the time of his arrest. On their direct case, the People have offered no proof which would place the car, concededly the defendant's, or the defendant himself, in or about the vicinity where the alleged rape occurred on the night in question (cf. *People* v. *Hutchings*, 36 AD 2d 659). Beyond the victim's own testimony that she was, in fact, inside the defendant's car, an allegation which is surely buttressed by her detailed descriptions, there is no independent evidence, either circumstantial or direct, to support the charge that the defendant was her assailant. (see *People* v. *Terwillinger*, 74 Hun 310, affd. on Op. below, 142 N. Y. 629; *People* v. *Deitsch*, 237 N. Y. 300, *supra*).

As a practical matter, and on the basis of the evidence adduced, the jury, logically and reasonably could infer that the complaining witness was raped. Absent independent corroboration of the perpetrator's identity, however, the law requires that the victim's testimony linking the defendant to the crime be discounted; and, on the basis of the facts, the conviction must fail (*People* v. *Page*, 162 N. Y. 272, 274–275, *supra; People* v. *Downs*, 236 N. Y. 306, *supra; People* v. *Anthony*, 293 N. Y. 649). The order appealed from should be reversed and a new trial granted.

The statutory requirement of corroboration in all rape cases and under the revised Penal Law in crimes prosecuted under Article 130, as well as the judicially created rule extending the corroboration requirement to crimes intrinsically related to rape or committed in aid of effecting a rape (Penal Law, § 130.15; *People* v. *Lo Verde*, 7 N Y 2d 114; *People* v. *English*, 16 N Y 2d 719; see also, *People* v. *Moore*, 23 N Y 2d 565, 567–568), finds plausible, if not redoubtable, justification in protecting against the danger of false accusations (*People* v. *Yannucci*, 258 App. Div. 171, 173; *Matter of Sam "F" and Bobby "S"*, 68 Misc 2d 244; 7 Wigmore, Evidence [3d ed.], § 2061, p. 354; cf. *People* v. *Radunovic*, 21 N Y 2d 186, 191, concurring Op., Breitel, J.). In terms of its objectives, however, the statutory rule is of minuscule practical value (7 Wigmore, Evidence [3d ed.], § 2061, p. 354); and in its overall effect continues to threaten disconcerting, if not mischievous consequences (*People* v. *Radunovic*, 21 N Y 2d 186, 193, *supra*, dissenting Op., Scileppi, J.). Wigmore, apprehending the threat of false accusations, recognizes, that the purpose of the rule is accomplished by the trial judge's power to set aside the verdict upon the ground of insufficient evidence (7 Wigmore, Evidence [3d ed.], § 2061, p. 354).

Indeed, it imposes itself as a broad testimonial disability, when common experience and ordinary suspicion already suggest circumspection (*Matter of Sam "F" and Bobby "S"*, 68 Misc 2d 244, *supra;* see also, 7 Wigmore, Evidence [3d ed.], § 2061, p. 354; cf. *People* v. *Radunovic*, 21 N Y 2d VRF, VTB, *concurring Op.*, Breitel, J., *supra*). Although we need not canvass either the efforts of the overwhelming majority of states which labor without such an "over evidence requirement" [sic] (See *Matter of Sam "F" and Bobby "S"*, 68 Misc 2d 244, *supra;* generally the complainant's uncorroborated testimony, if not contradictory or incredible, or inherently improbable, may be sufficient to sustain a conviction, while a more stringent standard, requiring corroboration, would apply where that testimony is contradictory or inherently unreliable or improbable; see also CJS, Rape, § 78; 7 Wigmore, Evidence [3d ed.], § 2061, esp. N. 1 at p. 254), or the myriad criticism which the rule's detractors would inveigh against it, some of its more egregrious flaws warrant at least passing comment.

First, and perhaps foremost, is the fact that in imposing an evidentiary standard more befitting a public event, the law necessarily frustrates the prosecution of an inherently furtive act. Secondly, it establishes a system of false distinctions between offenses committed most often against the person of a woman and other equally serious charges where "the motivation for falsehood or occasion for inaccuracy is . . . [as] great, and the disproof difficult" (*People* v. *Radunovic*, 21 N Y 2d 186, 192, concurring Op., Breitel, J., *supra*: specifying fraud, prostitution, illegitimacy and filiation proceedings, alleged gifts from the now-dead and between those in a confidential relationship). Predicated on an earlier ethic which held such activities unusually heinous, the distinction was once arguably proper; by more contemporary standards, it nevertheless expresses almost an irrational doubt toward the claims of women who have been victimized sexually, with virtually nothing to commend its continued use.

Legislation, amending Penal Law, § 130.15, has recently been signed into law and, as of its effective date, no longer requires corroboration of the complaining witness's testimony regarding penetration or, in most instances, the perpetrator's identity (Penal Law, § 130.15, as amd. ch. 373, Laws of 1972). Additionally, it discards the judicially created rule extending the corroboration requirement to incidental crimes where the charge is supported by evidence of a consummated rape (*People* v. *Verdo*, 7 N Y 2d 114, *supra; People* v. *English*, 16 N Y 2d 719, *supra; People* v. *Radunovic*, 21 N Y 2d 186, *supra;* cf. *People* v. *Moore*, 23 N Y 2d 565, 567–568, *supra*).

This amended version represents an improvement over the present law, but retains crude vestiges of the former evidentiary standard: the element of force, and in certain cases, identity, still requires corroboration. Consistency, as well as a quest for greater justice suggests instead a proposal to eliminate corroboration entirely (*Matter of Sam "F" and Bobby "S"*, 68 Misc. 2d 244, 250, supra). What was said once, and said well, recommends an eminently more reasonable, certainly more just approach to an admittedly difficult problem: "A better principle. . . . variously phrased, [would require] especially convincing and satisfying evidence, within the rubrics of proof beyond a reasonable doubt and the preponderance of evidence" in prosecutions for such offenses (*People* v. *Radunovic*, 21 NY 2d 186, 192, *supra*). The standard has already proven reliable in other instances where the danger of fabrication is constant (*supra*, p. 3) and provides a practical, yet efficient, safeguard against conviction on idle accusations.

In the end, the question is essentially one of credibility, and for the finder of fact. Formalistic requirements such as corroboration place an unrealistic premium on legal niceties, often contrary to the overwhelming proof in a case. Exeprience recommends further legislation dispensing with corroboration entirely.

People v. *Melvin Linzy, a/k/a, Melvin Linear*

Jasen, J. (*dissenting*):

Once again we have before us the issue of how much cooroborative evidence is legally sufficient to support a conviction for rape. In my opion, neither precedent nor the raison d'etre of the corroboration requirement sanction the result reached by the majority.

Section 130.15 of the Penal Law provides that, except for the offense of sexual abuse in the third degree (§ 130.55), a defendant may not be convicted of any offense defined in Article 130 or of an attempt to commit the same, solely on the uncorroborated testimony of the alleged victim. The People must establish, therefore, in every instance, corroboration of the complainant's testimony that (1) there was sexual penetration[1]; (2) that the penetration was without consent; and (3) that the defendant was the assailant. (*People* v. *Page*, 162 N.Y. 272; *People* v. *Perez*, 25 AD 2d 859; *Mtr of Sam "F" and Bobby "S"*, 68 Misc 2d 244; see also, Denzer & McQuillan, Practice Commentary, Penal Law, § 135.15, p. 279; *Communication and Study Relating to Requirement of Corroborative Evidence for Conviction of Certain Crimes*, 1962 N.Y. Law Revision Comm. Ann. Rep. 639, 653; Legis. Bull. No. 28 [1971], Assoc. of the Bar, City of New York, pp. 1–2.) Since there is ample evidence, both physical and medical, in the case at bar, to establish corroboration that the crime of rape was committed by forcible compul-

[1] Except, of course, for attempts, assaults with intent to commit sexual offenses, and impairment of the morals of a minor, which require proof of sexual activity, or intent to commit same, rather than penetration.

sion, the issue dispositive of this appeal is whether the record contains some independent showing to corroborate the complainant's identity of the defendant as her assailant.

In determining whether certain evidence satisfies the corroboration requirement in a particular case, it must be noted that the corroborating evidence need not be in and of itself sufficient to support a conviction (see, e.g., *People* v. *Terwilliger*, 74 Hun. 310, affd. on op. below 142 N.Y. 629; *People* v. *Imperiale*, 14 Misc 2d 887; 1962 Law Revision Comm. Ann. Rep., *supra*, at pp. 663–664), nor must it consist of eyewitness testimony (see, e.g., *People* v. *Duegaw*, 34 A D 2d 1043; *People* v. *Adams*, 72 App. Div. 166; and see Younger, *The Requirement of Corroboration in Prosecution for Sex Offenses in New York*, 40 Ford. L. Rev. 263, 268.) Rather, inquiry should necessarily be made as to whether such evidence serves the asserted purpose of that requirement, to wit: to eliminate or make negligible the possibility that innocent men will be convicted of rape. (See, Comment, *Corroborating Charges of Rape*, 67 Col. L. Rev. 1137, 1141; compare, *People* v. *Yannucci*, 283 N.Y. 546; *People* v. *Deitsch*, 237 N.Y. 300; *People* v. *Chumley*, 24 A D 2d 805 [cases holding particular items of evidence to be sufficient] with *People* v. *Czyz*, 262 App. Div. 1027; *People* v. *Speeks*, 173 App. Div. 440; *People* v. *Doyle*, 158 App. Div. 37 [cases holding particular items of evidence insufficient]; and see generally, 7 Wigmore, Evidence [3d ed.], §§ 2061, 2062.) Thus, evidence which tends to connect the defendant, and no other, with the rape sufficiently satisfies the requirement of corroboration of identity. (See, e.g., *People* v. *Masse*, 5 N Y 2d 217; *People* v. *Deitsch*, 237 N. Y. 300, *supra; People* v. *Hutchings*, 36 A D 2d 659; *People* v. *Chumley*, 24 A D 2d 805, *supra*.)

In the case before us, the People, on the issue of the defendant's complicity, rely on the fact that the complainant described with accurate detail the automobile, which was stipulated to as the defendants, and that a ring, matching precisely the description of a ring which the complainant said her assailant wore, was taken from the defendant's hand at the time of his arrest. In my opinion, this evidence, connecting the defendant with the events as testified to by the complainant, is more than "an immaterial fact" and "it is one of the 'surrounding circumstances' of the case with sufficient corroborative value to meet the mandate of the statute." (*People* v. *Masse*, 5 N Y 2d 217, 222; and see *People* v. *Marshall*, 5 A D 2d 352, affd. 6 N Y 2d 823.)

The descriptions furnished by the complainant were quite precise and contained vivid details. For instance, defendant's vehicle was described as a black and white model with high tailfins, a broken antenna, an unusual hood ornament, and a plastic bug hanging from the rear-view mirror; and as to the ring, she accurately described it as being gold, containing a flat black stone. Significantly, complainant had never met the defendant prior to the time of the attack, nor did she see him in person from that time to the trial.[2] Never having seen the defendant at any other time, the car and the ring, and their description, would not become known to the complainant in any casual way. Rather, since the complainant could have observed these somewhat unique items only at the time of the commission of the crime, her descriptions place the defendant at the scene of the crime, and the reasonable inference to be taken is that he was sufficiently connected with the crime as testified to by the complainant.

In sum, the objective and independent facts as testified to by the complainant with regard to the car and ring provide the necessary corroboration. Indeed, recognizing the probative value of this evidence goes "far toward rationalizing a rule, which, however salutary its original intention, has thus far in its existence been troublesome in application and at times absurd in result" (Younger, *supra*, 40 Ford. L. Rev. at p. 278) and is consonant with the legislative command that the provisions of the Penal Law "must be construed according to the fair import of their terms to promote justice and effect the objects of the law." (Penal Law, § 5.00.) The majority on the other hand, by its complete disregard of this evidence has, in effect, created a shield for the guilty, an untoward result which is, of course, clearly contrary to the reasons enunciated as the aims of the corroboration requirement, and has imposed "an impracticable burden on the prosecutor." (Model Penal Code, § 207.4, Comment 22, at p. 264 [Tent. Draft No. 4, April, 1965].)

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[2] I would only note that the defendant also testifified that the complainant was not known to him. Hence, we have a true stranger situation, as distinguished from acquaintances, friends or lovers.

To be sure, there is a need for prompt legislative action. The anomalous condition of the law created by New York's corroboration rule was aptly stated by Judge Breitel, concurring in *People* v. *Radunovic* (21 N Y 2d 186, 191) : "It is an immature jurisprudence that places reliance on corroboration, however unreliable the corroboration itself is, and rejects overwhelming reliable proof because it lacks corroboration, however slight and however technical even to the point of token satisfaction of the rule." To adhere to a rule which creates such a situation is intolerable.

Recent legislation (L. 1972, ch. 373, amending Penal Law § 130.15), which no longer makes it incumbent on the People to produce corroborating evidence of the assailant's identity and of penetration, is commendable. The only reasonable solution, however, to this concededly grave problem in the current administration of criminal law is outright repeal of all corroboration requirements in sex cases. Our system of jurisprudence relies on a jury to distinguish truth from falsehood, after hearing evidence and giving due weight to the requirement that one must be considered innocent until proven guilty beyond a reasonable doubt. Since these safeguards suffice for murder, robbery or burglary cases, there is no cogent reason why they should fail when the crime charged is a sex offense.

Accordingly, I would affirm the judgment of conviction.

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Order reversed and a new trial ordered. Opinion by Scileppi, J. All concur, Fuld, Ch. J., in the following memorandum: I concur in the court's opinion in so far as it directs a reversal of the defendant's conviction but I do not subscribe to the suggestion that the requirement of corroboration in rape prosecutions be eliminated or further relaxed by the Legislature; except Jasen, J., who dissents and votes to affirm in an opinion.

THE AMERICAN LAW INSTITUTE,
New York, N.Y., May 8, 1972.

Hon. G. ROBERT BLAKEY,
Chief Counsel, Subcommittee on Criminal Law and Procedures, U.S. Senate Committee on the Judiciary, Washington, D.C.

DEAR MR. BLAKEY: A copy of the 1972 charted results of our annual survey on the status of substantive penal law revision projects in 52 jurisdictions is enclosed for your and the Subcommittee's possible interest. This brings up to date the 1971 chart printed at pp. 558–559 in Part II "State Experience" of the *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary*, 92d Cong., 1st Sess. (1971).

Very truly yours,

RHODA LEE BAUCH.

Enclosure.

STATUS OF SUBSTANTIVE PENAL LAW REVISION*

I. REVISED CODES; EFFECTIVE DATES

Colo. Crim. Code, Ch. 40; 7/1/1972; Conn. Gen. Stat. Ann., Penal Code (Pub. Act 828 [1969]); 10/1/1971; Ga. Code. Ann., Tit. 26; 7/1/1969; Hawaii Laws of 1972, Act 9; 1/1/1973; Ill. Ann. Stat., Ch. 38; 1/1/1962; Kan. 1969 Session Laws, Ch. 180; 7/1/1970; Ky. Penal Code; 7/1/1974; La. Rev. Stat., Tit. 14; 1942; Minn. Stat. Ann., Ch. 609; 9/1/1963; N.H. [New] Criminal Code, Ch. 625; 11/1/1973; N. Mex. Stat. Ann., Ch. 40a; 7/1/1963; N.Y. Rev. Penal Law; 9/1/1967; Ore. Laws 1971, Ch. 743; 1/1/1972; and Wis. Stat. Ann., Tit. 45; 7/1/1956.

II. CURRENT SUBSTANTIVE PENAL CODE REVISION PROJECTS

A. Revisions completed; not yet enacted (18).—Alaska (House Bill 524 [an over-all revision of Sen. Bill 5] introduced in Jan. 1972 Legislature; currently in House Judiciary Committee).

California (Proposed Criminal Code [Staff Draft, 1971] being studied by Joint Legislative Committee for Revision of the Penal Code).

Delaware (revised and reintroduced in 1972 Legislature).

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*As of April 1972.

Idaho (Idaho Penal and Correctional Code, Tit. 18, enacted effective 1/1/1972 but repealed effective 4/1/1972).

Maryland (proposed new Code and Commentary to be available for distribution in May).

Massachusetts (Code & Commentary introduced in 1972 Legislature; Hearings now being held).

Michigan (Introduced in 1971 Legislature: House Bill 4004; Sen. Bill 2) (Pased by House 2/29/1972; currently being considered by Senate).

Montana (Proposed Montana Criminal Code of 1970) (Criminal Law Comm'n to reconsider and revise some sections; plan to submit Code to 1973 Legislature).

New Jersey (Proposed new Penal Code & Commentary submitted to Governor and Legislature 12/1/1971; Legislature's Joint Committee on the Judiciary will hold Hearings this spring).

Ohio (House Bill 511 currently before House Judiciary).

Oklahoma (Revised Code introduced March 1972 in Legislature during last days of Session; not acted upon; to be reintroduced in 1973 Legislature).

Pennsylvania (Sen. Bill 455 [Proposed New Crimes Code for Pa.] in Senate Judiciary Committee; Sen. Bill 440 [Proposed Code of Sentencing Procedure] approved by Senate; now in House).

Puerto Rico (Proposed Code: Senate Project 19 & House Project 27. Senate Judiciary Committee Hearings now being held).

South Carolina (Proposed Code with Commentary to be introduced in 1972 or 1973 Legislature).

Texas (to be reintroduced in 1973 Legislature).

United States (Proposed New Federal Criminal Code submitted to Congress Jan. 1971) (Senate Judiciary Subcommittee on Criminal Laws and Procedures holding Hearings).

Vermont (tentative enactment 1970 but project abandoned in Committee).

Washington (Proposed Criminal Code to be reintroduced in 1973 Legislature).

B. *Revisions well under way* (*6*).—Alabama (plan to submit Code to 1974 or 1975 Legislature).

Arkansas (plan to submit Code to 1973 Legislature).

Florida (since 1970) (partial enactment June 1971: CH. 71–136, LAWS OF FLORIDA [1971]).

Iowa (plan to submit Code to 1973 Legislature).

Missouri (plan to submit Code to 1974 Legislature).

Nebraska (plan to submit Code to 1973 Legislature).

C. *Revisions at varying preliminary stages* (*4*).—Indiana, North Dakota, Utah, Virginia.

D. *Revisions authorized—Work not yet begun* (*3*).—Maine.

North Carolina (work interrupted to revise Procedure Code).

Rhode Island (project was abandoned to work on Procedure Code; may be reactivated).

E. *Contemplating revision* (*1*).—Arizona.

III. NO OVERALL REVISION PLANNED

Mississippi, Nevada (recodification with minor changes enacted 1967), South Dakota, Tennessee, West Virginia, Wyoming.

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